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THE
PACIFIC REPORTER,
VOLUME 40,

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON,
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING,
UTAH, NEW MEXICO, OKLAHOMA, AND COURTS OF
APPEALS OF COLORADO AND KANSAS.

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PACIFIC REPORTER, VOLUME 40.

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

ARIZONA—Supreme Court.

ALBERT C. BAKER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

O. T. ROUSE.

J. J. HAWKINS.

J. D. BETHUNE.

CALIFORNIA—Supreme Court.

WILLIAM H. BEATTY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

THOMAS B. McFARLAND.

W. C. VAN FLEET.

RALPH C. HARRISON.

F. W. HENSHAW.

C. H. GAROUTTE.

JACKSON TEMPLE.

Supreme Court Commissioners.

I. S. BELCHER.

P. VANCLIEF.

NILES SEARLS.

JOHN HAYNES.

E. W. BRITT.

COLORADO—Supreme Court.

CHAS. D. HAYT, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

LUTHER M. GODDARD.

JOHN CAMPBELL.

Court of Appeals.

GILBERT B. REED, PRESIDENT.

JUDGES.

JULIUS B. BISSELL.

CHARLES I. THOMSON.

IDAHO—Supreme Court.

JOHN T. MORGAN, CHIEF JUSTICE.

JUSTICES.

ISAAC N. SULLIVAN.

JOSEPH W. HUSTON.

KANSAS—Supreme Court.

DAVID MARTIN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

W. A. JOHNSTON.

S. H. ALLEN.

JUDGES OF THE COURTS.

KANSAS—Court of Appeals.*Northern Department.*

A. D. GILKESON, PRESIDING JUDGE.

ASSOCIATE JUDGES.

T. F. GARVER.

GEO. W. CLARK.

Southern Department.

W. A. JOHNSON, PRESIDING JUDGE.

ASSOCIATE JUDGES.

E. C. COLE.

A. W. DENNISON.

MONTANA—Supreme Court.

WILLIAM Y. PEMBERTON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WILLIAM H. DE WITT.

WILLIAM H. HUNT.

NEVADA—Supreme Court.

R. R. BIGELOW, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

CHARLES H. BELKNAP.

M. S. BONNIFIELD.

NEW MEXICO—Supreme Court.

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ASSOCIATE JUSTICES.

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GIDEON D. BANTZ. (3d Dist.)

N. B. LAUGHLIN. (1st Dist.)

HUMPHREY B. HAMILTON. (5th Dist.)

OKLAHOMA—Supreme Court.

FRANK DALE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN H. BURFORD.

HENRY W. SCOTT.

A. G. C. BIERER.

JOHN L. McATEE.

OREGON—Supreme Court.

ROBERT S. BEAN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

FRANK A. MOORE.

CHARLES E. WOLVERTON.

UTAH—Supreme Court.

SAMUEL A. MERRITT, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

GEORGE W. BARTCH.

H. W. SMITH.

JAMES A. MINER.

W. H. KING.

WASHINGTON—Supreme Court.

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ASSOCIATE JUSTICES.

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T. J. ANDERS.

ELMON SCOTT.

MERRITT J. GORDON.

WYOMING—Supreme Court.

HERMAN V. S. GROESBECK, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

ASBURY B. CONAWAY.

CHARLES N. POTTER.

COURT RULES.

KANSAS COURT OF APPEALS.

Northern Department.

I. The court will meet in regular sessions, as follows:

At Topeka, on the first Tuesdays of March, June, and November.

At Concordia, on the first Tuesdays of January, May, and October.

At Colby, on the first Tuesdays of February, September, and December.

II. No cause shall be docketed, nor process issued thereon, except causes wherein the state is appellant, until the plaintiff in error or appellant shall pay to the clerk \$5, advance fee; nor shall any civil cause be docketed until security for costs shall be given, approved by the clerk of the court, conditioned for the payment of all costs for which the plaintiff in error may be liable.

III. Counsel for the plaintiff in error shall number the pages of the petition in error and the record, before filing the same; and the clerk shall prepare for the court a copy of the same, numbering the pages as in the original.

IV. Sixty days before the commencement of each term, the clerk shall prepare and send to the attorneys interested a printed copy of the trial docket for that term, showing the day upon which each cause will be heard.

Causes will be assigned for hearing in their order upon the appearance docket, except as otherwise provided by law; but a cause may, upon motion filed therefor, be heard out of its regular order, for special and sufficient reasons set out in such motion.

All causes will be heard by the court upon the day for which they are assigned.

V. A continuance in a civil cause, unless otherwise expressed in the order, will carry it to the heel of the docket. A continuance in a criminal appeal will carry it to the next assignment of causes.

VI. Counsel for plaintiff in error or appellant shall file 10 printed briefs in each case; six copies for the court, and four for the reporter and librarian.

This brief shall contain, in order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, set out separately and particularly. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.

VII. Counsel for defendant in error or appellee shall file with the clerk 10 printed copies of his brief, before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

VIII. In each civil cause, counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error at least 30 days before the time set for the argument thereof; and the counsel for defendant in error shall furnish a copy of his brief to counsel for plaintiff in error at least 10 days before the time set for the argument thereof. Proof of service of the briefs must be filed with the clerk of the court prior to the argument of the cause.

In all criminal appeals in which the state is a party, and in all civil causes in which the state is a party or in which any of its property is involved, counsel shall serve their briefs upon the attorney general as well as upon local counsel; such service to be made as in civil cases. In case of a failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or affirm or reverse the judgment.

IX. The clerk will deliver one copy of each brief to the state librarian, to be bound and indexed and placed in the state library. That the briefs may be of uniform size, and thus capable of being bound in uniform and convenient volumes, counsel are requested

to have such briefs printed in pages corresponding in size and form to the pages of the Kansas Reports.

X. Attorneys wishing to submit their causes upon briefs, on the day they are assigned for hearing, may avoid the inconvenience of personal attendance at court by filing a written order with the clerk to so submit. In all such cases, their briefs, with proof of service, must be on file.

XI. One hour only, except with the consent of the court, shall be consumed in the oral argument of a cause, by counsel for either party. Oral argument upon a motion will be limited to 30 minutes on each side.

XII. Every application for an order in any case shall be in writing, and shall be granted only upon the filing thereof, and due proof of service of notice on the adverse party or his attorneys, at least three days before the hearing.

XIII. All motions for rehearing of the decision or judgment in any cause (except when otherwise specially permitted) and copy of said motion must be filed within thirty (30) days after the decision or judgment is announced, and notice forthwith served on the opposite party or his attorney; and all such motions will be set down for hearing at the heel of the docket at the first sitting of the court after service of the notice of the motion. Such motion must specify distinctly the grounds upon which it is based, and set out the mistake of facts or error of law complained of.

XIV. In all original actions in this court, no fees or costs will be allowed or taxed for the mileage of any witness for any distance outside of the county where the court is held, unless the subpoena under which the witness attends has been issued upon the special order of the court, or a judge thereof.

XV. Execution on a judgment for costs having been returned unsatisfied, the clerk may notify the securities for costs, or their executors or administrators, of such return, and that, unless said costs are paid within 10 days after receipt of said notice, a motion will be made for a judgment against them. If good cause shall not be shown why the same ought not to be done, judgment may be entered against said securities or their executors or administrators for the amount remaining unpaid for which the plaintiff in error may be liable; and execution may be issued on such judgment as in other cases.

XVI. No record or paper filed shall be taken from the custody of the clerk, unless by order of the court, or by written consent of the attorneys of record for all the parties.

The clerk shall not permit any transcript or case-made to be taken from the files of his office until the copy thereof, required by rule 3 of this court, has been completed and compared. The clerk will allow no one, except the reporter of this court, to take an original opinion from the files of his office before such opinion has been reported. All records and papers that may be taken from the clerk's office must be returned at least 10 days before the first day of the next meeting of the court in the division where the papers are filed.

XVII. No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court.

XVIII. All attorneys admitted to practice in the supreme court of Kansas shall be entitled to practice in this court; and any practicing attorney of the district court will, on motion, be admitted to practice in this court; and any practicing attorney of any state or territory having professional business in this court may, on motion, be admitted, upon taking the oath prescribed by law. All motions for the admission of attorneys must be presented to the court at the morning hour of its session, immediately after the first call of the docket for the day. Each attorney, on being admitted, shall pay three dollars to the clerk, who shall furnish such attorney a certificate of admission and a printed copy of the rules.

Adopted March 12, 1895, by the Kansas court of appeals, Northern department.

Rule Prescribed March 12, 1895, by the Supreme Court Respecting Proceedings in the Kansas Court of Appeals for the Northern Department.

The court of appeals for the Northern department may, at any regular term held in either division, grant orders, render decisions and deliver opinions in cases pending in either of the other of said divisions; such orders, decisions or opinions to be at once transmitted to the clerk of the court of the proper division and therein filed, with the same legal effect as if originally made in term in the division wherein the respective cases are pending.

Any judge of said court shall have authority, at chambers in any division, to make all necessary orders respecting cases pending in either division of said Northern department.

Southern Department.

I. The court will meet in regular sessions, at the following times and places:

At Fort Scott, on the first Tuesdays of March, June, and November.

At Wichita, on the first Tuesdays of January, May, and October.

At Garden City, on the first Tuesdays of February, September, and December.

II. Every pleading filed with the clerk of the court shall contain the following caption: Kansas court of appeals, Southern department, designating the division of said court in which the same is so filed, followed by the names of the parties plaintiff and defendant.

III. No cause shall be docketed, nor process issued thereon, except causes wherein the state is appellant, until the plaintiff in error or appellant shall pay to the clerk \$5, advance fee; nor shall any civil cause be docketed until security for costs shall be given, approved by the clerk of the court, conditioned for the payment of all costs for which the plaintiff in error may be liable.

IV. Counsel for the plaintiff in error shall number the pages of the petition in error and the record, before filing the same; and the clerk shall prepare for the court a copy of the same, numbering the pages as in the original.

V. Not less than 60 days before the commencement of each term, the clerk shall prepare and send to the attorneys interested a printed copy of the trial docket for that term, showing the day upon which each cause will be heard.

Causes will be assigned for hearing in their order upon the appearance docket, except as otherwise provided by law; but a cause may, upon motion filed therefor, be heard out of its regular order, for special and sufficient reasons set out in such motion.

All causes will be heard by the court upon the day for which they are assigned.

VI. A continuance in a civil cause, unless otherwise expressed in the order, will carry it to the heel of the docket. A continuance in a criminal appeal will carry it to the next assignment of causes.

VII. Counsel for plaintiff in error or appellant shall file 10 printed briefs in each case; six copies for the court, and four for the reporter and librarian.

This brief shall contain, in order here stated—

(1) A complete statement of the case, presenting the questions involved, in the order in which they are raised.

(2) Specification of the errors complained of, set out in separate paragraphs. When the error complained of consists in the admission or rejection of evidence, the specification shall state the full substance of the evidence admitted or rejected, and such other portions of the record as shows its im-

portance of relation thereto. When error complained of is contained in the charge of the court, the specifications shall set out that part referred to totidem verbis, whether in the instructions given or instructions refused.

(3) A brief of the argument, exhibiting a full statement of law or facts discussed therein, with reference to the pages of the record and the authorities relied upon in support of each point.

VIII. Counsel for defendant in error or appellee shall file with the clerk 10 printed copies of his brief, before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

IX. In each civil cause, counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error at least 30 days before the time set for the argument thereof; and the counsel for defendant in error shall furnish a copy of his brief to counsel for plaintiff in error at least 10 days before the time set for the argument thereof. Proof of service of the briefs must be filed with the clerk of the court prior to the argument of the cause.

In all criminal appeals in which the state is a party, and in all civil causes in which the state is a party or in which any of its property is involved, counsel shall serve their briefs upon the attorney general as well as upon local counsel; such service to be made as in civil cases. In case of a failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or affirm or reverse the judgment.

X. The clerk will deliver one copy of each brief to the state librarian, to be bound and indexed and placed in the state library. That the briefs may be of uniform size, and thus capable of being bound in uniform and convenient volumes, counsel are requested to have such briefs printed in pages corresponding in size and form to the pages of the Kansas Reports.

XI. Attorneys wishing to submit their causes upon briefs, on the day they are assigned for hearing, may avoid the inconvenience of personal attendance at court by filing a written order with the clerk to so submit. In all such cases, their briefs, with proof of service, must be on file.

XII. One hour only, except with the consent of the court, shall be consumed in the oral argument of a cause, by counsel for either party. Oral argument upon a motion will be limited to 30 minutes on each side.

XIII. Every application for an order in any case shall be in writing, and shall be granted only upon the filing thereof, and due proof

of service of notice on the adverse party or his attorneys, at least three days before the hearing.

XIV. All motions for rehearing of the decision or judgment in any cause (except when otherwise specially permitted) must be filed within thirty (30) days after the decision or judgment is announced, and notice, together with a copy of said motion, forthwith served on the opposite party or his attorney; and all such motions will be set down for hearing at the heel of the docket at the first sitting of the court after service of the notice of the motion. Such motion must distinctly specify the grounds upon which it is based, and set out the mistake of facts or error of law complained of.

XV. In all original actions in this court, no fees or costs will be allowed or taxed for the mileage of any witness for any distance outside of the county where the court is held, unless the subpoena under which the witness attends has been issued upon the special order of the court, or a judge thereof.

XVI. Execution on a judgment for costs having been returned unsatisfied, the clerk may notify the securities for costs, or their executors or administrators, of such return, and that, unless said costs are paid within 10 days after receipt of said notice, a motion will be made for a judgment against them. Unless good cause shall be shown why the same ought not to be done, judgment may be entered against said securities or their executors or administrators for the amount remaining unpaid for which the plaintiff in error may be liable; and execution may be issued on such judgment as in other cases.

XVII. No record or paper filed shall be taken from the custody of the clerk, unless by order of the court, or by written consent of the attorneys of record for all the parties. The clerk shall not permit any transcript or case-made to be taken from the files of his office until the copy thereof, required by rule 4 of this court, has been completed and compared. The clerk will allow no one, except the reporter of this court, to take an original opinion from the files of his office before such opinion has been reported. All records and papers that may be taken from the clerk's office must be returned at least 10 days be-

fore the first day of the next meeting of the court in the division where the papers are filed.

XVIII. No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court.

XIX. All attorneys admitted to practice in the supreme court of Kansas shall be entitled to practice in this court; and any practicing attorney of the district court will, on motion, be admitted to practice in this court; and any practicing attorney of any state or territory having professional business in this court may, on motion, be admitted, upon taking the oath prescribed by law. All motions for the admission of attorneys must be presented to the court at the morning hour of its session, immediately after the first call of the docket for the day. Each attorney, on being admitted, shall pay \$3 to the clerk, who shall furnish such attorney a certificate of admission and a printed copy of the rules.

Adopted at Fort Scott, Kan., March 19, 1895, by the Kansas court of appeals, Southern department.

Rule Prescribed March 12, 1895, by the Supreme Court Respecting Proceedings in the Kansas Court of Appeals for the Southern Department.

The court of appeals of the Southern department may, at any regular term held in either division, grant orders, render decisions and deliver opinions in cases pending in either of the other of said divisions; such orders, decisions or opinions to be at once transmitted to the clerk of the court of the proper division and therein filed, with the same legal effect as if originally made in term in the division wherein the respective cases are pending.

Any judge of said court shall have authority, at chambers in any division, to make all necessary orders respecting cases pending in either division of said Southern department.

SUPREME COURT OF THE STATE OF WASHINGTON.

ADOPTED JULY 15, 1895.

GENERAL RULES OF THE SUPREME COURT.

Rule I. COURT RECORDS AND BOOKS.

The clerk of the supreme court shall keep the following books and records: 1. Journal. 2. Record of opinions. 3. Appearance docket. 4. Motion docket. 5. Execution docket. 6. Fee book. 7. General index of cases. 8. In addition to the foregoing, the said clerk shall keep books in which shall be stated proper accounts of all moneys received and disbursed.

Rule II. DOCKET FEES.

The clerk of the supreme court will not file any transcript until the appellant shall have deposited with him the sum of ten dollars as an advance docket fee, and he will not file any paper in any original motion, application or proceeding until the moving party shall have deposited a like sum for the same purpose.

Rule III. TRANSCRIPTS.

1. Every transcript shall be plainly written or printed on paper of good quality, of the size of legal cap, and be free from interlineations and erasures, and be duly paged and prefixed with an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness, and have at least one blank fly leaf: provided, the statement of facts and bill of exceptions must in every case be printed or typewritten, and when typewritten none other than the ribbon copy shall be used.

2. Every transcript consisting of more than fifty leaves shall be bound under the direction of the clerk of the supreme court at the expense of the appellant, and the cost of binding be taxed in the cause as other disbursements.

Rule IV. TRANSCRIPTS—OMISSIONS.

If any paper or part of the record directed to be sent up has been omitted from the transcript in any case, such omission may be supplied at any time before the cause is assigned for hearing by any party, without leave, by filing a properly certified transcript

of such paper or part of the record with the clerk of the supreme court, and at the same time giving the opposite party notice thereof.

Rule V. CLERK'S CERTIFICATE.

1. Transcripts must be certified by the clerk of the superior court in substantially the following form:

2 court R
State of Washington, ——— County, ss.

I, _____, clerk of the _____ superior court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to transmit to the supreme court.

In testimony whereof, I have hereunto
set my hand and the seal of said su-
perior court this _____ day of _____,
189-.

[Seal.]

By _____, Clerk.
By _____, Deputy.

2. Supplemental records shall be certified by the clerk of the superior court substantially in the same manner.

**Rule VI. TAKING PAPERS FROM
CLERK'S OFFICE.**

No paper filed with the clerk of the supreme court shall be taken from the court room or clerk's office except by permission of the court or one of the justices, and when so taken a receipt in writing therefor must be left with the clerk. Permission to take papers will not be granted except to a party, or his attorney, who shall have entered an appearance in the supreme court in the cause in which such paper is filed.

Rule VII. ADDITIONAL AUTHORITIES.

In case either party, after filing of briefs, desires to submit additional authorities, the same shall be submitted not less than one day prior to the hearing of the appeal. Said authorities so submitted shall be written or printed, and seven copies thereof shall be filed with the clerk of the supreme court, and not less than one copy served upon the adverse party. In citing such authorities parties shall be governed by Rule VIII.

Rule VIII. CONTENTS AND STYLE OF BRIEFS.

1. Briefs shall be printed throughout in plain, clear type, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the transcript for verification.

2. Each error relied on shall be clearly pointed out.

3. In citing authorities, the names and numbers of volumes and the titles of cases must be clearly set out; and in citing text books the number of the edition must be specified.

4. Briefs must be of the following dimensions, to wit: 8½ inches from top to bottom; 6½ inches from edge to edge, inclusive of the margin, which must be 1½ inches at the top, bottom and outer edge of each printed page. The title of the cause must be on the front cover in full.

5. In all equity causes and actions at law tried by the court without a jury, the party or parties appealing shall print in their brief the findings of fact, with the exceptions thereto, on which any question is sought to be raised by them on the appeal, and shall also print such findings as they requested the lower court to make, which were refused, with their exception to such refusal, in case any error or contention shall be based thereon.

Rule IX. ASSIGNMENT OF CAUSES.

1. For the purpose of hearings in the supreme court, causes from the several counties will be assigned as follows: 1. Spokane. 2. Stevens. 3. Whitman. 4. Lincoln. 5. Douglas. 6. Adams. 7. Okanogan. 8. Asotin. 9. Garfield. 10. Columbia. 11. Walla Walla. 12. Franklin. 13. Klickitat. 14. Yakima. 15. Kittitas. 16. Clarke. 17. Cowlitz. 18. Wahkiakum. 19. Skamania. 20. Pacific. 21. Chehalis. 22. Lewis. 23. Mason. 24. Thurston. 25. Pierce. 26. King. 27. Kitsap. 28. Jefferson. 29. Clallam. 30. Island. 31. San Juan. 32. Snohomish. 33. Skagit. 34. Whatcom.

2. Exceptions to this order may be made when public interests so require.

3. At the time of assigning causes for trial at any session of the court, the clerk shall also assign in the same manner all causes wherein the transcript and appellant's briefs are on file, also a stipulation signed by the attorneys for all the parties to the appeal, that said cause may be assigned at such session.

4. Cases ready for hearing may be submitted on briefs by stipulation, at any time, and when so submitted, shall be entitled to as prompt consideration as other cases then before the court.

Rule X. CALENDAR.

As soon as the causes shall have been assigned for a regular session of the court, the clerk shall print a calendar thereof, and mail

a copy of the calendar to each attorney or firm having any cause thereon.

Rule XI. ARGUMENTS.

No more than two counsel on a side will be heard upon the argument of any question, unless the court shall direct otherwise: provided, that each party who has appeared separately and by different counsel in the superior court shall, if he so desire, be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument upon the merits in all cases. In argument of motions and all preliminary or collateral matters, the counsel for the party having the affirmative of the issue shall open and close. Arguments upon the merits shall be limited to one hour upon a side, and all other arguments to one-half hour upon a side, unless an extension of time be obtained from the court before the argument is commenced.

Rule XII. ERRORS CONSIDERED.

No alleged error or mistake of the superior court will be considered by the supreme court unless the same be clearly pointed out in the appellant's brief: provided, that the objection that this court has no jurisdiction of the appeal may be taken at any time.

Rule XIII. REHEARINGS.

1. Every petition for rehearing must be filed within thirty days after the opinion shall have been rendered, and no more than one petition for a rehearing of the same question shall be filed: provided, that the court may, in its discretion, allow any petition to be amended. The filing of a petition for rehearing shall suspend the decision of the court until a ruling thereon.

2. One typewritten copy of the petition for rehearing, filed with the clerk, shall be sufficient.

3. When a decision is rendered upon a petition for rehearing, the clerk shall promptly notify counsel for the respective parties.

Rule XIV. COST BILLS.

1. The prevailing party shall, within ten days after the filing of the opinion in a case, file with the clerk a cost bill, and serve upon the adverse party a copy thereof. If any adverse party objects to any item or items thereof, he shall serve upon the prevailing party exceptions to such cost bill, together with affidavits in support of his exceptions, if desired, and file the original, with proof of service, with the clerk of the court within ten days after service of the cost bill upon him. Whereupon the clerk shall tax the costs to which the prevailing party is entitled, and shall notify the parties of such taxation. Either party may except to the taxing of any item or items, or failure to tax the same, and shall serve such exceptions on the adverse

party and file the same with the clerk within ten days after such taxation. Said exceptions shall be heard by the court on the first motion day after the expiration of five days from the date of service of such exceptions. If the party fail to appear at such time, the court will consider such exceptions upon the affidavits on file and the records in the cause, and determine the same.

2. If no cost bill is filed and served, the clerk will tax as costs only the clerk's costs, printing of briefs at seventy-five cents per page, the statutory attorney fee, and the cost of transcript at the rate of five cents a folio.

3. Where a cost bill has been served and filed in time, and no exceptions thereto filed, objection thereto will be deemed to have been waived.

Rule XV. SUBMISSION ON FAILURE TO APPEAR.

Where a party does not appear when the cause is called for hearing, and the appeal has been perfected, and the brief of said party shall be on file, the cause, as regards such party, shall be deemed submitted. This rule shall not preclude oral argument by the opposite party.

Rule XVI. RESPONDENT FILING NO BRIEF.

Where the respondent fails to file a brief in the cause, the court will take the submission of the same by the appellant, and decide upon the merits of the appeal, if it shall appear to have acquired jurisdiction of the cause.

Rule XVII. MOTIONS—HOW MADE AND HEARD.

1. Motions to strike out any portion of the transcript, or to dismiss or affirm upon the record, and all technical motions tending to prevent the hearing of a cause upon its merits, may be made in writing and noticed for some Friday of the session, or the same may be made and plainly stated in the respondent's brief and heard at the time the cause is assigned upon the calendar.

2. All other motions in appealed causes must be made in writing, and noticed for some Friday of the session at the opening of court on that day. The motions referred to in this and the first clause of the preceding paragraph will be known as noticed motions.

3. At least two days before the day set for hearing of such a motion, the motion and notice, with proof of service thereof, must be filed with the clerk. The clerk will prepare a calendar of noticed motions for each Friday, in the order of their filing, and they will be given precedence of other hearings on that day.

4. The Fridays of the weeks during the regular hearing of cases are hereby designated as motion days.

Rule XVIII. NOTICES OF MOTIONS.

1. All notices of motions not given in the briefs must be in writing; and the necessary time of notice shall be not less than ten days, unless a different time is fixed by statute or the special order of this court. But where the service of a notice is made by mail between different places, the time of notice above mentioned shall be thirteen days.

2. Service of papers must in all cases be made upon the attorney of record of a party. If he have one, unless the place of business or residence of such attorney is unknown, when it may be made upon the party.

Rule XIX. SERVICE OF PAPERS.

Service of papers may be made as follows:

First: If upon an attorney, by delivering to him personally, or at his office by delivery to his clerk or to the person having charge thereof; or if his office be not open, or there be no one in charge thereof, at his residence by delivery to some person of suitable age and discretion; or, if neither of the foregoing methods can be followed, by deposit in the postoffice to his address, with postage prepaid.

Second: If upon a party, by delivery to him personally, or at his residence, by delivery to some person of suitable age and discretion, between the hours of 9 o'clock in the forenoon and 9 o'clock in the evening.

Rule XX. SERVICE—RESIDENCE UNKNOWN.

Where the residence of a party and of his attorney of record, if he have one, is not known, the service may be made upon the clerk of the superior court in which the cause was tried, for the party or attorney.

Rule XXI. SERVICE BY MAIL.

1. Service may be made by mail when the person making the service and the person on whom such service is to be made reside in different places, between which there is regular communication by mail; postage must in such cases be prepaid.

2. Time shall begin to run from the date of deposit in the postoffice.

Rule XXII. HABEAS CORPUS.

1. A judge of the supreme court, when applied to for writs of habeas corpus, may make the same, if granted, returnable before himself or before the supreme court, or before any superior court of the state, or any judge thereof.

2. Upon such an application, however, the judge applied to may make an order to show cause why the writ should not issue returnable before the supreme court.

3. Unless there be special reasons to the contrary, writs of habeas corpus will be issued by the supreme court only after a hearing upon an order to show cause.

4. In all cases where the person whose release is sought to be obtained by original habeas corpus from this court is imprisoned in the penitentiary, or in a county jail, upon a charge or conviction of felony, service of the order to show cause and petition must be made upon the warden or sheriff, as the case may be, the prosecuting attorney of the county from whence the prisoner was committed, or in which he is confined, and the attorney general at his office in Olympia.

5. Where the imprisonment is in a county jail upon a charge or conviction of misdemeanor, the service must be upon the prosecuting attorney and sheriff of that county.

Rule XXIII. OTHER ORIGINAL WRITS.

1. In all other cases of applications to the supreme court for original writs, under either its original or its appellate jurisdiction, the

applicant shall show that he has given notice to the opposite party or his attorney of record of his intention to apply for such writ and the time thereof, or furnish satisfactory reasons by affidavit for his failure to give such notice.

2. The notice above required shall not be less than four nor more than fourteen days. Applications under this rule must be made on a regular motion day, unless there be some special emergency requiring earlier action.

3. The opposing party shall be at liberty to make any objections he sees fit upon the face of the papers presented with the application.

4. Upon the final hearing of any application under this rule, each side shall furnish for the use of the court, seven written or printed copies of their points and authorities.

RULES FOR THE ADMISSION OF ATTORNEYS TO PRACTICE IN THE COURTS OF THE STATE OF WASHINGTON.

Rule I. TIMES FOR EXAMINATION.

The first Thursday and Friday of each session of the supreme court are hereby designated as the times when examination of applicants for admission to practice as attorneys and counselors at law shall take place.

Rule II. EXAMINATION—WRITTEN AND ORAL.

Such examination shall be written and oral as hereinafter provided.

Rule III. QUALIFICATIONS.

Applicants for admission shall possess the qualifications required by statute.

Rule IV. APPOINTMENT OF COMMITTEE.

The supreme court will, from time to time, appoint a committee, composed of three members of the bar of the supreme court of the state of Washington, to aid and assist in the examination of applicants for admission.

Rule V. FILING NOTICE OF APPLICATION.

1. All persons making application for admission to the bar, as herein provided, shall file a notice of such application with the clerk of the supreme court at least one week before the first Thursday of each session of the supreme court, and shall pay to such clerk the sum of twenty dollars (\$20) in full of all fees, which sum shall be returned to the applicant in the event that his application for admission is denied.

2. Each application for examination shall be accompanied by the affidavit of the ap-

plicant showing that he has the qualifications required by statute, and that he is not under sentence of suspension or disbarment of any court.

Rule VI. BASIS OF EXAMINATION.

Such examination shall be based upon written questions and the answers thereto and such oral questions as the committee shall see fit to propound.

Rule VII. WRITTEN EXAMINATIONS.

The committee shall prepare and submit to the applicant numbered questions in writing, to be answered in writing.

While engaged in answering the questions the applicant shall be in a room free from interruption, and shall be upon honor not to communicate with any person, or to read any book or paper upon the subject of the answer to any question submitted to him.

Six hours will be allowed in which to prepare the written answers. The question with its number shall precede each answer. Each page of answers shall be signed by the applicant.

Immediately upon concluding his written answers the applicant shall deliver them to the committee.

Rule VIII. ORAL EXAMINATIONS.

Upon the day following the applicant's written examination, he shall be examined orally in open court by the court or the committee, at such length as may be deemed proper.

Rule IX. ADMISSION UPON EXAMINATION.

As soon as convenience will permit, the committee shall satisfy themselves, from the applicant's written and oral examinations, whether or not he should be admitted, and announce the result to the supreme court. The court shall then determine whether or not the applicant shall be admitted.

Rule X. PRACTICE.

Admission to practice in the supreme court shall entitle an attorney to practice in all the courts of the state.

Any person a resident of the state of Washington heretofore admitted to practice in any of the superior courts of said state shall be entitled to admission in the supreme court upon the production of a certified copy of his admission and the filing of the same with the clerk of the supreme court, together with his own affidavit that he is not under judgment of disbarment or suspension of any court. The fee for entering said admission and for certified copy of such record shall be five dollars (\$5).

Rule XI. DISBARMENT AND SUSPENSION.

The judgment of disbarment or suspension of the supreme court, or of any superior court of this state, shall disqualify any attorney against whom the same is pronounced from practicing as an attorney in any of the courts of the state until the same shall be reversed or vacated; and any attorney who, while so disbarred or suspended, shall practice as an attorney, shall be deemed guilty of a contempt, and punished accordingly.

State of Washington, County of Thurston, ss.
I, C. S. Reinhart, clerk of the supreme court of the state of Washington, hereby certify that the above and foregoing is a full, true and correct copy of the rules of said court as the same were adopted on the 15th day of July, A. D. 1895.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this — day of —, 189—.

_____, Clerk.

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THE
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BRADTFELDT v. COOKE et al.

(Supreme Court of Oregon. April 22, 1895.)

FRAUDULENT MORTGAGE — VALIDITY AS BETWEEN PARTIES—PURCHASE-MONEY MORTGAGE—CONSIDERATION—MISTAKE IN DEED—FORECLOSURE PROCEEDING — ATTORNEY'S FEES — DELIVERY OF MORTGAGE.

1. A mortgage given to secure a fictitious consideration for land conveyed by the mortgagee to the mortgagor in fraud of the former's creditors is enforceable between the parties thereto.

2. In an action to foreclose a purchase-money mortgage the defendant mortgagor alleged that the mortgage and the deed from the plaintiff mortgagee to defendant were executed at the same time as parts of one transaction, but that, through error, the land described in the mortgage was not conveyed by the mortgagee's deed. Thereupon plaintiff tendered defendant a deed to the mortgaged land. *Held* that, since defendant did not show that he sustained damage through the delay in perfecting his title to the land, and hence was not entitled to have the purchase rescinded, the mortgage was not without consideration.

3. The fact that a mortgage, upon being delivered to the mortgagee, is returned to the mortgagor for safe-keeping, does not defeat the delivery.

4. Where the mortgage note provided for a reasonable attorney's fee in case of suit, and plaintiff alleged that \$500 was agreed to be paid as such fee, while defendant denied that any sum was a reasonable fee, and no evidence was introduced thereon, the statutory fee only is recoverable.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by Eliza Bradtfeldt against Martha S. Cooke and others. From a judgment for defendants, plaintiff appeals. Reversed.

This is a suit to foreclose a mortgage alleged to have been executed by the defendant to the plaintiff to secure the payment of a promissory note for \$4,000. The facts show that on November 7, 1891, the plaintiff, being the owner in fee simple of lot 5 in block 21 in Albina addition to Portland, Or., for the expressed consideration of \$4,000, executed to the defendant a deed containing a covenant of warranty against all incumbrances, except three mortgages given to secure the payment of demands aggregating \$2,300, which purported to convey lot 5 in block 51 in said addition, and at the same time the defendant executed to the plaintiff a promissory note for \$4,000, payable in one year, with interest at

the rate of 8 per cent. per annum, and a mortgage upon lot 5 in block 21 in said addition, which purported to secure the payment of said note, but the defendant retained possession of said mortgage until August 12, 1892, at which time it was procured from her, and placed upon record; that on January 18, 1892, the defendant paid to Henry Witt, who held one of the mortgages excepted in the plaintiff's said covenant of warranty, the sum of \$1,050, and said mortgage was thereupon canceled of record. The complaint is in the usual form for the foreclosure of a mortgage. The defendant admits the execution of the note, but denies that any consideration was received therefor, and admits that she signed and acknowledged said mortgage, but denies that it was made to secure the payment of said note. And for a further defense she alleges that the plaintiff represented to her that she was having trouble with one F. H. Shroeder, her divorced husband, who was threatening to sue her for wages he claimed to be due him, and requested the defendant to take a deed to said property, so that, in case Shroeder obtained a judgment against her, he could not sell it upon execution, and that for said purpose, and without any consideration therefor, the plaintiff executed said deed; that it was agreed that the defendant should retain possession of said mortgage, but that the plaintiff, by falsely representing that she wished to show it to her relatives, unlawfully obtained possession thereof, and placed it upon record. The defendant further alleges that at plaintiff's request she paid Henry Witt the said sum of \$1,050, and had his mortgage satisfied of record; that she tendered to plaintiff a deed to said lot; and prays that she may be subrogated to the rights and interest of said Henry Witt in his mortgage, that the lien of said mortgage might be restored and foreclosed, and that her note and mortgage to plaintiff might be canceled. A demurrer to the new matter alleged in the answer having been overruled, the plaintiff replied thereto, and the cause, being at issue, was referred, and the evidence taken, from which the court further found, in addition to the facts above stated: "That it is claimed by the plaintiff that she sold and conveyed to the defendant Martha S. Cooke

lot 5 in block 21, and that the mortgage was executed back to secure a part of the purchase price; but the proof does not show that the plaintiff ever conveyed the said lot to the defendant Martha S. Cooke, nor that Martha S. Cooke ever obtained title to said lot. That there was no consideration for said note and mortgage executed by Martha S. Cooke. That at the time of the execution of said deed the plaintiff did not intend to sell, nor did the defendant Martha S. Cooke intend to purchase, the lot described in the mortgage, nor the lot described in the deed; nor was there an understanding or agreement between them that the plaintiff should sell or was selling, or that the said defendant should purchase or was purchasing, either of the said lots. On the contrary, it was understood and agreed between the parties that the said Martha S. Cooke should take a conveyance to said lot 5 in block 21, and hold the title for and to the use and benefit of plaintiff. That from and after the execution of said deed, and up to the time of commencing this suit, the plaintiff continued in possession of said lot 5 in block 21, and during all the said time continued to exercise acts of ownership of the said lot. That any and all the acts and things done or performed by the defendant Martha S. Cooke concerning said property were done and performed at the special instance and request of plaintiff. That the said defendant did not see the said lot at the time of said conveyance, nor for many months thereafter. It does not appear that she made any inquiry concerning the value of the lot, or that she had the title examined, or used or exercised any of the precautions ordinarily exercised by a purchaser. That the said note was delivered to plaintiff November 7, 1891, but said mortgage was never delivered by the defendant Martha S. Cooke to the plaintiff. That, many months after their execution, the plaintiff, by false statements and representations, wrongfully obtained possession of the said mortgage without consideration, and placed said mortgage on record." And, referring to the defendant's payment of the Henry Witt mortgage, the court found: "That at the time the defendant paid the said note she believed that the title to the property incumbered by said mortgage was vested in her. It appears from the evidence in this case that the lot owned by the plaintiff is lot No. 5 in block 21 in the original town site of Albina, and that the description in the deed made by plaintiff to the defendant is erroneous;" and decreed (1) that the note and mortgage executed by the defendant be surrendered up, and the mortgage canceled; (2) that the defendant recover \$1,050, paid upon the Henry Witt mortgage, and interest at 9 per cent. per annum since the payment thereof; and that the defendant should stand in the relation of assignee of said mortgage, and hold a lien upon said lot 5 in block 21 in said addition to secure the payment of said sum and interest; and that said lien be foreclosed, and the expense of such

sale and said debt be paid from the proceeds of the sale of the lot; and that the defendant recover her costs and disbursements of the suit,—from which decree the plaintiff appeals.

E. B. Watson, for appellant. W. M. Davis, for respondents.

MOORE, J. (after stating the facts). The plaintiff contends that the new matter alleged in the answer does not constitute a defense to the suit, and that the court erred in overruling the demurrer thereto; while the defendant insists that she may plead her participation in the scheme to hinder, delay, or defraud the plaintiff's creditors, and that, the note and mortgage being evidence of an executory contract, which, as she contends, is illegal, the court should not enforce it. The defendant's contention proceeds upon the theory that, she being in *pari delicto*, the maxim, "*Potior est conditio defendentis*," applies to prevent a recovery in cases where the contract sought to be enforced has not been executed. The rule is well settled that a court will not, in an action between the parties to an illegal contract, lend its aid either to annul it when executed or enforce it when executory. *Willis v. Hoover*, 9 Or. 418; *Bernard v. Taylor*, 23 Or. 416, 31 Pac. 968. But, while the decisions are quite uniform in affirming the foregoing rule, there is an irreconcilable conflict of judicial opinion in defining an illegal contract, and hence the important question to be considered is whether a conveyance made to hinder, delay, or defraud the grantor's creditors is valid between the parties thereto when there is a consideration to support it. The statute of frauds, so far as it applies to the case at bar, declares that "every conveyance * * * of any estate or interest in land * * * made with the intent to hinder, delay or defraud creditors * * * as against the persons so hindered delayed or defrauded shall be void." *Hill's Code*, § 3059. While such conveyances are by the statute declared to be void as to the grantor's creditors, they are, nevertheless, by the great weight of authority, binding and valid between the parties. *Harris v. Harris*, 23 Grat. 737; *Hess v. Final*, 32 Mich. 515; *Clemens v. Clemens*, 28 Wis. 637; *Knapp v. Lee*, 3 Pick. 452; *Dyer v. Homer*, 22 Pick. 253; *Harbaugh v. Butner*, 148 Pa. St. 273, 23 Atl. 983; *Still v. Buzzell*, 60 Vt. 478, 12 Atl. 209; *Bump, Fraud. Conv.* (2d Ed.) 436, 451; *Wait, Fraud. Conv.* § 395. But in *Nellis v. Clark*, 20 Wend. 24, it is held that a contract void as to creditors is void between the parties to it, and, when such contract is executory, it will not be enforced by the courts. The force of this authority is much weakened by the dissenting opinion of Nelson C. J., in which he clearly distinguishes the difference between an illegal contract, in the strict sense of the term,

and one fraudulent as it respects creditors; the former kind being altogether void, and the latter void only as against the persons hindered, delayed, or defrauded. In the case of *Harvey v. Varney*, 98 Mass. 118, Foster, J., in commenting upon the question under discussion, said: "*Nellis v. Clark*, 20 Wend. 24, was decided in the supreme court of New York in 1838, by Mr. Justice Cowen and Mr. Justice Bronson, and sustains the position which the present defendants maintain. But a dissenting opinion was delivered by the third judge, Chief Justice Nelson, now of the supreme court of the United States, the reasoning and conclusions of which commend themselves to our judgment in preference to the opinion of the majority of that court." And Steele, J., in *Carpenter v. McClure*, 39 Vt. 9, also said: "We are aware that in *Nellis v. Clark* the court, citing the case from Maine, have made the distinction between executed and subsisting contracts under a statute very similar to ours, and have put their decision substantially upon the grounds which have been so well set forth in the exhaustive and learned argument of the defendant's counsel. With great respect for the able court, the majority of whom concurred in that decision, we are unable to arrive at the same conclusion. So far as we are informed, contracts fraudulent as to creditors have been uniformly treated by our courts as not becoming thereby void between the parties, and such is clearly the spirit of our reported cases. *Gifford v. Ford*, 5 Vt. 532; *Conner v. Carpenter*, 28 Vt. 240; *Boutwell v. McClure*, 30 Vt. 676." It would be useless to cite further authority upon this subject, for, as was said by Dixon, C. J., in *Clemens v. Clemens*, supra: "It will be found, on examination, that these questions have been and are the subject of the most direct and positive conflict of opinion and decision among the courts of the different states of this Union, and sometimes among the courts of the same state." Amid such a conflict of authority it should be the duty of a court, when the question is raised for the first time, to adopt that line of decisions which, in its judgment, presents the better reason; and with this object in view we have carefully examined the numerous cases cited by counsel, both for the plaintiff and defendant, in their exhaustive briefs. It is admitted that where it appears from the plaintiff's own case, or by proper plea of the defendant, that the contract which is the subject of the suit is void because illegal, the court will not lend its aid either to enforce on the one hand or give relief on the other. *Buchtel v. Evans*, 21 Or. 309, 28 Pac. 67; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093. But there is a marked distinction between contracts which are void ab initio and those which are void only as to third parties. *Harris v. Harris*, supra. A contract which was void when executed cannot be made valid by ratification of the parties. Wait,

Fraud. Conv. § 489; *McIntosh v. Lee*, 57 Iowa, 356, 10 N. W. 895; *Atlee v. Fink*, 75 Mo. 100. Nor is there any method whereby an illegal contract—one which never had life—can be rendered efficacious. A fraudulent conveyance is not void, but merely voidable at the suit of the creditor, and is therefore capable of ratification. *Bump, Fraud. Conv.* 457; Wait, *Fraud. Conv.* § 482. A contract entered into to defraud creditors is clearly against the policy of the statute of frauds, as well as against the general policy of the law; but it is not illegal, in the strict sense of the term, for the wrong may be condoned by the creditor, and the transaction will thus become purged of the fraud. *Millington v. Hill*, 47 Ark. 301, 1 S. W. 547. The conveyance being valid between the parties to it, and not illegal in the strict sense of the term, it follows that the defendant should not have been permitted to plead the defense interposed, and there was error in overruling the demurrer.

2. The plaintiff was the owner of lot 5 in block 21, and, having executed a deed to the defendant of lot 5 in block 51, in which she had no interest, the question is presented whether there was any consideration for the note and mortgage. The plaintiff having in her complaint described the property as "lot 5 in block 21 in Albina addition to Portland, Oregon," the defendant, in her second defense, *inter alia*, alleges that "said plaintiff, upon the 7th day of November, 1891, made, executed, and delivered to defendant a warranty deed to the following described real property in the county of Multnomah, state of Oregon, to wit, lot five (5), block fifty-one (51), Albina addition, Portland, with the frame buildings situated thereon, the same being the real property described in plaintiff's complaint; that no consideration whatever passed from defendant to plaintiff; that defendant has ever since held the deed to said property. At the same time, and as a part of the same transaction, defendant made her certain promissory note, in words and figures as follows: [Here follows a copy of the note set out in the complaint.] And at the same time defendant made and executed a mortgage upon said property, the same being the mortgage described in the plaintiff's complaint, said note and mortgage being made and executed without any consideration whatever." It is very evident from these allegations that the defendant did not intend to rely upon any failure of title to the lot which the plaintiff purported to convey to her as a defense to the suit. No attempt is made to allege that the plaintiff was not the owner of the lot described in her deed, or that, by reason of any failure of title thereto, there was no consideration for the note and mortgage. It is true, the defendant, upon filing her answer, tendered a deed to the premises; but the rescission which she sought was in consequence of the alleged fraudulent transfer, and not because of any failure of title.

A grantee of premises conveyed with warranty has a remedy upon the covenants of his deed for a failure of title, and, if a perfect title be tendered by the grantor before a decree is rendered, the contract will not be rescinded, unless it appear to the court that the grantee has sustained some loss, injury, or damage by reason of the delay in perfecting the title. *Kimball v. West*, 15 Wall. 377; *Mays v. Swope*, 8 Grat. 46; *Hughes v. McNider*, 90 N. C. 248. The plaintiff, before the decree was rendered, tendered a deed to the defendant, which contained a correct description of the premises, and, there having been no proof of a demand for a rescission of the contract, nor any loss, injury, or damage sustained by the defendant by reason of any delay in perfecting the title, no rescission should be decreed. That the deed was the consideration for the note and mortgage is admitted by the answer, in which it is alleged that they were executed at the same time, and as parts of the same transaction. When two contracts are contemporaneously executed by the same parties, and relate to the same subject-matter, they must be construed together, as constituting but one agreement. *Dean v. Lawham*, 7 Or. 422; *Kruse v. Prindle*, 8 Or. 158. The mortgage recited that it was given to secure the purchase price of the premises, and, while there was an error in the description contained in the deed, the subject-matter related as well to the purchase price and security as to the property conveyed or mortgaged.

3. This brings us to a consideration of the delivery of the mortgage the execution of which is admitted in the answer. The statute provides that "the execution of a writing is the subscribing and delivering it, with or without a seal" (*Hill's Code*, § 754), but, the defendant having denied the delivery, her pleading should be construed as a whole, and not by the use she has made of the technical word "executed." The answer also alleges that the plaintiff agreed the defendant might retain possession of the mortgage. As the defendant bases her right to retain possession from plaintiff's agreement, she necessarily admits plaintiff's right to the possession but for such agreement. No lien could attach to the premises until the mortgage had been delivered by the defendant with the intent to give effect to the instrument. 1 *Devl. Deeds*, § 260. Delivery is a question of fact, but this may be inferred from circumstances. The plaintiff testifies that after the mortgage had been properly signed, sealed, witnessed, and acknowledged it was delivered to her, and that, the defendant having a safe, it was agreed that she should keep it. If this testimony is to be believed, the mortgage was executed, and the lien attached to the property. The agreement that the defendant should retain it recognizes the right of the plaintiff to contract with reference to it, and, in our judgment, corroborates the plaintiff's testimony. The mortgage having been delivered, the de-

fendant has sustained no injury, even if the plaintiff adopted a ruse to secure its possession. In view of these considerations the decree of the court below must be reversed, and one entered here foreclosing plaintiff's mortgage for the amount due on the note. The note having provided for a reasonable attorney fee, the plaintiff alleges that \$500 was such sum as the defendant promised to pay in case suit were brought thereon. The defendant denied that any sum was reasonable as such fee, and upon the issue thus formed no evidence was taken, and consequently the statutory attorney fee only will be allowed.

(27 Or. 74)

WHALLEY v. GOULD et al.

(Supreme Court of Oregon. April 15, 1895.)

FILING TRANSCRIPT ON APPEAL.

Under *Hill's Ann. Laws*, § 541, subd. 3, authorizing the court, upon notice to the respondent, to enlarge the time for filing a transcript on appeal, an order of the circuit court enlarging that time without such notice is invalid.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by Henry Whalley, administrator, against Frank P. Gould and others. From a judgment for plaintiff, defendants appeal. Dismissed.

R. S. Strahan, for appellants. J. B. Thompson, for appellee.

PER CURIAM. The only question for consideration on this motion is whether an order of the circuit court enlarging the time in which to file a transcript on appeal is valid, when made without notice to the respondent. Like orders of this court have been repeatedly held void and of no force or effect when called in question by a motion to dismiss the appeal. This doctrine was first established in *Bush v. Gelsey*, 18 Or. 267, 19 Pac. 122. It is there held that notice is made necessary by the express requirement of subdivision 3 of section 541 of *Hill's Annotated Laws of Oregon*, and cannot be dispensed with, and this ruling has been adhered to in all subsequent cases in which the question arose. *Kelley v. Pike*, 17 Or. 330, 20 Pac. 635; *McCarty v. Wintler*, 17 Or. 391, 21 Pac. 195; *Wagon Road Co. v. Landingham*, 24 Or. 439, 33 Pac. 983. In *Kelley v. Pike*, supra, after stating that the appellant is required to file his transcript with the clerk of this court by the second day of the next regular term after the appeal is perfected, and that a failure to do so will operate as an abandonment of the appeal unless the court or judge thereof, upon notice to the respondent, by order enlarge the time for filing the same, the court says: "Under no other circumstances can the transcript be filed in this court so as to give it jurisdiction of the cause; and in our opinion such order should be obtained from the court, or judge thereof, in which the decision appealed from

was rendered, although this court has held that it had authority to make such an order, and will probably adhere to that ruling when a case is properly presented. It is important for members of the bar to bear in mind that an order of that kind cannot be made except upon notice to the respondent." Notwithstanding the language of the court in *Kelley v. Pike* was evidently intended to apply to an order enlarging the time in which to file a transcript, whether made by this or the circuit court, and was designed to emphasize the importance of the ruling in *Bush v. Gelsey* by warning counsel of the consequences of a failure to give notice to the respondent of the intended motion for such order, it is now contended that the statute requiring notice applies only to motions addressed to this court, and not to the court from which the appeal is taken. But we think it exceedingly doubtful whether, under a proper construction of the statute, this court has any authority whatever to enlarge the time for filing a transcript on appeal. It is expressly provided that the appellate court has jurisdiction when the transcript is filed, and not otherwise, and it is not apparent how it can be said that it has authority to make an order enlarging the time in which to file the transcript in a cause over which the statute expressly provides that it has not jurisdiction until such transcript is filed. Nevertheless the practice has been to entertain such motions, and we do not desire to be understood as intimating that it will not be adhered to, and these suggestions are only prompted by the argument that the statute requiring notice of motion for an order enlarging the time in which to file a transcript applies only to this court. In our opinion, the statute was probably intended to apply to the circuit court alone, but, however that may be, we can find no room in its language for the distinction sought to be made by counsel. It says the court or judge thereof may, "upon notice to the respondent," by order enlarge the time for filing a transcript, and if, as held in *Bush v. Gelsey*, the notice is a prerequisite to the exercise of this authority, it is certainly immaterial in which court the proceedings are had. The authority to enlarge the time is to be found in the statute, and it is only by compliance with its terms that the order can be made. Without the statute, neither this court nor the circuit court has power to enlarge the time for filing a transcript, and by its express terms this power cannot be exercised except upon notice to the respondent; and, indeed, this is a wholesome requirement, for otherwise an appellant might, by means of ex parte orders, so delay the hearing of an appeal as to injuriously affect the respondent's rights. If the time fixed by statute for filing a transcript is to be extended, it is right and proper that the respondent should be notified of the application for such extension, and given an opportunity to be heard upon the matter. It follows, therefore, that, however reluctant the

court may be to dismiss an appeal, it has no alternative in this case, and the motion must be allowed.

(29 Or. 64)

MATLOCK v. WHEELER et al.

(Supreme Court of Oregon. April 8, 1895.)

BOND—JUSTIFICATION OF SURETIES.

Hill's Ann. Laws, § 537, subd. 4, provides that where a party in good faith gives notice of appeal, and thereafter omits to do any other act necessary to perfect the appeal, the appellate court may permit an amendment or performance of such act. Subdivision 3 requires sureties to justify if excepted to. *Held*, that the appellate court may permit a new undertaking to be filed, if the original is rendered ineffectual by failure of the sureties to justify after exception, when there has been no culpable fault on the part of appellant.

Appeal from circuit court, Lane county; J. C. Fullerton, Judge.

Action by J. D. Matlock against A. Wheeler and others. There was a judgment for plaintiff, and defendants appeal. Heard on motion by plaintiff to dismiss the appeal. Overruled.

J. M. Williams and L. Flinn, for appellants. L. Bilyeu, for respondent.

PER CURIAM. The respondent moves to dismiss this appeal because the surety on the undertaking, after exceptions to his sufficiency had been filed, was not produced for justification, as required by law. Before the time fixed for hearing the motion to dismiss, the appellants served and filed in this court a motion for leave to give a new and sufficient undertaking, which was brought on for hearing with the motion to dismiss. That the appeal was taken in good faith, and the omission of the appellants to produce the surety for justification was the result of inadvertence and mistake on the part of their counsel, is not questioned; but respondent contends that the failure to do so of itself operated as an abandonment of the appeal, and it is therefore not within the power of this court, under subdivision 4 of the section which provides for exceptions to and justification of sureties on appeal, to allow a new undertaking to be filed at this time. That subdivision provides that "when a party in good faith gives due notice of an appeal and thereafter omits through mistake, to do any other act * * * provided in this section necessary to perfect the appeal (which of course includes the failure to have the sureties justify), * * * the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just" (Hill's Ann. Laws, Or. § 537¹), and, in our opinion, clearly authorizes this court to permit a new undertaking to be filed when the original is

¹ Hill's Ann. Laws, § 537, subd. 3, requires sureties on appeal bonds to justify if excepted to.

rendered ineffectual by the failure of the sureties to justify after exception, where there has been no culpable fault on the part of the appellant. It was to prevent the failure of an appeal which had been taken and is being prosecuted in good faith that the statute was enacted, and to this end it should receive a liberal construction. The courts are always reluctant to permit an appeal to fail when it can be avoided without violating some positive provision of law or well-settled rule of practice. The failure of an appellant to produce his sureties for justification may render the undertaking of no effect, but it does not necessarily avoid the appeal or show such negligence as ought to be visited with the consequences of a dismissal and denial of the right to be heard in this court when he shows a reasonable excuse for his failure, and is willing to file a new and sufficient undertaking. The motion to dismiss will therefore be overruled, and the undertaking submitted may be filed.

(22 Nev. 318)

ROBERTS v. GREER et al. (No. 1,419.)
(Supreme Court of Nevada. April 20, 1895.)

HOMESTEAD—RIGHTS OF SURVIVING HUSBAND.

A homestead, duly filed on while husband and wife were residing thereon, remains a homestead in his hands after her death, and as such exempt from levy and sale for his debts, where he continues to reside upon it, although he has no children or other dependent relatives residing with him.

(Syllabus by Bigelow. C. J.)

Appeal from district court, Washoe county; A. E. Cheney, Judge.

Action by Hiram W. Roberts against H. H. Greer and H. W. Caughlin for an injunction. Plaintiff had judgment, and defendants appeal. Affirmed.

On December 16, 1879, the plaintiff and Johanna Roberts, his wife, were living upon and occupying the lands in controversy in this action, which were community property. On that day Johanna duly filed a declaration of homestead thereon, and they continued to live upon the premises until October 25, 1893, when she died. Since then the plaintiff has lived upon and occupied them. They had no children, nor has the plaintiff any dependent relatives living with him. There has apparently been no administration upon the wife's estate. The premises do not exceed \$5,000 in value. On July 25, 1893, the defendant Greer obtained a judgment against plaintiff, upon which, on October 27, 1893, an execution duly issued. Under this writ the lands were sold by defendant Caughlin, as sheriff of Washoe county, to defendant Greer, and it is alleged that upon the expiration of the period of redemption he intends to execute a sheriff's deed for the same. Judgment was rendered in the plaintiff's favor, to the effect that the sale was void, and enjoining the sheriff from executing any deed thereunder. The defendants appeal.

J. L. Wines and Torreyson & Summerfield, for appellants. William Webster and Goodwin & Dodge, for respondent.

BIGELOW, C. J. The question for decision in this case is whether upon the death of the wife the homestead of the parties upon community property remains in the hands of the childless husband as a homestead, and as such exempt from levy and sale for his debts. The answer depends upon the construction of our homestead law. The first section of the act, as amended in 1879 (St. 1879, p. 140; Gen. St. § 539), provides that the husband and wife, or either of them, or other head of a family, may make and file a declaration of homestead, and that thereafter "the husband and wife shall be deemed to hold said homestead as joint tenants: provided, that if the property declared upon as a homestead be the separate property of either spouse, both must join in the execution and acknowledgment of the declaration; and if such property shall retain its character of separate property until the death of one or the other of such spouses, then and in that event the homestead right shall cease in and upon such property, and the same belong to the party (or his or her heirs) to whom it belonged when filed upon as a homestead." Section 4 of the act (St. 1879, p. 141; Gen. St. § 542) provides as follows: "The homestead and all other property exempt by law from sale under execution, shall, upon the death of either spouse, be set apart by the court as the sole property of the surviving spouse, for his or her benefit, and that of his or her legitimate child or children; and in the event of there being no surviving spouse, or legitimate child or children of either, then the property shall be subject to administration, and to the payment of his or her debts or liabilities: provided, that the exemption made by this act and the act of which it is amendatory shall not extend to unmarried persons except when they have the care and maintenance of minor brothers or sisters, or both, or of a brother's or sister's minor children, or of a father or mother, or of grandparents, or unmarried sisters living in the house with them; and in all such cases the exemption shall cease upon the cessation of the terms upon which it is granted; and upon the death of such unmarried person the property shall descend to his or her heirs, as in other cases, unless disposed of by will, subject to administration and the payment of debts and liabilities."

It may be admitted that the statute is by no means clear upon the point involved in this action. Generally it is very crude, and many of its provisions conflicting to the last degree. Through this maze the courts must thread their way as best they may, and in endeavoring to carry out what appears to be the spirit of the law their decisions must necessarily, sometimes, seem to fall but little short of judicial legislation. The language

used by the supreme court of Texas is very applicable to the situation here. It said: "The homestead estate was one unknown to the common law, and is of very recent origin, having been created by statute and under the construction given by the courts. As might have been reasonably expected in the legislation upon a new subject-matter, the statutes did not in express terms anticipate and provide for every possible phase of the question, and the courts have been called upon to construe and apply the law to new cases as they would arise. This construction has almost invariably been a liberal one, and designed to carry out the beneficent purposes and intention of the legislature. This court has repeatedly called attention to the necessity of more specific legislation on the subject, and in the absence of it has been forced to decide cases not so much from the letter of the law as from its evident spirit and intention. These decisions have not been made in a spirit of judicial legislation, but in an anxious desire and effort, by analogy and otherwise, to arrive at a proper construction of the constitution and laws." *Blum v. Gaines*, 57 Tex. 119, 121. Viewing the law in the liberal spirit here indicated, it seems to us there is more reason for concluding the legislature intended the homestead in the hands of the surviving husband to be exempt from execution than the contrary. The constitution (section 30, art. 4) provides that "a homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists." Under this provision the conditions upon which a homestead shall be granted have been left entirely to the legislature. While that body has seen fit to limit the right to initiate a homestead to married persons, and to those who are the heads of families, there seems nothing to prevent its being extended to others who are not in either situation. If it could do this, it could extend it to some classes and not to others. It could provide that a homestead once created should continue under some circumstances, and not under others. The first section of the act quoted above provides that "the husband and wife shall be deemed to hold said homestead as joint tenants." As used in this statute, the word "homestead" may be defined as meaning not only the property—the real estate—occupied as the home, but also the right to have it exempted from levy and forced sale. In case of a husband and wife, the homestead is a home that cannot be taken from the occupiers for the debts of either or both of the spouses. It is this "homestead" that they are to hold as joint tenants. One of the fundamental incidents of a joint tenancy is the right of survivorship. If, then, when the legislature provided that they should hold the homestead as joint tenants, if they understood at all the meaning of the language used, as we must presume they did, they must have

meant that the survivor should not only succeed to the property which constituted the homestead, but also to the right to hold it exempt from forced sale. If not, they would not hold the "homestead" as joint tenants, but merely the property covered by the homestead right. It will be noticed, further, that the same section also provides that where the property declared upon as a homestead is the separate property of either spouse, and shall remain such until the death of one of the parties, the "homestead right" in such property shall thereupon cease. From this, upon the principle that what is enumerated excludes what is not, it seems quite clear that the legislature must have intended that in case of community property this "homestead right" should not cease upon the death of one of them. In section 4 it is again the "homestead" that upon the death of either spouse is to be set apart as the sole property of the survivor, and it is further provided that, in case there is no surviving spouse nor children, the "property" is to become subject to administration. This shows that the attention of the legislature must have been particularly called to the fact that there was a distinction between the homestead and the property upon which the homestead right rested, and that they did not use those terms indiscriminately.

In *Tyrrell v. Baldwin*, 78 Cal. 470, 476, 21 Pac. 116, speaking of a provision of the Code, the court said: "That section provides that 'the court may (shall) of its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded,' etc. Here the quality of the exemption is clearly impressed upon the homestead set aside. It would not be a homestead, it would be wanting in the main feature which recommends it to favor, if, upon the death of the head of the family, it were no longer protected by the law of exemption. There is greater necessity for such protection after the death of one of the spouses than before." An argument leading to the same result may also be drawn from the provision that, where there is no surviving spouse nor children, the property shall become subject to administration and distribution to the heirs. Unless in this provision the legislature intended to provide for a case where both husband and wife died at the same instant, which is hardly supposable, it must have contemplated that there would be a time during which the homestead would continue to exist, when but one of them would be alive, and it is only after the death of the survivor that the homestead property is to be distributed to the heirs. In *Smith v. Shriveles*, 13 Nev. 303, this court decided that, upon the death of one of the spouses, the children took no interest in the homestead. If that decision is cor-

rect, then the fact that there are or are not children cannot alter the estate that comes to the surviving husband or wife. If it would not, then no case can be thought of where the homestead would continue after the death of one of the spouses, if it would not here. Defendants' counsel, admitting what is really beyond controversy, that upon the death of the wife the title to the homestead property vested absolutely in the husband, found their argument that it is not thereafter exempt from levy and sale for his debts principally upon the language of the first proviso of section 4, where it directs that "in all such cases the exemption shall cease upon the cessation of the terms upon which it is granted." But the view we take of this provision is that it really strengthens the opposite position. We are of the opinion that this proviso is simply a limitation upon the first section, wherein that section provides for a homestead for an unmarried person who is the head of a family. Without this limitation the first section might be construed to apply to cases where an unmarried person had living with him others who were not relatives. This was carefully guarded against,—so carefully, in fact, that it seems to even prevent a surviving husband or wife with dependent children from ever securing a homestead in their own right after the death of the other; and then the clause in question was inserted for the purpose of providing for the termination of the unmarried persons' homestead when they no longer have dependent relatives living with them. This, we think, is all that was intended by this clause, and the care of the legislature to provide for the termination of such a homestead may be considered an indication that they did not intend one granted to a married person to terminate upon the cessation of the terms upon which it was granted. We are aware that in *Estate of Walley*, 11 Nev. 260, 268, the majority of the court expressed the opinion that the construction of this statute contended for by defendants' counsel was correct, but the point was not involved in that case, and, of course, was not decided. What was there said was stated only by way of argument as to the proper construction to be placed upon another statute, and probably did not receive the consideration usually given to points actually decided. Since then, in *Smith v. Shrieves*, supra, the court has held that children take no interest in a homestead; and if, as heretofore remarked, this was correctly decided, then the existence or nonexistence of children cuts no figure in the right to a homestead, and, if a childless widow or widower cannot have one, then such a person with children cannot do so. But certainly the legislature cannot have deliberately intended to exclude a widow, or a widower, with children, from all benefit of the homestead act, and yet, as we have seen, if they are not granted a

homestead by virtue of their survivorship, they cannot afterwards secure one. We think that stronger arguments against the view we have taken may be drawn from the general policy of the homestead act, which seems to aim only at securing a homestead for a family, and not for individuals, from the fact mentioned by Justice Beatty in his dissenting opinion in *Smith v. Shrieves*, supra, that, when our legislature adopted our law of 1865, they apparently preferred to follow the California act of 1860, which, at best, is not clear upon this point, in preference to the California amendment of 1862, which is clear and definite that the homestead in the hands of the surviving spouse is exempt from all debts incurred prior to the death of the other; from the fact that the legislature clearly did not intend that a homestead in the separate property of either of the spouses should continue after the death of one, and consequently, as community property virtually becomes separate property after such death, no greater reason exists for granting a homestead in that than exists in regard to property which has always been separate; from the fact that no provision has been made for abandoning such a homestead, and under the provisions of section 2, taken literally, if a homestead exists at all to a surviving husband or wife, it never can be abandoned, and, as this cannot have been intended, the legislature must have intended that no such homestead should exist at all. But strong as some of these reasons, and perhaps others that could be suggested, are, we consider those on the other side stronger still, and consequently hold that view to be the law. While not strictly in point, yet as to some extent supporting the views here expressed, and showing that other courts upon statutes more or less like our own have come to the same conclusion, we cite *Towne v. Rumsey* (Wyo.) 35 Pac. 1025; *Ellis v. Davis*, 90 Ky. 183, 14 S. W. 74; *Keyes v. Cyrus*, 100 Cal. 322, 34 Pac. 722; *Silloway v. Brown*, 12 Allen, 84; *Kimbrel v. Willis*, 97 Ill. 494; *Blum v. Gaines*, 57 Tex. 110; *Wap. Homest.* 82 et seq. The judgment is affirmed.

BONNIFIELD and BELKNAP, JJ., concur.

(106 Cal. 651)

GISELMAN et al. v. STARR. (No. 15,893.) (Supreme Court of California. April 2, 1895.)

MORTGAGES—ASSIGNMENT BY TRUSTEE—GIFT—ACTION BY EXECUTORS—REAL PARTY IN INTEREST—MISTAKE IN DESCRIPTION.

1. Where a mortgage is executed to a trustee, "his assigns and successors," the trustee has implied power to assign the mortgage.

2. Evidence that a father, as guardian of his daughter's estate, included in the inventory thereof a note and mortgage, and that he had stated that he intended to give them to her, will not, in the absence of evidence of a formal assignment or indorsement, establish a gift to her.

3. In an action to foreclose a mortgage by executors who are prima facie owners of the instrument, defendant's objection that the action was not brought in the name of the real party in interest is without force, where there is no showing of a counterclaim or set-off against the real owner which is not available against plaintiffs, and it appears that the judgment in the action would protect defendant against other claimants.

4. In a suit to reform a mortgage which described the land as beginning "on line between sections 2 and 25 in township 14," and recited that the property so described was the same as that formerly conveyed by T. to Y., it appeared that T.'s deed described the land beginning "on line between sections 24 and 25 in township 14," and that sections 2 and 25 in township 14 were not contiguous, but that sections 24 and 25 were contiguous. *Held*, that a decree changing "2" to "24," on the ground of mistake, was justified.

Department 2. Appeal from superior court, Lake county; R. W. Crump, Judge.

Action by William Giselman and another, executors of the will of S. C. Hastings, deceased, against M. Starr, to foreclose a mortgage. Judgment for plaintiffs, and defendant appeals. Affirmed.

Thos. B. Bond and Woods Crawford, for appellant. Hudson & Sayre and W. W. Sanderson, for respondents.

HENSHAW, J. The appeals are from the judgment and from an order denying a new trial. Action by plaintiffs, as executors of the last will of S. C. Hastings, deceased, to reform, and, as reformed, to foreclose, a mortgage executed by defendant. Starr executed the note and mortgage in suit to William Giselman, trustee, in payment and cancellation of an existing note, also secured by mortgage, made by him to S. C. Hastings. A few days thereafter, Giselman indorsed the note, "Pay to the order of S. C. Hastings, without recourse. William Giselman, Trustee,"—and delivered it to Hastings. At the same time he executed, as trustee, an assignment to Hastings of the mortgage. These papers, upon the death of Hastings, coming into the hands of the executors, of whom Giselman is one, this action was in due time commenced. The defendant meets it by answer and cross complaint, whereby he claims that he executed the note and mortgage to Giselman as trustee for the use and benefit of the daughters of said Hastings; that, at the time of the assignment to Hastings, he knew this fact, and, so knowing, took the note and mortgage without consideration; that thereafter Ella Hastings, daughter of S. C. Hastings, acquired by gift all of the interest of S. C. Hastings in the note and mortgage; and that the action is not prosecuted by the real parties in interest. The named beneficiaries of the trust and the widow of S. C. Hastings are interpleaded as having or claiming some interest in the mortgage and note, and are brought in under averments that, without a determination of their rights, defendant cannot tell to whom to pay the amount found due, nor with safety redeem

in the event of a sale. Plaintiff's answer to the cross complaint does not, in terms, deny that the note and mortgage were executed to Giselman as trustee for the use and benefit of the named children of S. C. Hastings, but does deny that they are or ever have been the property of the children, or any of them. Upon all other material averments of the cross complaint it joins issue. The children and others interpleaded by defendant, one and all, filed disclaimers, and in this state of the pleadings the trial was had. The death of Hastings and their appointment as executors admitted, plaintiffs introduced the note with its indorsement, the mortgage and the assignment of it, and rested upon this direct evidence and the presumptions arising from it. Code Civ. Proc. § 1963, subds. 8, 11, 21, 22; Civ. Code, §§ 1614, 3104, 3122-3124.

1. The first point presented by appellant is that the transfer by Giselman to Hastings is void, since the note and mortgage are the only instruments creating and containing the terms of the trust, and there is nothing in them to show that Giselman had the power to sell or assign. If the note and mortgage are the only instruments creating the trust, then is the trust radically defective in naming no beneficiaries. Civ. Code, § 2221. But aside from this, and treating the instruments as defining the powers of the trustee, there is contained in them, by necessary implication, the power to the trustee to sell or assign; for the promissory note is made payable to Giselman, trustee, or order, and the mortgage was also to Giselman, trustee, his assigns and successors. No evidence having been offered to overcome the presumption that Hastings took the note and mortgage for value, the transfer to him was not in violation of the trust but was valid.

2. In support of the contention that the interest of S. C. Hastings in the note and mortgage passed by gift to his daughter Ella, it is shown that Ella was incompetent, and that the father applied for and obtained letters of general guardianship over her and her estate. In the inventory of her estate, which is duly verified by the guardian, the note and mortgage are entered as the property of the incompetent. The note was exhibited to the appraisers by or at the instance of Hastings, and by them appraised at a valuation suggested by him. The clerk of the court testified that, at the time of the application for letters of guardianship, the father expressed sympathy and anxiety for his afflicted child, and said he was making provision for her, and desired to make such provision while he was living. "He said he had not yet turned over anything, but expressed his desire to do so." This array of facts and circumstances makes a strong presentation of the intent of Hastings to give the note and mortgage to his daughter. It is established that upon one occasion, under oath, he declared them to be her property. But such a declaration, how-

ever binding in good morals, is not of itself sufficient to establish a gift. No legal duty was imposed upon Hastings to give this particular property to his daughter, and, if the intended donation lacked anything of consummation, the promises or declarations were but nudum pactum, and not enforceable. It is not here a question of acceptance of the gift by the incompetent, which, the gift being advantageous to her, the law would presume; but the question is whether the gift was so completely made as to enable the law to presume its acceptance. To every gift delivery is essential. Says Chancellor Kent, speaking of negotiable instruments: "Delivery in this, as in every other case, must be according to the nature of the thing. * * * It must be the true and effectual way of obtaining the command and dominion of the subject. * * * If the thing given be a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed." The Civil Code declares that "a verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee." Section 1147. Hastings' attempted or intended gift fell short of these requirements. Lacking his indorsement of the note, his possession remained a possession in his personal, and not in his representative, character, and the gift failed of completion. What has been said renders unnecessary any consideration of the points presented by appellant, that Ella Hastings' guardian was a volunteer, who appeared without service of summons or cross complaint upon either the ward or herself, and that she had no power to disclaim or to bind the ward by disclaimer.

3. The defendant has a statutory right to have a cause of action against him prosecuted by the real person in interest (Code Civ. Proc. § 367); and it was in the exercise of that right that he pleaded lack of title in plaintiffs, and asked to have determined the conflicting claims of those whom he asserted to be the owners. But the purpose of the statute is readily discernible, and the right is limited to its purpose. It is to prevent a defendant against whom a judgment may be obtained from further harassment or vexation at the hands of other claimants to the same demand. It is to prevent a claimant from making a simulated transfer, and thus defeating any just counterclaim or set-off which defendant would have to the demand if pressed by the real owner. But where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern, and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the

name of the real party in interest. The cases which seemingly lay down the broad rule that it is not a good plea to allege that the note sued upon is the property of another, and not of plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, are to be read in the light of their facts, and so read they will be found to be in strict accord with what is here said. They are cases where prima facie legal title is shown in plaintiff, such a title as would protect defendant if judgment were obtained upon it. If, under such circumstances, the defendant claims another to be the real owner, he must support his right to make that claim by showing that he has some equity or defense against the real owner which he cannot maintain against the prima facie legal owner. Such is the meaning of *Price v. Dunlap*, 5 Cal. 483, and *Gushee v. Leavitt*, Id. 160. In the case under consideration the plaintiffs are prima facie legal owners, as executors, of the note and mortgage. Defendant is fully protected against those whom he names as owners and claimants by the judgment in favor of plaintiffs, and, in addition, he neither pleads nor shows any defense or set-off which he could make against the real owner, were Ella Hastings declared to be such. Therefore, by satisfying the present judgment, defendant is discharged from liability to all of the alleged conflicting claimants; and, since he does not dispute the debt nor its amount, this is all that in equity he can ask or should desire.

4. The complaint sufficiently pleaded facts which, if proved, would entitle plaintiffs to a reformation of the description of the second tract of land mortgaged. In the mortgage the description began "at meander post on line between sections 2 and 25 in township 14 north, of range 10 west, M. D. M.," etc. It was sought to change "2" to "24," making it read "between sections 24 and 25." This reformation the court ordered. The evidence, it is contended, does not support the finding. The evidence is in some respects confusing and unintelligible. The witness Starr speaks of the land by descriptions foreign to that of the mortgage, and without the judicial knowledge of this court, though doubtless well understood by the trial judge and counsel. We cannot be expected to know judicially where the "mill property" is, or where "the fence stood about where the west line of Main street is now," nor much about a description "which goes about down to the China House, and runs west along the section line about 700 feet," and other such discussions of boundaries with which the record abounds. But through the mists enough can be discerned to show that the finding is justified and supported. The mortgage declares that the tract described is the same heretofore conveyed by A. F. Tate to L. A. Young. Tate's deed contains the description contended for by plaintiffs. Defendant is given the description claimed, and asked if, assuming it correctly,

describes the property on which the flour mill rests, he meant to mortgage it. He replies, "Yes," but says he "understands it is not a proper description." The Young deed would seem to show that it is. He also says that the meander corner must be on the north line of section 25, "the section line between 24 and 25." Construing the description given in the mortgage, sections 2 and 25 of township 14 are not contiguous sections, while sections 24 and 25 are. Altogether there is sufficient evidence to support the finding of mistake, and to justify the decree of correction.

The averments in the cross complaint, which it is complained were not found upon by the court, were either admitted or sufficiently covered by the findings actually made. The judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

(106 Cal. 621)

PEOPLE ex rel. SCHNELL v. SAUSALITO LAND & FERRY CO. (No. 15,847.)

(Supreme Court of California. April 2, 1895.)

REVIEW ON APPEAL—FINDINGS.

Where the findings of the court are supported by the evidence, the judgment based thereon will not be disturbed on appeal.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by the people on the relation of John Schnell against the Sausalito Land & Ferry Company to abate a nuisance. Judgment for defendant, and plaintiff appeals. Affirmed.

Atty. Gen. Hart and Hepburn Wilkins, for appellant. Robert Harrison, for respondent.

MCFARLAND, J. This is an action brought in the name of the people, at the request of the relator, Schnell, to obtain a judgment declaring certain obstructions alleged to have been put in a public street by defendant to be a nuisance, and decreeing that they be abated, and that defendant be enjoined from further maintaining them. Judgment was rendered for defendant, and plaintiff appeals from the judgment and from an order denying a new trial. The things alleged as constituting the obstructions are that respondent wrongfully erected a fence and some buildings upon and across a certain public street in the town of Sausalito, known as and called "Water Street" or "Water Avenue." But the court found "that defendant at no time built or erected, placed or maintained, on any part of said Water street, or on any other public way, any structure or obstruction whatever," or that it threatened so to do. This finding is entirely determinative of the case against appellant, unless the latter can show that it has no reasonable support in the evidence, and this it fails to do. The court finds (in

brief) that Water street runs northerly and southerly along the edge of the water on the westerly shore of the bay; that the fence and buildings complained of were erected on an artificial wharf and ferry landing which respondent constructed, partly of rock and dirt and partly of wooden piles and frame work, between Water street and deep water; that said wharf and ferry landing are east of the easterly line of Water street, and are the private property of respondent, free from any public right or easement; and that said fence and buildings do not "in any manner prevent the free and comfortable use and enjoyment by the public of said Water street, and of every part thereof." We are satisfied that these findings are amply supported. The evidence could not be intelligibly reviewed without making references to maps, deeds, ordinances, dedications, and other documents, in addition to considerable oral testimony, and such a review of the evidence here would serve no useful purpose. There are only two errors of law assigned in rulings upon the admissibility of evidence, and they are of no substantial importance. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(106 Cal. 646)

EMERIC v. ALVARADO et al. (S. F. No. 52.) 1
(Supreme Court of California. April 2, 1895.)

DISMISSAL OF APPEAL—FAILURE TO FILE TRANSCRIPT.

Where an appeal is to be considered as to certain parties upon the judgment roll alone, without a bill of exceptions, and no transcript is filed or served within the time fixed by the rules of the court, the appeal as to such parties will be dismissed, upon their motion, notwithstanding the fact that a bill of exceptions, to be considered as to other parties in the same appeal, has not yet been settled.

In bank. Appeal from superior court, city and county of San Francisco.

Motion by Emily S. Tewksbury and other defendants to dismiss an appeal taken on behalf of Leota K. T. Gutierrez in an action by Henry T. Emeric against Henry V. Alvarado, administrator, and others. Motion sustained.

T. M. Osmont, for appellant. O. H. Lindley, for respondents.

PER CURIAM. Motion to dismiss the appeal. An appeal from certain portions of the final decree in partition entered herein was taken on behalf of Leota K. T. Gutierrez, one of the defendants, March 23, 1894, and certain of the respondents have moved to dismiss the appeal, under rule 5 of this court, upon the ground that the transcript on appeal has not been filed. The appellant seeks to avoid the effect of the rule by showing that she has served upon the attorney for

1 Rehearing denied.

the plaintiff the draft of a bill of exceptions containing the errors of the trial court, and matters relating thereto, which she desires to have considered upon the appeal, and that the trial judge has not yet settled this bill of exceptions. The draft of this bill of exceptions was not served upon the attorneys for the parties moving herein, and the affidavits on their behalf that no statement or bill of exceptions has been proposed to or served upon them are not controverted by the appellant. As the record to be considered upon the appeal as to these respondents consists of the judgment roll alone, without any bill of exceptions, it was incumbent upon the appellant to file the transcript within the time prescribed by rule 2. The right of the respondents to have the appeal dismissed as to them, for failure to file the transcript within this time, cannot be prejudiced by the fact that the appellant has included with them, in the same notice of appeal, another party to the action, between whom and herself she desires a bill of exceptions to be considered in connection with the judgment roll, and which has not been settled.

The motion must be granted, and it is ordered that the appeal be dismissed as to the respondents Emily S. Tewksbury; George Leviston; W. W. Sanderson; Lafayette I. Fish; Simon Blum; Isabella Castro De O'Neill; Frank Silveira Soito; Frank Silveira Soito, as administrator of the estate of Rosa G. Moitzo De Soito, deceased; Philip G. Galpin; Victor Castro; Richard O'Neill; and John P. Prendergast; Richard O'Neill and William Gleason, as trustees and cestui que trust; and Richard P. Hammond, Jr., Albert E. Crane, and John F. Sheehan, referees in partition; George F. Allardt, surveyor in partition; Bernardo Andrada; Dolores Castro De Barovich; Frederick Blume; James Curry; John Fay; Ann S. Galvin, executrix of the will of William Galvin; Kate Griffins, administratrix of Owen Griffins; Theodore H. Hittell; Thomas R. Horton; William H. Horton; Eugene Le Roy; Georges Le Roy; John McLure; Thomas W. Mulford; James Mulholland; Northern Railway Company; Francisco Silveria De Rose; Rene De Tocqueville; Anita Castro De Soto; and Thomas B. Wright.

(106 Cal. 623)

LION v. McCLODY. (No. 15,787.)

(Supreme Court of California. April 2, 1895.)

RESCISSION OF CONTRACT.

Defendant, in an action to foreclose a purchase-money mortgage, sought to rescind the purchase on the ground of fraudulent representations. It was found that he had purchased the land from a real-estate agent, without the knowledge of the owner, who afterwards ratified the sale; that no representations were made by the owner; that the defendant had resided within a short distance of the land for several years, and had ample opportunity to judge of its value; that he had placed the land on the market after purchasing it, and had made no com-

plaint for two years, and until after suit was begun to foreclose the mortgage. *Held*, that judgment for plaintiff was sustained by the findings.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Lazard Lion against Henry McClory. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. P. Veuve, for appellant. Jackson Hatch and E. M. Rosenthal, for respondent.

McFARLAND, J. This is an action to foreclose a mortgage executed by defendant to plaintiff to secure purchase money of the mortgaged premises, which had been sold and conveyed by the latter to the former. The defendant, in a cross complaint, set up that he had been induced to purchase the premises by certain false and fraudulent representations concerning the same made by the plaintiff, and prayed that the sale be rescinded, and that the mortgage, as well as a certain cash payment, be delivered up and restored to said defendant. The court rendered judgment for plaintiff, foreclosing the mortgage, and denying the prayer of the cross complaint. Defendant appeals from the judgment. The appeal is based entirely upon the judgment roll, which includes findings, and we see nothing on the face of the record to warrant a reversal. The findings negative some of the averments of the cross complaint, but appellant contends that upon the facts found the judgment should have been for the defendant. The facts found are, briefly, these: Respondent never made any representations of any kind to appellant; but in the spring of 1891 an enterprising real-estate agent, without any authority from respondent, who was the owner of the land, and without the knowledge of respondent, commenced negotiating with appellant for the sale of said land to the latter. He (the agent) represented to appellant that the land "was worth sixteen or seventeen thousand dollars"; and he, at the time he made the representation, believed that it was worth that amount "for the purpose of subdivision into lots." The appellant believed said representation and relied thereon in making the purchase. On April 10th a written receipt was signed, which showed that appellant was to purchase the land for \$13,500,—\$3,000 to be paid in cash, and two notes, for \$5,250 each, to be given and secured by mortgage. This receipt was shown to respondent on said April 10th, who before that had known nothing of the matter, and he wrote on it, "I approve this sale." The transaction was not completed until June 2, 1891, when appellant paid respondent \$3,000, and executed the said two notes and mortgage upon which this action was brought. It is found that on June 2, 1891, "the actual market value" of the said land was \$8,188.83. At that time the appellant resided, and for many years prior thereto

had resided, "within one-third of a mile of said land," and was "well acquainted with the same," and "might easily" have "ascertained the true market value of said land." On said June 2, 1891, the appellant "entered upon said land, and has remained in possession ever since, collecting the issues, rents, and profits thereof, and applying them to his own use"; and at no time until after the commencement of this action, which was August 25, 1893, more than two years afterwards, did appellant make known to respondent any objection to said purchase, or to the price, or "any objection connected with or arising out of said purchase." Respondent knew nothing of the representations made by said real-estate agent, although it is found that he knew "the actual market value of said land." The appellant, immediately after he took possession, on June 2, 1891, employed said real-estate agent to sell said land, who kept the same exposed for sale for two years and until his death, which occurred just before the commencement of this action. When the action was commenced the appellant for the first time undertook to repudiate the purchase and to demand a rescission. Upon these findings judgment was properly rendered for respondent. Conceding that respondent was responsible for the representations of the agent, who had acted without his authority or knowledge, still the case is barren of any right of appellant to repudiate the purchase after the commencement of the suit. The representation as to the value of the land was clearly a mere expression of opinion, upon which appellant had no business to rely. The representation was not of the value of land in Texas, or some other remote place. The land was right under appellant's nose; he had known it for years, and had as good opportunity as the agent to form an opinion of its character and value; and to set aside a sale of land because the vendor or the real-estate agent who sold it had exaggerated its value would be to invalidate nearly every sale which a real-estate agent ever made. Moreover, the appellant waited for more than two years to see if his speculation would turn out successfully before he made any sign of dissatisfaction, and this he could not do. The court found that there was no misrepresentation as to the quantity of the land. Appellant contends for a reversal because there is no finding as to the averment of the cross complaint that the agent falsely represented "that plaintiff's sons did not wish plaintiff to sell the same because they desired to build homes for themselves thereon." Whether this omission was from inadvertence, or from a belief of the court that the averment was immaterial, does not appear. It was clearly of no consequence; and a finding that the averment was true would, under the circumstances, have made no difference in the result. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(5 Cal. Unrep. 5)

In re WALKERLEY'S ESTATE (S. F. No. 6.)¹

Appeal of DOUGHTY et al.

(Supreme Court of California. April 2, 1895)

APPEAL—NOTICE—DISMISSAL.

An appeal will be dismissed, where notice was not served on all parties interested.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Appeal by Mary S. Doughty and others in the matter of the estate of William Walkerley, deceased. Dismissed.

Fox, Kellogg & Gray and B. B. Newman, for appellants. H. Firebaugh, Fred. E. Whitney, and Rogers & Paterson, for respondents.

PER CURIAM. The order heretofore made, denying the motion to dismiss three certain appeals of Mary S. Doughty and others, is hereby vacated; for, upon further examination of the papers and records, it appears that notice of the first appeal—that from the decree of distribution—was not served upon all of the parties in interest, for that it was not served upon F. E. Whitney, Esq., representing William Bacon and others, and that, therefore, it should be dismissed. Also, as to the appeals attempted to be taken from "the order, judgment, and decree settling the final account of executors," no opposition being made to the motion to dismiss, and it being conceded upon argument by appellants' attorney that the said last-mentioned appeals are imperfect, and have been abandoned, it is hereby ordered that each and all of said appeals be, and the same are hereby, dismissed.

(106 Cal. 648)

PEOPLE v. REILLY. (No. 21,172.)

(Supreme Court of California. April 2, 1895.)

CRIMINAL LAW — DEPOSITION TAKEN AT PRELIMINARY EXAMINATION—ADMISSIBILITY.

1. An objection to a deposition, taken at the preliminary examination of accused, on the ground that Pen. Code, § 869, subd. 5, requiring the reporter to transcribe his notes into longhand within 10 days after such examination, and file the same with the county clerk, has not been complied with, cannot be heard on appeal, where the record contains nothing to show that the statute was violated.

2. Under Pen. Code, § 686, which provides that a deposition taken on preliminary examination in the presence of accused, who had opportunity to cross-examine, may be read on the trial if it is satisfactorily shown to the court that the witness could not be found in the state, the admission of such deposition will be assumed, on appeal, to have been based on satisfactory evidence.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

John Reilly, convicted of robbery, appeals. Affirmed.

Alexander Campbell, Jr., for appellant. Atty. Gen. Hart, for the People.

¹ Rehearing granted.

BELCHER, C. The defendant was convicted of the crime of robbery, and sentenced to be imprisoned in the state prison for the term of 20 years. He appeals from the judgment and from an order denying his motion for a new trial. The only point made for reversal is that the court below erred in permitting the deposition of John O'Brien, taken at the preliminary examination of defendant, to be read in evidence. O'Brien was the prosecuting witness, and when his deposition was offered counsel for defendant objected that it was inadmissible under section 686 of the Penal Code; and again, that it was incompetent and inadmissible, and that no foundation had been laid for its introduction. The objection was overruled and an exception reserved.

1. It is urged here that no foundation for the introduction of the deposition was laid, because "no showing was made that the purported deposition ever was filed in the superior court, or with the county clerk of the city and county, or that the reporter had transcribed his shorthand notes into longhand, or that he ever certified to the same," as required by subdivision 5 of section 869 of the Penal Code. That section provides that when testimony, given at a preliminary examination, has been taken down by a shorthand reporter, "the reporter shall, within ten days after the close of such examination (if the defendant be held to answer to the charge), transcribe into longhand writing his said shorthand notes, and certify and file the same with the county clerk of the county, or city and county, in which the defendant was examined." The record shows that the deposition produced was the testimony of O'Brien, the complaining witness, which had been taken down by question and answer before the committing magistrate, in the presence of the defendant, upon the preliminary examination of defendant touching this charge of robbery, including the cross-examination of the witness in behalf of said defendant by his counsel; but it fails to show whether or not the testimony was taken down by a shorthand reporter, and, if it was, whether or not the reporter transcribed his shorthand notes into longhand writing, or ever certified or filed the same with the county clerk. So far, therefore, as we are advised, the testimony may have been properly transcribed, certified, and filed, and this may have appeared on the deposition. And, if not, specific objection on this ground should have been taken, and the record should have been made to show the facts. But the rule is that, unless the record clearly shows error, no presumption will be indulged that error was committed. We must presume, therefore, that the court rightly performed its duty, and that the ruling complained of was proper. *People v. Gibson* (Cal.) 39 Pac. 864.

2. It is also urged that no foundation for

the introduction of the deposition was laid, because there was no sufficient showing that the witness could not with due diligence be found within the state. Section 686 of the Penal Code provides that in a criminal action the defendant is entitled to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, "the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state." It was proved that a subpoena for the witness O'Brien was placed in the hands of an officer, who knew him, for service, and was returned with the following indorsement: "I hereby certify that, after searching diligently for John O'Brien, I could not find him. [Signed] John Gullfooy." It was also proved that O'Brien was an old man, who had been engaged in peddling rags, sacks, and bottles, and that up to a short time before he had stopped at a boarding house on Fourth street, in San Francisco, which had then been closed, and that its former occupants did not know where he had gone, or what had become of him; that diligent efforts to find him had been made in all those portions of the city where he had been accustomed to wander, and where he would be likely to be found, but that all such efforts had been unsuccessful. Without rehearsing the evidence in detail, it is enough to say that, as it was satisfactorily shown to the court below that due diligence had been used, and the witness could not be found, its conclusions in this regard must be accepted as correct. Certainly we cannot say that it abused its discretion in so holding. It follows that the judgment and order appealed from should be affirmed.

We concur: **VANCLIEF, C.; SEARLS, C.**

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(106 Cal. 643)

VAN EMAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 10.)

(Supreme Court of California. April 2, 1895.)

CRIMINAL LAW—SETTLEMENT OF CASE—WAIVER OF NOTICE.

The state's attorney, who had actual notice of the date first set for the settlement of defendant's bill of exceptions, several days prior thereto appeared at the hearing and procured a continuance, subsequently agreeing to call at the office of defendant's attorney and settle the exceptions there, but on the day named sent his clerk to ask a continuance until the follow-

ing day. *Held*, a waiver by the state's attorney of the service on him of the written notice of two days required by Pen. Code, § 1171.

In bank.

Application for writ of mandate to W. R. Dalingfield, judge of the superior court of city and county of San Francisco, commanding him to settle a bill of exceptions. Granted.

Bruner & Bruner, for petitioner. Eugene N. Deuprey, for respondent.

GAROUTTE, J. This is a motion, upon previous notice, for a peremptory mandate to W. R. Dalingfield, judge of the superior court of San Francisco, commanding him to settle a bill of exceptions. The petitioner was convicted of a felony in the department of the superior court presided over by the respondent, and upon December 12th duly served and filed his notice of appeal from the judgment and order denying his motion for a new trial. On January 11, 1895, and within due time, defendant's counsel presented to respondent, in open court, his proposed bill of exceptions. At that time respondent stated that such matters usually came up regularly on the last Saturday of each month, and he thereupon caused it to be placed upon the calendar for Saturday, the 26th day of January, for a hearing. Before handing the proposed bill of exceptions to respondent on January 11th, counsel for petitioner verbally notified the district attorney that he was about to do so, and requested him to examine the draft as soon as possible, in order to expedite its settlement. Being referred by the district attorney to special counsel for the people, Mr. Deuprey, he also gave him verbal notice that he was about to present the draft to respondent, and requested him to examine it and prepare his amendments as soon as possible, to which request Mr. Deuprey replied that he would. On Friday, January 25th, affiant called on said Deuprey at his office, and inquired of him personally if he would be ready on the following day to settle said proposed bill, to which said Deuprey replied that he would be ready at 11 o'clock a. m. next day. At 11 o'clock on January 26th affiant attended in court, and, upon said matter being called for settlement, a clerk from said Deuprey's office stated that Mr. Deuprey could not be present that day, and requested that the matter go over to a future day. It was then agreed by affiant and said clerk that said Deuprey should call at affiant's office on Monday, January 28th, at 1:30 p. m., to settle said bill, if possible, out of court. That on said last-named hour and day said clerk of Mr. Deuprey called at affiant's office and requested that the settlement of said bill be continued to January 29th, at 10 o'clock a. m., before said judge. On the matter coming on to be heard at that time, said Deuprey objected to the settlement of said proposed bill of exceptions upon the ground that the two days' written notice

required to be served upon the district attorney by the provisions of section 1171 of the Penal Code had not been given. The court sustained the objection, and refused to settle the bill.

Section 1171 of the Penal Code marks out the procedure to be followed in the preparation and settlement of bills of exceptions in criminal cases; and, while this statute should be liberally construed in the interest of a defendant's right of appeal upon a bill of exceptions, we do not think the exigencies of the present case even demand a construction of the statute. The object and purpose of service of notice upon the district attorney is to give that official an opportunity to prepare and offer his amendments to the bill at the hearing. The facts summarized show that the hearing was set for January 26th, and counsel for the people had actual notice of it several days prior to that time. He was directly informed of it by the judge, had the proposed bill of exceptions in his possession, and was engaged in the labor of preparing his amendments thereto. He stated to defendant's counsel upon January 25th that he would be ready to proceed with the settlement of the bill upon the following day. At that time Mr. Deuprey's clerk appeared in court and requested a continuance, which was granted, and it was thereupon agreed between said clerk and defendant's counsel that Mr. Deuprey should call at the office of defendant's counsel upon January 28th, and they should then attempt to settle said bill without the assistance of the court. At that time Mr. Deuprey, by his clerk, requested a continuance until the following day at 10 a. m., before the judge, at which time the bill was refused settlement. The defendant should seldom, if ever, be deprived of his right of appeal upon a bill of exceptions, or otherwise, by any failure upon his part to comply with the technical requirements of the statute. The law should be liberally construed as to such matters in his favor, and in this case, upon the showing made, we think it may well be held that the conduct of counsel for the people was such as to constitute a waiver upon his part of the service upon him of the written notice of two days required by said section 1171. For these reasons it is ordered that the writ issue as prayed for.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; HARRISON, J.; TEMPLE, J.; HENSHAW, J.

(107 Cal. 1)

In re COMASSI'S ESTATE. (No. 18,393.)¹
(Supreme Court of California. April 3, 1895.)
REVOCATION OF WILL—MARRIAGE—ADOPTION OF CHILD.

1. Under Code Civ. Proc. § 1970, which declares that a will cannot be revoked otherwise than as provided by the Civil Code, and Civ. Code, § 1292, providing that no will can be re-

¹ Rehearing denied.

voked except by declaring such revocation in a subsequent will, or by canceling or destroying with intent to revoke, a will executed by a married woman will not be revoked by the death of her then husband and her subsequent marriage.

2. An adopted child is not "issue of the marriage," within the meaning of Civ. Code, § 1298, providing that if a testator marry, and have issue of such marriage, his former will is revoked.

In bank. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Appeal from an order denying an application for probate of the will of Clara G. Comassi, deceased. Reversed.

A. C. Searle, for appellant. Armstrong, Bruner & Platnauer, for respondent.

HARRISON, J. Clara G. Comassi died in the city of Sacramento July 31, 1892, and thereafter a document bearing date June 23, 1877, purporting to be her last will and testament, was presented to the superior court for probate. The probate was contested by Mabel Delphina Comassi, formerly Mabel Delphina Eric, claiming as heir to the deceased, by virtue of an adoption; and upon the hearing of the contest the court found that in May, 1886, upon proceedings had in the superior court for Yuba county, that court made an order declaring that Mabel should thenceforth be regarded as the child of said Clara G. Comassi, and that the said Mabel and the said Clara should sustain towards each other the legal relation of parent and child. The court also found that the will was properly executed, and that at the time of its execution the deceased was in all respects competent to make a will; that she was at that time a married woman, the wife of one G. Comassi; that her husband died on the 26th of December, 1878, and that on the 25th of August, 1886, she was again married to Joseph O. Barbeau, from whom she was subsequently divorced. The court held that her marriage subsequent to the execution of the will had the effect to revoke it, and denied the application for its probate. From this order the petitioner has appealed.

The right of any person to execute a will, as well as the form in which the will must be executed, or the manner in which it may be revoked, are matters entirely of statutory regulation. The power of the legislature to limit the class of persons who shall be competent to make a will, or to declare that a change in the personal status of such persons after its execution shall operate as a revocation of the will, or be a sufficient reason for denying it probate, is unquestioned. "The Civil Code establishes the law of this state upon the subjects to which it relates" (section 4); and in order to determine whether a will has been properly executed or revoked, or whether, after its execution, there has been such a change in the status or personal relations of the testator as in law will effect its revocation, we

have only to determine whether, in the one case, there has been a compliance with the requirements of the statute, or, in the other case, whether the changed condition of the testator is within the conditions named in the statute. By the common law a married woman had no power to make a will, and the marriage of a woman revoked any will that she had previously made. In this state, however, there is no restriction upon the power of a married woman to make a will, and upon proof of its execution it is entitled to probate, the same as the will of any other person, unless it is shown to have been revoked in one of the modes prescribed by the statute. Section 1292 of the Civil Code declares: "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or, (2) by being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence, and by his direction." And section 1970, Code Civ. Proc., declares: "A written will cannot be revoked or altered otherwise than as provided in the Civil Code." The effect of these provisions is to do away with the doctrine of implied revocation, which was for so many years a subject of controversy in the English courts, and which, in many of the states of this country, is still permitted, under a clause in their statutes authorizing a revocation to be "implied by law from subsequent changes in the condition or circumstances of the testator."

The respondent does not controvert the effect of these provisions, but contends that, under the provisions of section 1300 of the Civil Code, the subsequent marriage of the testatrix had the effect to revoke her will. That section is as follows: "A will executed by an unmarried woman is revoked by her subsequent marriage, and is not revived by the death of her husband." By its own terms, this section is applicable only to a will "executed by an unmarried woman," and can have no application to the present case, for the reason that at the time of the execution of her will the testatrix was a married woman, whose husband was at that time living. The argument of the respondent that this section controls the present case, for the reason that at the time of her subsequent marriage her will was the will of an unmarried woman, fails to cover all the conditions which the section prescribes as essential to the revocation of a will previously executed. The section does not declare that every will of an unmarried woman shall be revoked by her subsequent marriage, but, by its terms, limits such revocation to "a will executed by an unmarried woman";

and, unless she was unmarried at the time she executed her will, the section has no application. A will is "executed" when it is signed and attested in the manner prescribed by section 1276, and the will in the present case was so executed in 1877, at a time when Mrs. Comassi was a married woman. The Code is silent respecting the effect of a subsequent marriage upon a will executed by a married woman; and, as the present will is not within any of the cases named in the chapter on "Wills," it is not excepted from the provisions of section 1292, and could be revoked only in one of the modes therein specified. In many states it has been held that the statutes which enable a married woman to execute a will have taken away the reason for the common-law rule which held that the marriage of a woman revoked a will previously made by her, and that consequently the rule itself is no longer applicable. *Webb v. Jones*, 38 N. J. Eq. 163; *Will of Ward*, 70 Wis. 251, 35 N. W. 731; *Roane v. Hollingshead*, 76 Md. 369, 25 Atl. 307; *Emery, Appellant* (In re Hunt's Will), 81 Me. 275, 17 Atl. 68. In Ohio it is expressly declared by statute that such marriage shall not revoke her will. In this state the legislature has seen fit to adopt a different policy, but has limited the effect of marriage to a will executed by an unmarried woman. It is as useless to conjecture the motives that may have governed the legislature in singling out an unmarried woman as the only person whose will shall be affected by her subsequent marriage, as it is to conjecture why there should be a difference in the effect of a subsequent marriage upon a will executed by an unmarried man and upon one executed by an unmarried woman. It has conferred upon each the same ability to make a will after marriage as before, and a woman can, immediately after her marriage, make a will identical with the one made by her before her marriage. The legislature has, however, made these distinctions, and courts have no alternative except to give effect to them. If it had been the purpose of the legislature that the will of any woman should be revoked by her subsequent marriage, it could have readily expressed that purpose in apt words, as has been done by the wills act of England (1 Vict. c. 26), the eighteenth section of which provides that "every will made by a man or woman shall be revoked by his or her marriage." The same provision is found in the statutes of many states in this country. Instead of so doing, however, the legislature of this state has limited this result to a will executed by an unmarried woman, in language which gives no opportunity for construction. To hold that a will executed by a married woman will, upon her subsequent marriage, be attended with the same result as that executed by an unmarried woman, would be to interpolate into the statute words that the legislature has industriously

omitted. The provision of section 1300 is the same as section 13 of the wills act of 1850 (St. 1850, p. 178), and was evidently taken from the Revised Statutes of New York, and in that state the precise question here presented has been determined in accordance with this opinion. In re *Burton's Will* (Surr.) 25 N. Y. Supp. 824. See, also, In re *Kaufman*, 181 N. Y. 620, 30 N. E. 242.

Section 1298 of the Civil Code has no application. The conditions required by this section are that the testator shall not only have married, but shall also have issue of such marriage, in order to a revocation of his will. The adoption of a stranger in blood is not the issue of the marriage, and cannot be treated as its equivalent. *Davis v. Fogle*, 124 Ind. 41, 23 N. E. 860. Section 1299 is, by its terms, limited to a survival of the testator by the "wife," whereas in the present case it is the wife who has died. The judgment denying probate to the will is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.

(5 Cal. Unrep. 17)

JONES v. SHUEY et al. (No. 15,727.)

(Supreme Court of California. April 3, 1895.)

MECHANIC'S LIEN—PLEADING AND PROOF—VARIANCE—TENDER.

1. Where the claim of mechanic's lien, and the complaint in an action to foreclose the lien, alleged a contract to pay plaintiff \$3.50 per day, and a contract to pay the reasonable value of his services was proved, and such value was shown to be \$2.84 per day, the variance is fatal.
2. A tender, to be valid, must be unconditional.

Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by L. S. Jones against J. A. Shuey and the Southern Pacific Company. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

W. S. Tinning, for appellants. R. H. Latimer, for respondent.

PER CURIAM. This is an action to foreclose a mechanic's lien. The defendant Shuey is the lessee of the land upon which the building is situated, and his codefendant is the owner thereof. The contractor is not made a party to the action. The plaintiff is a carpenter who was hired by the contractor, and he subsequently filed his notice of lien, wherein he stated that he was "to work on the building or structure then being erected on said land, for the sum of three and fifty one-hundredths dollars per day, for each and every day said L. S. Jones worked on said building or structure." The allegations of the complaint as to the character of the contract were in line with the claim of lien, but upon the evidence offered at the trial the court in effect found the contract not to be express,

but implied, as to the amount of wages to be paid; and, as we construe the finding, found that plaintiff was to be paid whatever sum his services were reasonably worth; and also further found that such services were reasonably worth the sum of \$2.84 per day. It thus appears that the contract proven is not the contract alleged, neither is it the contract set out in the notice of lien, and the variance is so broad and so material as to demand a reversal of the judgment. The identical question here presented arose in the very recent case of *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195, and a reversal of the judgment was the result. See, also, *Reed v. Norton*, 90 Cal. 599, 26 Pac. 767, and 27 Pac. 426. The court was justified in holding that no valid and legal tender had been made. A tender must be unconditional. *Brown v. Gilmore*, 22 Am. Dec. 223. We also think the demurrer to the complaint was properly overruled. The court found as a fact that Walton, the contractor, was the agent of both defendants, and rendered judgment against them accordingly. There is no evidence whatever in the record to support a finding to that effect. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

(106 Cal. 690)

GOODWIN v. SCHEERER et al. (No. 15, 560.)¹

(Supreme Court of California. April 3, 1895.)
JUDICIAL NOTICE — LOCATION OF LAND — EJECTMENT — BURDEN OF PROOF — SUFFICIENCY OF EVIDENCE — ADVERSE POSSESSION.

1. A court will not take judicial notice that a certain tract of land is or is not included within the boundaries of a particular patent.

2. Proof by plaintiff that his grantors held undisputed possession of the land in controversy for more than five years before they were dispossessed by the defendant entitles him to recover against a defendant in possession who offers no evidence in support of his right to the land, or the title of those under whom he claimed.

3. Where the city under which defendant holds as lessee, before the making of the lease, granted all its rights in occupied lands within a territory including the disputed premises, the burden of showing that the lands in controversy were unoccupied, and so not included in the grant, is on defendant relying on that fact as an affirmative issue.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Ejectment by James W. Goodwin against Joseph Scheerer and the city and county of San Francisco. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

H. T. Creswell, for appellants. J. W. Goodwin and Geo. T. Wright, for respondent.

HARRISON, J. Ejectment for certain lands in the city and county of San Francisco. The cause was tried by the court without a jury, findings of fact were waived,

¹ Rehearing denied.

and judgment rendered in favor of the plaintiff. A motion for a new trial was denied, and from this order and the judgment the defendants have appealed.

The evidence offered by the plaintiff showed that his grantors had been in the undisturbed possession and occupancy of distinct parcels of the land described in the complaint,—one of them from April, 1885, and the other from July, 1885,—until December, 1890, when the defendant Scheerer took forcible possession of the entire land, and ousted them therefrom, and remained in possession until after the commencement of this action. The action is brought against Scheerer and the city and county of San Francisco. The defendant Scheerer testified that a short time before taking possession he had obtained a lease of the property from the board of supervisors of the city, and had been put in possession thereof by the deputy superintendent of streets. The lease itself was not offered in evidence, nor was there any evidence given in support of the right of the city to make the lease, except the testimony of one of the witnesses that the property is a part of the old Mission or Channel creek land, reclaimed by the city, and that it had been always understood that it was city property.

It is contended by the appellants that it was incumbent upon the plaintiff to show that the land had not been reserved by the city for public use, and that, as no such evidence was given, the plaintiff was not entitled to judgment. The reasons urged in support of this proposition are that the court should take judicial notice that the land in question is a part of the Pueblo lands which were confirmed to the city of San Francisco by the decree of the circuit court of the United States May 18, 1865, and that as such confirmation was "in trust for the benefit of all lot holders under grants from some competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the city," it is incumbent upon a claimant in ejectment against the city for any of the lands within the limits of the Pueblo to show that such lands had not been granted or reserved; and that a failure to show these facts is fatal to the action, even though the evidence on behalf of the plaintiff is in other respects sufficient to establish his right of recovery. It would be carrying the rule of judicial notice further than it has ever been carried to hold that the knowledge of the court includes the precise lines upon the surface of the earth which define the boundaries of a patent, or that any particular parcel of land is within or without those boundaries, or that any designated tract of land within the city and county of San Francisco is a portion of the lands which were confirmed to the city by the terms of the aforesaid decree. The boundaries of the city and county of San Francisco include a large quantity of territory that is not in-

cluded within the limits of the Pueblo grant; and within the limits of the Pueblo grant, as confirmed by the decree, are many other tracts of land for which patents have been granted by the United States upon confirmed Mexican grants, and whose title is independent of the city and of the Pueblo claim. The city has itself become the owner by purchase of different parcels of these lands, and its title thereto is in no respect connected with the confirmation of the Pueblo claim. Since the entry of the decree by the circuit court confirming this claim the United States has itself granted to the city a portion of the lands which had been reserved by the decree for military purposes. Act July 1, 1870 (16 Stat. p. 186). The rule contended for by the appellant would require us to hold that in any action of ejectment against the city and county of San Francisco the court may determine, without the introduction of any evidence, that the land in controversy is not only within the limits of the patent for the Pueblo claim, but also that the city's claim to the demanded land is derived through the decree of the circuit court. Such a rule of evidence finds no support either in principle or precedent. The city is not precluded from acquiring land from other sources, and it has become the owner of different parcels of land by exchanging its own lands for those of other owners, as well as by purchase and by donation. See Mun. Rep. of S. F. 1867-68, pp. 459-463; also, St. of 1867-68, p. 60. In an action by the city and county, as plaintiff, to recover possession of a parcel of land from the occupant, it would not be contended that she could rest her case upon her complaint, and that the burden would be upon the defendant to show that she was not entitled to a judgment of recovery. If no evidence were introduced in the case, the court would not be justified in giving judgment against the defendant upon the theory that by virtue of its judicial knowledge the demanded land was established to be a part of the Pueblo claim which had never been granted by any competent authority. The same rule must obtain when the city and county is a defendant, and the plaintiff has introduced evidence sufficient, in the absence of any evidence on her part, to entitle him to a recovery. The possession of land is itself *prima facie* evidence of ownership, and in an action of ejectment proof of such possession prior to the intrusion of the defendant is, in the absence of any evidence in support of the defendant's right to the possession, sufficient to authorize a judgment of recovery. If the plaintiff shows that such possession has been continued for a period long enough to bar an action for the recovery, he establishes a title by prescription. Civ. Code, § 1007. Upon such proof the burden is thrown upon the defendant to show that his right to retain the possession has not been overcome. After the plaintiff had shown in the present case

that his grantors had been in the quiet and undisturbed possession of the lands in controversy for a period of more than five years, and had been forcibly dispossessed by the defendant Scheerer, he was entitled to a judgment in his favor, unless the defendants should offer evidence in support of their claim to retain the possession. The defendants, however, offered no evidence in support of such claim, nor did they offer any evidence of the character of the title claimed by the city, or even that it claimed any title to the land, except as it may be inferred from the statement that it had made a lease to Scheerer.

It is, moreover, contended on behalf of the appellants that it was incumbent on the plaintiff to show that the land in question was in the possession of some one at the date of the Van Ness ordinance; otherwise, the land was a portion of the "residue" which, by the decree of the circuit court, was confirmed to the city in trust for the use and benefit of its inhabitants. The appellants have not, however, in their assignments of error, specified any insufficiency of evidence in this respect; their specification being that there is no evidence to show that the city "has not reserved the premises described in the amended complaint for public parks, streets, sites of schoolhouses, city hall, or other public building." Waiving the question, however, whether this objection is available to the appellants, we are of the opinion that the contention itself is untenable. If, as is claimed by them, the premises are within the territory covered by the Van Ness ordinance, the reservations provided for by that ordinance are only those which are delineated upon the map or plan provided for therein, which was subsequently ratified and confirmed by the state. St. 1858, p. 56. It is not claimed by the appellants that the land in controversy is delineated upon this map as one of the reservations thus made by the city; and by the terms of that ordinance the city granted all its right to the lands embraced within this territory, subject to those reservations, to the parties who were in the actual possession thereof on or before the 1st day of January, A. D. 1835, and who had continued in possession until the introduction of the ordinance. There is no presumption that any portion of the land covered by the ordinance was or was not in the actual possession of any one during this period; but, in any legal proceeding in which the fact whether a particular parcel of land was or was not then held in actual possession becomes material, it must be established by that party who relies upon the fact as an affirmative issue in support of his claim or defense. Code Civ. Proc. § 1981. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(107 Cal. 33)

RANDALL v. DUFF et al. (No. 15,718.)¹
(Supreme Court of California. April 4, 1895.)

RATE OF INTEREST—APPEAL.

1. A direction by the appellate court to allow interest to plaintiff, who was entitled, as purchaser under an ineffectual foreclosure of mortgages, to receive all that was equitably due mortgagees, entitles him to interest at legal, and not at conventional, rates.

2. When there is a question whether or not the lower court has entered the judgment directed on remand, an appeal lies.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by A. W. Randall against Julia R. Duff and others to quiet title. From a judgment amending a decree, plaintiff appeals. Affirmed.

S. M. Buck and W. C. Belcher, for appellant. W. L. Duff, H. S. Foote, and L. D. McKissick, for respondents.

TEMPLE, J. This case has been here twice before. 79 Cal. 115, 19 Pac. 532, and 21 Pac. 610; 101 Cal. 82, 35 Pac. 440. For a fuller statement of facts, reference may be had to those appeals. Plaintiff was appellant in the appeal reported in 101 Cal. and 35 Pac. He then complained of the judgment in various respects,—among others, that the trial court allowed interest only up to March 15, 1885, the date of the filing of the cross complaint, because that court thought the cross complaint contained a sufficient tender to stop interest; this court thought the offer or tender in the cross bill insufficient for that purpose, and that interest should have been allowed on the amounts credited to appellant down to March 1, 1892, at which time the whole amount was compensated or paid by damages allowed to the defendants for plaintiff's occupation of the mortgaged premises. The judgment of this court was: "Wherefore the judgment of the superior court is affirmed in all respects, except as to this matter of interest, as to which the judgment is reversed; and the cause is remanded to the superior court, with directions to amend its decree by allowing interest to the plaintiff down to March 1, 1892, and by reducing the judgment against him correspondingly." Interest had been allowed in the decree then appealed from at legal rates, but the court held that, as to a portion of the moneys with which plaintiff was credited in the accounting, he was entitled to be subrogated to the rights of the mortgagees under an ineffectual foreclosure of whose mortgages he had purchased, and by so purchasing had paid off the mortgages. In stating the subrogation, the court used the following language: "But plaintiff was also successor to the mortgagees, and entitled, as against the defendants, to receive all that was equitably due on the mortgages, including interest on the amount secured up to the date of payment or tender." When the remittitur reached the lower court, counsel for appellant claimed that the judgment of this court, interpreted in

the light of the general tenor of the opinion and of the above language in particular, entitled appellant to interest on the amount of the mortgage debt at conventional rates rather than at the legal rate. The superior court, however, declined to grant the relief, and amended its decree by computing interest on the credits allowed appellant down to March 1, 1892, at legal rates. From the judgment so entered this appeal was taken.

I do not think the judgment of the court is ambiguous, and therefore it needs no interpretation. Nor do I think the opinion must necessarily receive the construction placed upon it by appellant. Subrogation is allowed by courts of equity to secure justice. Ordinarily, it takes place when one has paid a debt which some one else ought to have paid. In such cases, sometimes, the person so paying succeeds to the securities which the original creditor held for his debt. This is allowed when justice requires it, and the securities which a person so obtains are held by him merely to insure reimbursement. He will not be permitted to make a speculation out of it. Often a lien is thus kept alive which, but for the purpose of enabling the court to do equity, would be considered released. Obviously, a court of equity will not allow a resort to such securities beyond what is necessary to effectuate the purpose. It is not clear that plaintiff was entitled to recover as indemnity the principal and interest on the mortgage, and evidently no such question was discussed or decided in the opinion. It is true, undoubtedly, that the plaintiff was entitled to recover the entire sum due on the mortgage for principal and interest (if the attempted foreclosure was wholly void) so far as this was necessary to protect him. I cannot see why indemnity in his case should go beyond reimbursement with legal interest. His equity against the defendants is based upon the fact that he was misled by the apparent authority vested by defendants in an unfaithful agent, and thereby induced to purchase at the foreclosure sale. Defendants were permitted to recover upon reimbursing plaintiff for the money so paid. Perhaps, under such circumstances, it was not necessary for plaintiff's security to resort to the doctrine of subrogation. But the matter need not be pursued further. The fact that none of these matters are noticed in the opinion, and that the judgment of this court seems unambiguous, demonstrates that the construction contended for by appellant cannot be maintained.

A motion was made to dismiss the appeal, and was submitted when the case was argued on the merits. It is contended that the judgment entered in the court below was in effect the judgment of this court, and that no appeal can be taken from it. For some purposes the judgment may be deemed on a par with the judgment which might have been entered here. But great injustice might be done if it were held that such a judgment cannot be appealed from. Serious doubts may arise.

¹ Rehearing denied.

as to whether the judgment entered was the judgment ordered; and such a judgment is as plainly within the language allowing appeals as any other. I think there can be no doubt of the right to appeal. Nor do I think the appeal frivolous. The judgment is affirmed.

I concur: HENSHAW, J.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Justice TEMPLE. Of course, when the lower court enters the judgment directed by this court, there is an end of the litigation; but, when there is a question whether or not the lower court has entered the judgment directed, then an appeal lies. If the appeal be frivolous, and not taken bona fide, the remedy is the imposition of heavy damages.

(107 Cal. 49)

STEEN v. HENDY et al. (No. 15,644.)¹
(Supreme Court of California. April 4, 1895.)

ACTION AGAINST EXECUTOR—PRESENTATION OF CLAIM.

Failure of the plaintiff, in an action against an executor, to prove that his claim against decedent had been presented to such executor, the latter having duly objected and excepted to the proceeding on that ground, warrants a reversal of the judgment rendered against the executor for such claim.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by E. T. Steen, substituted for J. W. Falkner, against Joshua Hendy and the Joshua Hendy Machine Works, a corporation. The defendant having died after the action was begun, it was continued against his executors. From a judgment for plaintiff, the executors appeal. Reversed.

Boyd, Field & Hoburg, W. H. H. Hart, and Nowlin & Fassett, for appellants. Wm. H. Jordan, for respondent.

PER CURIAM. This appeal is from the judgment, with a bill of exceptions. The action was brought to obtain a dissolution of an alleged partnership, to have an account taken, and for other relief. It was commenced March 11, 1876. At the first trial plaintiff recovered judgment, and defendants appealed, and that appeal was disposed of here, October, 1889. 80 Cal. 636, 22 Pac. 401. The facts of the case appear in the opinion then rendered. It was found that the partnership—if the relations between the parties could be so called—had ended before the suit was brought, leaving in Hendy's hands property in which Steen had a contingent interest, and which Hendy continued to sell from time to time after this suit was begun. By stipulation, however, it was found that Hendy had in his hands something more than \$10,000 which belonged to Steen. The question left to be determined was what interest or what share of the profits of Hendy's busi-

ness Steen was entitled to. After the remittitur was filed from this court, Steen amended his complaint, made for the first time the corporation a defendant, and claimed that Hendy had actually realized a large amount of money from the use of the trust funds, which he (Steen) was entitled to recover. The corporation was created September 29, 1882, and it was made a party to the suit November 26, 1889. The supplemental and amended complaint, by which the corporation was brought in, charged, in effect, that Hendy owned all the stock of the corporation, and that it was organized to carry on Hendy's business, to hide plaintiff's property, and to defraud plaintiff. A money judgment was demanded against both defendants. Soon after Hendy paid the amount found due, exclusive of interest, and the cause was referred to a referee to try, with directions to report findings and a judgment. While the trial was in progress, October 21, 1891, Hendy died. The record does not show when letters of administration were issued in the estate of Hendy, but it appears by order made August 10, 1892, that the death of Hendy was suggested by plaintiff, and it was ordered that the case be continued in the names of the executors; and the bill of exceptions recites that "at the first session after his death and said substitution, to wit, on the 19th day of November, 1891, said defendants objected to further proceeding with the trial, or the taking of any further testimony in the case, upon the ground that the claim upon which the action is based has not been presented for allowance to the executors and executrix of Joshua Hendy, deceased; but the referee, notwithstanding such objection, proceeded with said trial and the taking of testimony in the case, to all of which the defendants duly excepted, and the said trial and taking of testimony was then proceeded with by said referee. The trial was concluded, and the case argued and submitted to the referee for decision in February, 1892, and the said referee rendered his decision and filed his findings of fact and conclusions of law on the 5th day of November, 1892, with the clerk of the court, and judgment and decree were made thereon on December 30, 1892. There was no evidence that the claim upon which this action was based was ever presented to the executors and executrix of the estate of Joshua Hendy, deceased, and no claim whatever was ever presented to them, or either of them. And the defendants, and each of them, excepted, and now excepts, to the decision, on the ground that it is against law in the following particulars: * * * (3) The decision is against law in giving judgment against defendants, to wit, the executors and executrix of the estate of Joshua Hendy, deceased, inasmuch as no claim was presented to them." This appeal was not taken within 60 days after the rendition of judgment, and it is contended by the respondent that this objection to the judgment cannot now

¹ Motion to modify judgment, see 40 Pac. 393.

be entertained; that the point is, really, that the judgment is not sustained by the evidence, and if such a point could be made at all it cannot be raised on this appeal, because it was not taken within 60 days after the rendition of the judgment. It is plain that this case is not within the rule in section 939, Code Civ. Proc., where it is by implication provided that an exception to the decision or verdict, that it is not supported by the evidence, may be reviewed on an appeal from the judgment if the appeal be taken within 60 days after the rendition of judgment. The Code provides for no exception to a judgment on the ground that it is not sustained by the evidence. *Mazkewitz v. Pimentel*, 83 Cal. 450, 23 Pac. 527. Nor could such a point be urged on a motion for a new trial. Exceptions of that character are directed to the findings of fact. In this case there was no finding upon the subject. Nor does the exception appear to be aimed at a finding. The exception was to the entry of judgment against the executors and executrix on the ground that no claim had been presented to them. Section 1502, Code Civ. Proc., provides that, if an action is pending against a decedent at the time of his death, it must be presented to the executor or administrator, as in other cases; "and no recovery shall be had in the action unless proof be made of the presentations required." Regularly, in such cases, a supplemental complaint should be filed, alleging the death and due presentation of the claim. There are cases, however, which seem to hold, at least by implication, that a judgment would not be void though these facts were neither alleged nor proven. Such a judgment would be erroneous only, and would not be reversed even on appeal, unless the objection was first made in the trial court. In *Bank v. Howland*, 42 Cal. 129, the objection was made for the first time on the motion for a new trial. The court said: "It was too late at that time for the plaintiff to have supplied the requisite proof. The objection must therefore be disregarded." In *Drake v. Foster*, 52 Cal. 225, the objection was made for the first time in this court, and it was held that it was too late. In *Derby v. Jackman*, 89 Cal. 1, 26 Pac. 610, the supplemental complaint averred the due presentation of the claim. This was denied in the answer, and, as it was held, was the only good denial in the answer. Judgment was, on motion, entered for plaintiff on the pleadings. This court held the judgment erroneous, and said: "The effect of that section (1502) plainly is that, although due presentation of the claim be not denied, still it must be proven." The effect of these cases is that proof of the presentation of the claim is not a fact essential to the validity of the judgment, where no issue has been made upon that question, but that the failure to make the proof is ground for reversal, when objection is made in the trial court, and the exception is properly preserved. It must be

held that the exception here was made in due time, and has been properly brought here.

Respondent's counsel suggests that Hendy died October 21, 1891, and the objection to proceeding because the claim had not been presented was first made November 19, 1891, and the record fails to show that at that time letters testamentary had been issued. If that be so, so much the worse for respondent. It shows that he had timely warning, and yet failed to preserve his rights. The referee should not have proceeded at all with the case until letters had been issued and the representatives brought in. If he did so, that would alone constitute ground for reversal. Litigants must know, at their peril, of the death of an adversary. Negligence cannot be attributed to the dead, and, although the heirs may sometimes lose by failure to have administration properly made, those having claims against the estate acquire no rights by the delay except the extension of the time to collect their demands. Undoubtedly respondent had the right to present his claim to the representatives of Hendy at any time within the period allowed by law for the presentation of claims, but he was not entitled to recover a judgment which will bind the estate of Hendy until such presentation had been made. That the claim of plaintiff was one which would require presentation respondent does not deny. The matter was fully considered by this court in *Lathrop v. Bampton*, 31 Cal. 17, and in *Rowland v. Madden*, 72 Cal. 17, 12 Pac. 226, 870. This result certainly seems a great hardship in this case, but we are powerless to save the plaintiff from the consequence of his neglect. The judgment is reversed.

BEATTY, C. J., and HARRISON, J., not participating.

(107 Cal. 27.)

HORGAN v. ZANETTA. (No. 15,838.)¹

(Supreme Court of California. April 4, 1895.)

MORTGAGE ON GROWING CROPS—ESTOPPEL.

1. The removal of a mortgaged crop from the land of the mortgagor, on which it was grown, is prima facie an extinguishment of the mortgage lien, section 2972, Civ. Code, as amended in 1878, continuing such lien only so long as the crop remains on the land of the mortgagor.

2. A creditor of a lessee who, without knowledge of the fact that the lessor had a mortgage on such lessee's crop, induced the lessee, without false representations, to remove his grain to the creditor's farm to be threshed, and afterwards attached it, was not estopped to deny the continuance of the mortgagor's lien on the crop after it had been removed from the land on which it was grown.

Department 2. Appeal from superior court, San Benito county; James F. Breen, Judge.

Action by T. J. Horgan against E. Zanetta. Judgment for plaintiff, and defendant appeals. Reversed.

¹ Rehearing denied.

N. C. Briggs, John L. Hudner, S. F. Gell, and John Wyatt, for appellant. Geo. P. Burke, for respondent.

McFARLAND, J. In 1893, James Murphy was the lessee of a parcel of inclosed land called "Field No. 1." D. W. Cole owned adjoining land, called "Field No. 2." Murphy had executed a chattel mortgage of the crop of grain growing on his said leased land to the plaintiff, Horgan, to secure \$800. In July, Murphy commenced harvesting the crop and hauling it away from the land on which it had grown onto the said land of Cole, and finished doing so in the early part of August. On September 1st, Cole brought suit against Murphy, and attached the grain. Jensen and Lauritzen also brought suit against Murphy, and upon either the 1st or 2d of September attempted to levy an attachment on said grain, but it is contended that for certain reasons this last attachment was invalid. However, Cole recovered judgment in his case against Murphy on September 7th, and Jensen and Lauritzen recovered judgment on September 8th; and executions in both cases were immediately issued and levied on the grain,—the one on September 7th, and the other on September 8th,—and the grain was sold to satisfy these executions by the defendant, Zanetta, who was constable, and who justifies under these attachments and executions. On September 15th plaintiff served a notice upon defendant, claiming "the possession of or a lien" upon the grain by virtue of the said chattel mortgage. Defendant proceeded and sold the grain under the executions without regarding the alleged mortgage lien; and thereafter plaintiff commenced this action to recover the \$800 secured by said mortgage, with interest and damages. The court rendered judgment for plaintiff for \$535.07, being the value of the grain as found by the court, together with damages, attorney's fees, and costs. Defendant appeals from the judgment, and from an order denying a new trial.

Section 2972 of the Civil Code, as amended in 1878, provides that the lien of a mortgage on a growing crop continues "as long as the same remains on the land of the mortgagor." Prior to 1878 the lien continued only until the crop was severed from the land. In the case at bar the crop had been removed from the land of the mortgagor at the time the attachments and executions were levied on it by the appellant. Therefore, the lien of the mortgage had *prima facie* been extinguished. It, therefore, devolved upon respondent to remove this *prima facie* case by showing that the case at bar is an exception to the general rule. This he attempted to do by evidence of facts which, he contends, estop appellant from denying the continuance of the lien. The facts substantially are these: The land on which the crop was raised was rough and hilly, and

not suited to the placing of a machine for threshing; and, after Murphy had commenced harvesting, there were conversations between him and Cole which resulted in Murphy hauling the grain onto Cole's land, which was level and adapted to the use of a threshing machine. The court finds that Cole "represented" to Murphy these facts about the character of these two different tracts of land as to their respective adaptability to threshing, and requested him to take the grain onto Cole's land; and, as there was a conflict of evidence on the point, the finding must be taken as correct. It is quite evident, however, that Murphy, who lived on field No. 1, must have had as full a knowledge of the situation as Cole; and the court finds that "the fact was as represented by Cole, owing to the roughness of the ground in said field No. 1." It is not found that Cole made any false representation in the premises. The court, however, found that Cole made the representation, "having then actual knowledge of said mortgage," and for the purpose of defeating the same; but we find no evidence to support said finding in the statement on motion for a new trial which expressly declares that it contains "all the testimony given by both parties on the subject of the removal of the grain or the knowledge of Cole of plaintiff's mortgage." Cole testified positively that he knew nothing of the mortgage when the grain was removed, and did not know of it until about the time of the attachment, which was September 1st. The only other evidence on the subject is the testimony of the witness J. W. Rowe, who said that he "had a talk with Cole about September 4, 1893, and about one week before, when Cole came to see me about threshing his grain. The first talk I had with Cole was about the 19th of August. This was on the Saturday two weeks before the day I threshed. I threshed on September 4, 1893." He further said that at this conversation Cole said that "I guess Murphy has done me up for the rent"; that Horgan had a mortgage on record, and that he (Cole) had been to Hollister and had seen it; but that he was going to town to see his lawyer, and would try to hold the grain, and would "run a bluff on Horgan anyhow." This witness (Rowe), in an affidavit made on motion for a new trial, specifically states that Cole did not say that he knew of the mortgage before the removal of the grain onto his land, and that the conversation was on the second Saturday before September 4th; but, leaving that out of view, his testimony as given at the trial is not at all to the point that Cole knew of the mortgage at the time he talked with Murphy about moving the grain. That was in July, and the conversation between Rowe and Cole—putting it at the very earliest period—was the 19th of August, which was some time after all the grain had been removed by Murphy to Cole's land, and long

after Murphy had commenced to remove it. Indeed, the conversation with Rowe is strong to the point that Cole had then just discovered the existence of the mortgage, and was going to ask his lawyer if he could not hold the grain for the rent notwithstanding the mortgage. We must therefore take the facts to be that Cole did not know of the mortgage until after the grain had been removed by Murphy to his (Cole's) land, but that he did know of the mortgage at the time he sued out the attachment. It does not appear that the mortgagee used any care or diligence in looking after the crop when harvested, or paid any attention to the grain until after it had been attached, which was about a month and a half after Murphy commenced to harvest it, and nearly a month after he had removed it from his land.

We think that, under these facts, Cole was not estopped from denying the continuance of the mortgage lien, and that, at the time of the attachment, the said lien had been extinguished by the removal of the grain from the land of the mortgagee on which it was raised. *Goodyear v. Williston*, 42 Cal. 11; *Waterman v. Green*, 59 Cal. 142. The cases cited by respondent are cases where there was a tortious removal of the crop from the land on which it grew by third persons, or where the mortgagor had stored the crop at a warehouse in the name of the mortgagee at the latter's request. We see no ground upon which Cole was estopped from asserting his right as attaching creditor, or from denying the continuance of the lien. He made no false representation. The person to whom the representation was made knew the fact represented, and the respondent, who is the party asserting the estoppel, was not influenced by the representation to change his position, or to do any act to his prejudice. The case arises out of a mere contest between hostile creditors of Murphy, each standing upon his legal rights. It is true that, when Cole attached, he knew that there had been a mortgage on the crop; but he also knew that the lien had been extinguished by the removal of the crop from the land of the mortgagor, and he was not bound to look after the former rights of the mortgagee who had lost them by his own carelessness. These views make it unnecessary to consider appellant's justification under the execution of Jensen and Lauritzen, against whom no claim of estoppel is made. The judgment and order denying the motion for a new trial are reversed.

We concur: HENSHAW, J.; TEMPLE, J.

(107 Cal. 42)

EICHHOFF v. EICHHOFF et al. (No. 15-957.)

(Supreme Court of California. April 4, 1895.)

BILL TO ANNUL JUDGMENT—BURDEN OF PROOF.

1. In an action to annul a judgment for want of jurisdiction, where the record shows

summons issued, but fails to show that defendant was served or appeared in the action, the plaintiff has the burden of showing affirmatively the facts constituting want of jurisdiction.

2. An action brought in equity to annul a judgment at law, though not collateral, is an indirect attack upon the judgment.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Melocene W. Eichhoff, by her guardian ad litem, against Magdalena Eichhoff and others, to annul a judgment of divorce. From a judgment for defendants, plaintiff appeals. Affirmed.

J. J. Paulsell and Kile & Plummer, for appellant. Jas. H. & J. E. Budd and Nicol & Orr, for respondents.

TEMPLE, J. This action was brought to set aside a judgment and decree rendered by the superior court of Marin county in 1882, annulling the marriage between Gustave Eichhoff and Melocene Eichhoff. The complaint shows as a cause of action that in the suit for the annulment of the marriage this plaintiff (defendant in that action) was not served with summons, had no notice of the suit, and never appeared therein, and that said judgment was procured by the fraudulent practices of said Gustave Eichhoff. At the trial, the plaintiff, to sustain her allegations, put in evidence the judgment roll in the action for the annulment of the marriage, the petition for the appointment of a guardian ad litem, and the order appointing the guardian ad litem, and rested. The defendant put in no evidence, and the court thereupon rendered judgment for defendant, and the plaintiff appeals from the judgment. The appeal was taken within 60 days after the rendition of judgment. The judgment roll put in evidence shows that a summons was issued, but there was no proof of service. There was no memorandum that the default of the defendant had been entered, as required by the Code. There was no appearance for the defendant in the case by answer or demurrer. There is no recital in the judgment to the effect that summons had been served; but it is stated that a guardian ad litem had been duly appointed for the defendant, and that such guardian appeared in open court, and consented that the action be tried. Neither in the petition for the appointment of a guardian ad litem nor in the order appointing the guardian is there a recital to the effect that the summons had been served on the defendant.

The only question presented on this appeal is whether, under these circumstances, the burden was cast on the plaintiff of proving that summons had not in fact been served on the defendant in the former action, or whether the defendant had the laboring oar. The question as to the validity of this judgment was once before considered by this court. In *re Eichhoff's Estate*, 101 Cal. 600, 36 Pac. 11. There the attack upon the judgment was collateral. It was held by this court that

the judgment was not void. It was said: "The fact that the court has rendered a judgment implies a determination by it, before it assumed to hear the controversy, that it had jurisdiction over the subject-matter of the action, and of the defendant against whom the complaint was directed. * * * The judgment roll in the present case is consistent with the fact that proper service was made upon the defendant before the hearing upon the complaint, and as any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment, it must be presumed, in support of the action of the court, that such service was shown to it, although it has not preserved any record thereof." This conclusion is determinative of the question here submitted. The presumption that the court did have jurisdiction of the person of the defendant must be overcome by proof. Plaintiff's action is based upon the well-established grounds of the jurisdiction of courts of equity to grant relief in cases of fraud, accident, or mistake. She set forth her equities in her complaint; but it is incumbent upon her, as plaintiff, not only to aver the facts constituting her case, but, if they are denied, to prove them. The judgment roll did not prove want of service of summons, but the contrary. Under the decision, the fact presumed is a fact adjudged. She was in this action allowed to prove that this adjudication was procured through fraud, or was a mistake; that she never was in fact served, and had no opportunity to be heard in the action. The mere bringing of this suit does not change the presumptions arising from the fact of the rendition of the judgment. Apparently, counsel have been misled by some cases in which judgments have been reversed on appeal. In *McKinlay v. Tuttle*, 42 Cal. 570, and in some other cases in which that case has been followed, it was held, in effect, that on an appeal the judgment would be reversed for irregularities which would not render the judgment void if attacked collaterally. In *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220, it is said "that upon a direct appeal it is essential for the party seeking to sustain the judgment to show by the record itself that the court had jurisdiction of the defendant, whereas in a collateral attack the entry of the judgment is itself conclusive of such jurisdiction. Upon a direct attack there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, but in all matters of which the judgment contains a record, its verity, in the absence of any contradictory evidence, will be presumed as fully as upon a collateral attack." The phrase "direct attack," in the above quotation, evidently refers to appeals from the judgment. In fact, when an action is brought in a court of equity to set aside a judgment at law, the attack, although not collateral, is always indirect. *Freem. Judgm.* § 485. The judgment is not under review,

but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in his behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not procured by fraud or mistake. It may be said that in such a case the legal validity of the judgment is admitted, and it is because of its validity or apparent validity that the plaintiff requires to be relieved from it. Says *Freeman*, at section 495, speaking of judgments entered without notice to defendant: "But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues after full opportunity has been given to those who seek to sustain, as well as those who seek to avoid, the judgment. If, at such trial, it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains." It will be seen that the burden is on the plaintiff in such an action to excuse himself for not defending when the judgment shows that he was in default for not doing so. By such an attack upon a judgment the plaintiff does not question or dispute its effect as an adjudication, but he seeks to be relieved from its operation upon equitable grounds. The judgment is affirmed.

We concur: **McFARLAND, J.; HENSHAW, J.**

(107 Cal. 102)

MILLETT et al. v. LAGOMARSINO et al.
(No. 15,586.)

(Supreme Court of California. April 5, 1895.)

ADVERSE POSSESSION BY TENANT—COLOR OF TITLE.

1. The possession of a tenant holding under a landlord, who is not the real owner of the premises, is adverse to such real owner, without a surrender of possession to the landlord and a re-entry by the tenant.

2. A deed to a tenant in possession, by one who has purchased the premises at a tax sale, but to whom no tax deed has been issued, gives such tenant color of title, which renders applicable to his possession the provisions of Code Civ. Proc. § 323, prescribing the essentials of adverse possession by a person claiming title founded upon a written instrument.

In bank. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by Martin M. Millett and another against Thomas Lagomarsino and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Nowlin & Fassett and Aylett R. Cotton, for appellants. Nagle & Nagle, for respondents.

TEMPLE, J. Action brought to quiet title. The answer denies plaintiffs' ownership, and avers title in one of the defendants, John B.

Cronan, under whom the other defendant holds. Plaintiffs recovered judgment, the court finding the allegations of the complaint true, and all the allegations of the answer untrue. Plaintiffs' sole claim of title is from adverse possession. The lot in question is known as "Lot 2," and is one of many lots comprising about 10 acres, which belonged at one time to the City Extension Homestead Association, and which with other lands were subdivided by the association prior to 1870. Lot 2 was conveyed to John Tenney by the association prior to 1873, and the others to different owners. Lot 2 was 100 feet square. In November, 1873, Michael Millett entered into possession of the 10-acre tract, and other lands under a lease for 3 years, executed by 10 owners of lots in the tract, or in some portion of the lands formerly owned by the association; for the lease included other lands besides the 10-acre tract, which last-mentioned tract, however, was inclosed by itself. The lessors did not claim undivided interests in the demised premises, but each owned the land which had been conveyed to him by the association. The lease was in writing, and purported to lease to Millett their interest in the lands known as the "City Extension Homestead Association." Millett remained in possession of the premises up to some time in 1891, when lot 2 was entered upon by defendant Lagomarsino, who claimed under defendant Cronan, who had obtained a deed for the lot from John Tenney. For the first three years Millett paid rent as stipulated in his lease, and after that he still retained possession, but paid no rent. In July, 1892, Millett obtained a deed for the lot from one Jason Wight, who had purchased the property at a tax sale, although it does not appear that a tax deed was ever executed to him. Millett recorded this deed, and then—as plaintiffs contend—commenced to assert title to the land, and to hold the same adversely to all the world. Appellants contend that, as Millett entered into possession as a tenant, he cannot initiate an adverse possession without first surrendering possession to his landlord; and, further, that, if he can do so, Tenney and his grantees should have some notice of the change in the manner in which Millett was holding before his possession could become adverse to Tenney, so as to set the statute of limitations in operation. The rule that it is necessary to surrender possession, and again enter, before the possession can become adverse, obtains only where the person claiming to hold adversely was put into possession by the owner, or has at least held possession under such owner. No such relation ever existed between Millett and Tenney. The lease from McNear and others did not render Millett's possession of lot 2 less hostile to Tenney. Had Tenney sued Millett for trespass in entering upon it, the lease would have constituted no defense. On the contrary, if it is properly construed as in-

cluding lot 2, and thereby authorizing Millett to enter into possession of it as tenant, it would have made the lessors joint trespassers with Millett. The only effect of the lease affecting this case was—conceding that it included lot 2—to show that while Millett was occupying the premises under it he was not in possession, claiming to be the owner. As the relation of landlord and tenant never existed between Tenney or his grantees and Millett, section 326, Code Civ. Proc., has no application to this case. It was not contended that Millett acquired any title through the deed from Wight, but simply that it brought him within the provisions of section 323, Code Civ. Proc. It seems sufficient for that purpose. *Packard v. Moss*, 68 Cal. 123, 8 Pac. 818; *Wilson v. Atkinson*, 77 Cal. 485, 20 Pac. 66. The possession of Millett was sufficient to establish an adverse holding under the statute, and there was no conflict in the evidence. As to Tenney, Millett had all the time been a trespasser, and his possession was sufficient notice of an adverse claim. There is some claim that McNear, when he made the lease as one of the lessors, was the agent for all who had owned lots in the homestead, and was acting for Tenney in making the lease. There is really no evidence which tends to show this, and the terms of the lease disprove the claim. If the law be as announced in this opinion, there is nothing whatever in the affidavits used on the hearing of the motion for a new trial. The evidence set out in them would not have tended to prove a defense. The judgment and order are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; HENSHAW, J.

(107 Cal. 92)

FAIRCHILD v. BOARD OF EDUCATION
OF CITY AND COUNTY OF SAN
FRANCISCO et al. (No. 15,828.)

(Supreme Court of California. April 5, 1895.)

REMOVAL OF TEACHER.

Plaintiff, who for more than 10 years had been a principal in the public schools of S. F., was granted a leave of absence by the board of education. During her absence the position was filled by the election of another teacher, and upon her return she was assigned to the head of a school of a lower grade, and at a lower salary. Held an unlawful removal of a teacher without cause.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Mandamus by Harriet M. Fairchild against the board of education of the city and county of San Francisco and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Wm. Grant, for appellants. Horace W. Philbrook, for respondent.

HENSHAW, J. Appeal from judgment of superior court in mandamus, and from order denying a new trial. Plaintiff was, and for more than 10 years before the 14th day of September, 1892, had been, a principal teacher in the public schools of San Francisco, elected for no definite term. Upon that day she obtained a leave of absence until July 1, 1893. Upon the expiration of her leave of absence she reported for duty, and asked to be allowed to resume the position of principal of the Potrero school, which position she was filling at the time of her vacation. That position had been filled during her absence by the election of another teacher to it. Her request was therefore refused, and she was assigned to the head of the day-school substitute class, under rule 124 of the board of education, which rule, so far as applicable to the case at bar, is as follows: "When a principal or assistant has been employed in the public schools of San Francisco for a period of not less than ten years, the board may grant such principal or assistant a leave of absence for a period not exceeding one year, and the teacher to whom such leave is granted shall, at the expiration of the leave of absence, be entitled to a position of the same grade as he or she held when the leave was granted. When a teacher returns from a leave of absence, if there be no suitable vacancy, the teacher shall be assigned to the head of day-school substitute class." This rule was in force at the time plaintiff obtained her leave of absence. The compensation allowed teachers in the day-school substitute class is much less than that which attached to the grade and position to which plaintiff had been elected.

Under this state of facts, it is apparent that the case is parallel in its essential features with Kennedy's Case, 52 Cal. 483, 22 Pac. 1042. The board of education, in regulating vacations, could pass no rules in contravention of the statutory provisions. Upon returning from her vacation, plaintiff was entitled to enter upon the performance of the duties of a principal teacher, if not in her former school, at least in one of like grade. She was likewise entitled to receive the compensation belonging to her grade. To fill her position by election when she was in the enjoyment of her leave of absence, and to assign her, under less pay, to the substitute class, was but doing in another form what this court declared unlawful when Kate Kennedy, upon her return, was removed to a position in a school of lower grade, at less salary. The board of education may make all reasonable rules regulating vacancies and leaves of absence; but it cannot provide, as an implied condition to accepting such vacations, that the teacher shall run the risk of forfeiting school or salary, and, by enforcing the condition, accomplish by indirection that upon which the statute had placed its ban. Section 1793, Pol. Code. The judgment and order appealed from are affirmed.

We concur: **BEATTY, C. J.; TEMPLE, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.**

McFARLAND, J. I concur, but solely upon the authority of the Kennedy Case, 22 Pac. 1042.

(106 Cal. 547)

ALVORD et al. v. SPRING VALLEY GOLD CO. et al. (No. 18,305.)

(Supreme Court of California. March 21, 1895.)

RECITAL IN DEED — ASSUMPTION OF MORTGAGE — EFFECT — CONSTRUCTION OF ASSUMPTION CLAUSE — SECONDARY EVIDENCE — LAYING OF FOUNDATION.

1. A recital in a deed that the land is subject to a mortgage which the grantee agrees to pay is conclusive of the validity of the mortgage as against the grantee.

2. A deed recited that it was subject to a mortgage, and also subject to a large indebtedness of the grantor, and that the grantee agreed to pay all the debts of the grantor above specified, and to discharge all the "lawful obligations" of the grantor. *Held*, that the grantee was bound to pay the mortgage debt even if it was not a lawful obligation.

3. Secondary proof of the contents of a missing document not in the possession of the adverse party cannot be given when the proof shows that no inquiry has been made of a person who might probably have it.

In bank. Appeal from superior court, Butte county; J. E. Prewett, Judge.

Action by William Alvord and another against the Spring Valley Gold Company and another to foreclose a mortgage. From a judgment for defendants, plaintiffs appeal. Reversed.

T. Z. Blakeman, for appellants. O. W. Cross, J. M. Allen, A. F. Jones, and F. C. Lusk, for respondents.

VAN FLEET, J. This was an action to foreclose a mortgage alleged to have been given by the Spring Valley Hydraulic Gold Company, a New York corporation, on its mining property in California, to secure payment of certain bonds of that corporation. The court below held the mortgage invalid for want of a compliance with the act of April 23, 1880 (St. 1880, p. 131), which requires the ratification of the holders of at least two-thirds of the capital stock. Many interesting questions have been argued by counsel, but only one of them need be considered.

The complaint contained, among other things, the following allegations: "That on or about the 23d day of July, 1886, the said Spring Valley Hydraulic Gold Company duly granted and conveyed unto the defendant the Spring Valley Gold Company all of the property described in said indenture of mortgage, together with other property, in consideration of which grant and conveyance the Spring Valley Gold Company assumed, undertook, and bound itself to pay, and agreed to pay, all of the indebtedness then existing of the Spring Valley Hydraulic Gold Com-

pany, and particularly the indebtedness represented by the aforesaid bonds, and secured as aforesaid by the said indenture, of mortgage, and undertook and agreed to assume towards all the creditors and obligees of said Spring Valley Hydraulic Gold Company the position of debtor and obligor, and to be substituted in the place and stead of said Spring Valley Hydraulic Gold Company as such debtor and obligor." This allegation was not denied by the answer, but the execution of the mortgage therein referred to was put in issue. The evidence showed that in July, 1886, a deed was executed from the Spring Valley Hydraulic Gold Company to the defendant the Spring Valley Gold Company (which is a California corporation) for the property in question, which deed was executed by both of the parties thereto, and contained the following clause: "Subject, nevertheless, to a certain mortgage or deed of trust on said premises, bearing date May 14, 1881, made by the said Spring Valley Hydraulic Gold Company to William Alvord, F. F. Low, and Henry B. Laidlaw, trustees, to secure the payment of \$200,000 and interest thereon, and recorded in the office of the recorder of Butte county, California, June 3, 1881, in Book M of Mortgages, pages 773 to 782, and subject also to an indebtedness of the said the Spring Valley Hydraulic Gold Company of about \$165,000, in addition to the above-mentioned indebtedness of \$200,000, secured by said mortgage or deed of trust, as aforesaid. And the party of the second part, in consideration of the conveyance to it of the property aforesaid, does hereby agree and undertake and bind itself to pay all present indebtedness of the party of the first part, above specified, and all other indebtedness whatsoever of the party of the first part, and to perform and discharge all the liabilities and lawful obligations now incurred by or imposed upon the party of the first part; and the party of the second part does hereby further undertake and agree to assume towards all the creditors and obligees of the party of the first part the position of debtor and obligor, and to be substituted in the place and stead of the party of the first part, as such debtor and obligor." The action of the board of directors of the Spring Valley Gold Company, in executing and accepting that deed, was expressly approved and ratified by the unanimous vote of the stockholders of that company, cast at a meeting at which the entire subscribed capital stock was duly represented.

Conceding, then, that the act of 1880 applied to foreign corporations, and that a compliance with its provisions on the part of the New York company was not proven (on which points we express no opinion), we are, nevertheless, of opinion that neither the Spring Valley Gold Company, nor the other defendants who claim under that company by title subsequent, are in a position to avail themselves of that defense. The deed referred

to contains an unequivocal recognition of the mortgage in question as a valid and subsisting obligation and lien on the property, and a promise to pay it as a part of the consideration for the conveyance. It is settled by an almost unanimous line of decisions in this country, approved by all text writers, that such a recital in a deed, even when the deed is not executed by the grantee, is conclusive evidence, in favor of the mortgagee and against the grantee in the deed, of the existence and validity of the mortgage. The effect of such a recital is to charge the land with the lien as effectually as if the purchaser had himself executed a mortgage of that purport. It is contended by respondents that the case of *Biddel v. Brizzolara*, 64 Cal. 354, is in conflict with this rule, but we are unable to perceive any such conflict. The judgment in that case was in accordance with section 1559 of the Civil Code, which section, however, does not appear to have been there brought to the attention of the court. See, also, *Flint v. Cadenasso*, 64 Cal. 83. Under that section, it is clear that the mortgagee has the right to enforce such a contract as was contained in the deed in question, and the grantee is estopped by its recitals. The estoppel being by deed, it was not necessary to plead it.

Respondents contend that the effect of the covenants in the deed in question is to be limited to "lawful obligations" of the grantor, and such was the construction adopted by the court below. Such a construction is contrary to the plain meaning of the language used. The deed recites the existence of a specific bonded indebtedness, and that it is "subject to" a specific mortgage given to secure that indebtedness, and contains a covenant on the part of the grantee "to pay all of the present indebtedness of the party of the first part, above specified," and also all other indebtedness. This specific language cannot be controlled by the general language following, by which the grantee undertakes to perform all the "lawful obligations" of the grantor. The latter expression must be taken to constitute a covenant additional to the specific covenant with relation to this mortgage, and not as in any way limiting it.

The deed itself was put in evidence, and was competent, and, as we have seen, conclusive, evidence as against the grantees and those claiming under them of the due execution and validity of the mortgage. The finding of the court, therefore, that the mortgage was never executed was against the evidence, and the judgment must, for that reason, be reversed. As the matters assigned as errors of law will probably not arise on another trial, we need not notice them. It is, however, proper to remark that secondary evidence of the contents of a missing document not in the possession of the adverse party cannot be given when the proof shows that there is a person who might probably have it, and of whom no inquiry has been made.

The preliminary proof should show that inquiry has been made, without result, of every person who, according to the evidence, would be likely to have the document, or to know of its whereabouts. The judgment appealed from is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; McFARLAND, J.

(107 Cal. 8)

PAULY v. PAULY et al. (No. 19,505.)

(Supreme Court of California. April 4, 1895.)

CORPORATIONS—RATIFICATION OF UNAUTHORIZED ACT—ASSUMPSIT—DOCUMENTARY EVIDENCE.

1. The unauthorized act of the secretary of a corporation cannot be ratified at a special meeting of which all the directors were not notified.

2. Where plaintiff loaned money to a corporation, which applied the same to its own use, he may recover, though the notes on which the loan was made are void because unauthorized.

3. The unauthorized notes of a corporation, though not evidence of liability on the express contract appearing on the face thereof, are admissible to show that the money which they represent was furnished by plaintiff.

4. In an action by a bank against a corporation on an account, it appeared that it was customary for the manager of defendant company, when bills were presented, to "O. K." them, and that they were then presented to the bank, paid by the latter in the same manner as checks, and charged on its books to defendant's account: that defendant had no pass book, but at stated periods the bank would present a statement, and surrender the paid vouchers, and that these were transcribed to defendant's ledger. *Held*, that the books of the bank and the statements in defendant's ledger were prima facie evidence that the account of the bank was correct, and that the vouchers were admissible to show that the sums named therein were applied to the proper use of defendant.

5. In an action by a bank against a corporation for money loaned, the acts and admissions of the latter's financial managers are admissible against it, though such persons are also officers of the bank.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Frederick N. Pauly, receiver of the California National Bank of San Diego, against Charles W. Pauly, assignee of the San Diego Cable Railway Company, and another. From a judgment for defendants, plaintiff appeals. Reversed.

M. A. Luce, for appellant. James E. Wadham, for respondents.

HAYNES, C. The complaint contains several causes of action, the first four being upon promissory notes alleged to have been executed by the San Diego Cable Railway Company to the California National Bank of San Diego, aggregating \$57,330. Another cause of action is for attorneys' fees and expenses in a certain action brought by the bank against the cable company in the United States circuit court; and the last cause of action is for the

sum of \$359,000, for moneys alleged to have been paid by the bank to various persons, at the request of the cable company, for its use and benefit, and upon its order. The \$359,000 includes the moneys evidenced by the promissory notes sued upon in the antecedent counts. The answer consists of specific denials of the allegations of the complaint, and a counterclaim to recover the sum of \$50,000, the alleged value of certain shares of the capital stock of the cable company, and the further sum of \$119,000 for moneys alleged to have been had and received by the bank to and for the use of the cable company. The cause was tried by the court without a jury, and the court found against the plaintiff upon each of its causes of action, and also against the defendants upon their counterclaim, and judgment was entered accordingly. This appeal is taken by the plaintiff from the judgment against him, and from an order denying his motion for a new trial. There is no appeal from the judgment upon the counterclaim. The bank became insolvent and suspended business November 12, 1891, and the cable company was adjudged insolvent March 15, 1892.

Appellant specifies certain particulars in which the findings are claimed to be not justified by the evidence, but the principal questions arise upon rulings made upon questions of evidence; and the more important of these hinge upon the relations existing between these corporations through their respective boards of directors. The board of directors of the cable company consisted of Dare, Collins, Havermale, Palmerston, and Fisher. Of these, Dare, Collins, and Havermale were officers and directors of the bank, Havermale being president and Collins cashier, while Dare was president of the cable company, Havermale vice president, and Collins treasurer. The promissory notes in question were executed in the name of the cable company by O'Brien, secretary, but he does not appear to have been authorized to do so by any previous resolution or formal direction of the board, nor does there appear to have been any general power conferred by the board upon the secretary to execute promissory notes or other obligations of that character on its behalf. It is claimed by appellant, however, that these notes were ratified by the cable company—First, by a failure of that company to dissent; and, second, by express action of the board of directors of the cable company, at a special meeting held November 28, 1891, at the house of Vice President Havermale, at which meeting there were present Havermale, Collins, and Palmerston, of whom Palmerston only was not interested in the bank; Dare being absent in Europe, and Fisher not having been notified. As evidence of such ratification, plaintiff offered in evidence the minutes of said special meeting, as follows: "On motion of Mr. Palmerston, seconded by Mr. Collins, the following resolution was unanimously adopted: 'Resolved, that the San Diego Cable

Railway, a corporation, by and through its board of directors, regularly assembled, does hereby acknowledge and agree to pay the sum of \$84,330, being due the California National Bank of San Diego, and evidenced as follows: One note of \$20,000, dated September 3, 1891, due December 3, 1891; one note of \$10,000, dated September 3, 1891, and due December 3, 1891; one note of \$10,130, dated September 3, 1891, and due December 3, 1891; one note, \$17,200, dated June 30, 1891, and due on demand. The sum of \$27,000, placed to the credit of the S. D. Cable Railway Co. in their account with the California National Bank, on February 12, 1891, being carried in the form of a note, as a cash item, signed by Dare & Collins, for \$23,500; also, an overdraft for the sum of \$9,444.27,—the total principal sum being \$93,774.27." Counsel for plaintiff also stated that he expected to follow with further evidence going to show that the cable company received the money, and that it went into the construction of the road; that the business had been transacted at the bank; that the cable company obtained its money there, and that these notes were given for the debt. Several objections were made to the introduction of said minutes, to the effect that the meeting was not called by competent authority; that it was not held at the office of the company; that the minutes do not show that notice was given to Fisher; that Fisher was in fact not notified; and that two of the three directors present were directors of the bank, and could not bind the cable company by an acknowledgment of an indebtedness to the bank.

Appellant does not rely upon the authority of the secretary to execute these notes to sustain their validity. No such authority was shown; and, as to the attempted express ratification, it appearing affirmatively that the meeting was special, and that the directors were not all notified, the meeting was not duly assembled, and its action did not bind the corporation as a valid corporate act. The other objections to the admission of the minutes as an express ratification of the execution of the notes need not be considered. The court, therefore, did not err in the exclusion of the resolution as evidence of express ratification, nor in refusing to receive the promissory notes in evidence in support of the causes of action based thereon. Whether they could be received, in connection with other evidence, for any purpose, need not be considered in this connection. This, however, is not conclusive of the right of the plaintiff to recover for money loaned or advanced by the bank, so far as it was applied to the proper uses of the cable company. The liability of defendant does not rest upon the express contract appearing upon the face of these notes, but upon the right of the lender to recover money which has gone to swell the assets of the cable company. If the bank in fact furnished to the cable company moneys, whether as loans upon unauthorized promissory notes

or upon account, or paid money for construction of its road, or in discharge of its legal liabilities, so far as the same were in fact applied to the proper use and benefit of the cable company, such moneys may be recovered by the plaintiff to the extent to which they have not been repaid. Plaintiff in the last count of his complaint pleaded facts which, if proved, would entitle him to such a recovery. In support of this proposition see the following authorities: *Mor. Priv. Corp.* §§ 526, 616, 715; *Gardner v. Butler*, 30 N. J. Eq. 702, 721, 724; *Oil Co. v. Marbury*, 91 U. S. 587; *Railroad Co. v. Spreckles*, 65 Cal. 193, 3-Pac. 661, 802; *Seeley v. Lumber Co.*, 59 Cal. 22. In *Railroad Co. v. Simpson*, 23 Fed. 214, it was held that the corporation must account to the contractor for benefits received under an ultra vires contract, with interest on the amount found to have been due when the work was stopped. In *Leavenworth Co. Com'rs v. Chicago, R. I. & P. Ry. Co.*, 134 U. S. 688, 707, 10 Sup. Ct. 708, Mr. Justice Blatchford, speaking for the court, said: "I am unable to see anything in the fact that some of the same men were found to be trustees in this deed and directors in the Rock Island Company, and that directors in the Southwestern Company were also directors in the Rock Island Company, which should block the course of justice, paralyze the power of the court, and deprive the creditor corporation of all remedy for the enforcement of its lien. If it could show that the Southwestern Company did not owe this interest, or that the Rock Island Company had in its hands the means of the Southwestern Company to meet this obligation, and that by reason of collusion between those who controlled both companies this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of the Southwestern. Notwithstanding this commingling of officers, the corporations were distinct corporations. They had a right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to these contracts; and the question is not, could they do these things? but, have the relations of the parties—the trust relations, if, indeed, such existed—been abused to the serious injury of the Southwestern Company?" The money that was paid, from whomsoever it was obtained, was obtained by and disbursed through the proper financial officer of the cable company, viz. its treasurer, through the agency of the bank, and, if applied to the proper uses of that company, there at once arose an implied promise to repay it.

The remaining controversies, so far as they involve the rulings of the court upon questions of evidence, require a general statement of the facts disclosed by the record. The bank was in existence before the cable company was organized. Who the stockholders

of the cable company were, aside from the directors, is not disclosed. It is shown that on February 15, 1890, certificate No. 2, 500 shares, was issued to Collins, and certificate No. 3 to Dare, for 500 shares, and to Palmerston July 8, 1890, 100 shares; that Fisher originally held 500 shares, but on March 17, 1890, he sold all but 1 share to Dare and Collins. During part of the time covered by these transactions, Collins was cashier of the bank, and part of the time president, and all of the time treasurer of the cable company. Dare and Havermale were also directors of the bank, and were also president and vice president, respectively, of the cable company, and Palmerston and Fisher, who were not connected with the bank, were the remaining directors, Fisher being the general manager. An account was opened by the bank with the cable company, and all moneys, whether acquired by loans or otherwise, were credited to the company's account by the bank as deposits. Fisher had charge of the construction and general business, and bills and accounts of labor and materials were presented to him, he would "O. K." them, signing his name thereto, and direct the holder to go to the bank for payment; and these bills, accounts, time warrants of the laborers, etc., were paid by the teller of the bank as though they were checks, stamped "Paid," and charged to the company's account. From the organization of the cable company, through all these transactions, J. E. O'Brien was bookkeeper of that company, and during the latter part of the time was also its secretary. The company had no pass book as a depositor, but generally twice a week the bank would deliver to O'Brien a statement of the company's account, and surrender the paid vouchers, and from these statements and vouchers O'Brien kept a ledger account with the bank in the books of the company, which was thus practically a rescript of the bank's books. Some of the machinery was purchased by Dare, and the bills for such did not pass through Fisher's hands, but would be audited and settled for at the bank; and part of the time, instead of giving time checks to laborers, a pay roll would be made out, and money to pay the same would be drawn from the bank in bulk, and a check would be the voucher in such case, but by whom drawn does not appear. At the time of the trial, Dare had long been absent in Europe, Collins was dead, and two of the three bookkeepers of the bank who made entries in the company's account in the books of the bank were absent from the state. The cashier of the bank and the bookkeeper who had charge of the general books of the bank testified as to the manner in which the accounts were kept, and Brimhall, one of the three who kept the books in which this account appeared, testified to the handwriting of the absent bookkeepers, as well as his own, that the entries were made in the usual course of business on the day of the several transactions, as they occurred, and that he be-

lieved the account to be correct. Some testimony was also given by one or more other parties who had settled their private accounts with the bank and found the bank's accounts to be correct. The court eventually received in evidence, first, the statements of account furnished to the bookkeeper of the cable company by the bank, and afterwards the ledger of the cable company, showing the account with the bank made up from said statements; but refused to receive in evidence the books of the bank and the vouchers returned to the cable company's bookkeeper with the statements. Plaintiff again offered in evidence each of the notes set out in the complaint, and these were again excluded. Plaintiff then offered in evidence the note of \$17,200, dated June 30, 1891, as explanatory of an item of the same date and amount appearing in the statement admitted in evidence, said item being, "Note for \$17,200," for the purpose of showing that that entry was of the note offered; and that note was thereupon received in evidence. The ledger account of the cable company, which was received in evidence, showed that said credit, "Note for \$17,200," was carried through the stated accounts to the final balance as a credit to that amount, and these statements also showed a final balance or overdraft against the cable company of \$9,444.27. This balance, added to the credit, "Note for \$17,200," makes \$26,644.27, and for this amount appellant insists he should have had judgment, and that the finding that the cable company was not indebted to the bank in any sum whatever is not justified by the evidence; and this contention I think must be sustained.

The evidence was meager in regard to the financial resources of the cable company. Mr. Fisher testified, when called by defendants, that: "Collins and Dare looked after the financial part of the road entirely, and I never saw any of the accounts after I passed on the bills, as I have stated here before. I would 'O. K.' them, and that is the last I would ever see of them." That he did not examine the books. That he had implicit confidence in Mr. Dare and Mr. Collins. That after the failure of the bank he only knew of any balance being due the bank through reports in the newspapers, but he never said anything to the officers of the bank about it. That, prior to the failure of the bank, he heard rumors that the bank was carrying the cable company, and the officers of the bank denied it, and said the cable company had a balance in the bank. When these conversations occurred does not appear, but it does appear that after March 17, 1890, he held but 1 share of stock, having sold 499 shares to Collins and Dare, and admitted that after that time, though he remained a director, he had no financial interest in the corporation, and gave that as the reason why he made no inquiries as to the truth of the newspapers' reports, after the bank's failure, to the effect that the cable company owed

the bank "ninety-odd thousand dollars." It would therefore appear probable, at least, that the former inquiries were made in the early stages of the work. All the notes mentioned in the record were made after Fisher parted with his interest in the corporation. It further appeared that, though Mr. Fisher had procured the books for the bookkeeper in which to keep the company's accounts, he had never looked into them, or sought to inform himself of the state of the company's accounts. In *Morse on Banks and Banking* (3d Ed., p. 513, § 295) it is said: "The sound rule would seem to be that the depositor's bank book, if it has been returned to him, and he has not within a reasonable time objected to it, should be regarded as prima facie evidence of the way the account stood between him and the bank at the date of the last balancing. It settles the presumption in the case, and leaves the onus on the party disputing it." This prima facie evidence was not rebutted, and judgment for the sum stated should have been for the plaintiff.

There are other grounds justifying a reversal, and, as they involve questions which will doubtless arise upon another trial, they should be noticed.

The vouchers delivered with the statements to the cable company are not only prima facie evidence of the payment by the bank of the several sums named in them, but these payments, having been made principally upon bills certified by the general manager, to that extent, at least, furnished satisfactory evidence that the money paid thereon was in fact applied to the proper use and benefit of the cable company; and, as we have already held that the plaintiff could not recover upon the notes alone, because of their unauthorized execution, such evidence was material and important to the plaintiff, and he was prejudiced by the exclusion of these vouchers.

The court also erred in excluding the books of the bank. The first objection to this evidence argued by counsel for respondents in his brief is that these books were not "kept in the regular and usual order of business," because the cable company had no pass book, and because the money was not paid out upon checks, but upon bills, etc. Whether or not there was a pass book in no wise affected or changed the mode of keeping the bank's accounts. The statements rendered to the cable company's bookkeeper showed the deposits, as well as the payments, in the same manner as if written up in the pass book. That payments were made upon bills instead of checks could not affect the correctness of the accounts, the bills being treated as checks. I think the preliminary evidence was sufficient to authorize the admission of the books of the bank, especially in view of the fact that statements of the bank's account had been regularly furnished to the cable company, thus giving it the opportunity to examine it and investigate its correctness.

These statements, being in evidence, and no objection having at any time been made to them, furnished at least prima facie evidence that the account of the bank was correct. The interest of Dare and Collins as officers of the bank does not seriously, if at all, affect this question. Their interest on behalf of the bank was not greater than in transactions with any other customer, and it is well settled that books of account kept by banks are admissible in evidence. See *McLennan v. Bank*, 87 Cal. 589, 575, 25 Pac. 760, and cases there cited. The interest of parties to a transaction invites scrutiny just as the interest of a witness invites scrutiny; but such interest goes only to the weight of the testimony, not to its admissibility. Even when a party was disqualified as a witness, because of his interest, he was permitted to testify to the correctness of his account, and put that in evidence.

It has been seen that the notes upon which the first four counts are based, not having been executed by proper authority, are not evidence of a liability upon the express contract appearing upon their face; but, as it is also true that if the money represented by or named in the notes was furnished by the bank, and was received by and applied to the proper use and benefit of the cable company, plaintiff is entitled to recover the same, the question arises whether the notes are admissible in evidence for the purpose of showing that the money represented by them was furnished by the bank. The record does not disclose the circumstances under which, nor by whose direction, the secretary executed the notes. It does appear, however, that Collins and Dare were intrusted with the management of the finances of the cable company, and the only evidence in the record showing that money was received from any other source than the bank was given by Mr. Fisher, to the effect that he understood that the money was borrowed in the East; that he, Collins, and Dare each made notes individually, the other two becoming indorsers, and he thought that in this way about \$100,000 was raised, and that he did not know of the cable company borrowing in its own name. The stumbling block in this case, however, seems to have been the double relation or agency of Collins, Dare, and Havermale, being at the same time officers and directors in both corporations. In *Mining Co. v. Senter*, 26 Mich. 73, Capt. Frue was the agent of the Adams Company, and also of the South Pewabic Company. Frue sold to Senter certain timber belonging to the Adams Company, in payment of a bill which the Pewabic Company owed to Senter, in order that the latter company should be given additional credit, and this action was brought by the plaintiff against the defendant for taking said timber. After discussing other questions, Mr. Justice Campbell said: "The question next arises, how far the double agency of Captain Frue affected his relations

to his employers and to third persons. It was claimed that, upon the principle that a man cannot contract with himself, and cannot occupy positions involving a conflict of duties, all of his dealings whereby the property of one company was transferred to or used for the other should be held unlawful. There is no validity in such a proposition. The authority of agents may, where no law is violated, be as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relations. Every survey of boundaries, by a surveyor jointly agreed upon, would come within similar difficulties. It is only where the agent has personal interests conflicting with those of his principal that the law requires peculiar safeguards against his acts. There can be no presumption that the agent of two parties will deal unfairly with either. And when both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transactions, instead of lessening his powers, it may become necessary to enlarge them far enough to dispense with such formalities as one man would use with another, but which could not be possible for a single person to go through with alone." Collins and Dare were not the bank, though they were its agents; and in an action by the bank, or its receiver, it is not perceived why their acts and admissions as the agents of the cable company, in charge of its financial affairs, are not admissible in evidence against it in relation to those matters that were intrusted to their management by the latter company. If they had procured the money from another bank, with which they were not connected, assuming that the notes were executed by the secretary by their direction, I think it would not be contended that the notes were inadmissible in evidence, in connection with the other facts, for the purpose of showing that the payee was the party lending the money.

I think the judgment and order should be reversed, and a new trial granted.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

(107 Cal. 78)

Ex parte TYLER. (No. 21,176.)

(Supreme Court of California. April 5, 1895.)

DISBARMENT OF ATTORNEY.

In a proceeding to disbar an attorney, brought under Code Civ. Proc. § 287, subd. 2, authorizing the court to remove or suspend an attorney when guilty of any violation of his professional duties, it is no defense that the violations of the professional obligations or the

professional delinquencies charged against the attorney may render him liable to a criminal prosecution, or that his conviction therefor is barred by the statute of limitations.

In bank.

Habeas corpus by George W. Tyler. Writ discharged.

Geo. W. Tyler, in pro. per.

PER CURIAM. By the judgment of this court, made December 3, 1886, the petitioner was suspended from the right to practice law for the period of two years, and until the payment of a certain judgment against him in favor of J. M. Hogan. 71 Cal. 353, 12 Pac. 289, and 13 Pac. 169. A motion made by him in 1889 for a modification of this judgment was denied. 78 Cal. 307, 20 Pac. 674. In October, 1894, the petitioner appeared in the superior court of Alameda county, Hon. John Ellsworth presiding, for the purpose of making a motion in a cause pending in said court, and was informed by the judge that he would not be permitted to make said motion or practice law in said court as an attorney until he should exhibit satisfactory proof that he had paid, or caused to be paid, the aforesaid judgment in favor of Hogan. The petitioner, however, insisted that he had a right to practice law, and appear as an attorney in said court, without making such proof, and thereupon, without leave of the court, and in contempt of its authority, made a motion in said cause, for which he was adjudged by the said court guilty of contempt, and was sentenced to pay a fine, and, in default thereof, to be imprisoned until the same was paid, or was satisfied at the rate of one dollar per day. Petitioner, having been taken in custody by the sheriff under a warrant of commitment issued upon this order, has sued out the present writ of habeas corpus.

The former judgment of this court that the petitioner had been "guilty of a violation of his duty as attorney and counselor, and of his oath of office as such," is a judicial determination of that fact, by reason of which this court is estopped from any investigation of the sufficiency of the proofs to establish the charge, or of the legal effect of those proofs; and the subsequent denial of the petitioner's motion for a modification of this judgment was a determination that the court did not exceed its authority in rendering judgment, and is equally an estoppel against its re-examination. It is, however, contended by the petitioner in support of his application that this court never had any jurisdiction to entertain the proceedings for his disbarment, and that the judgment therein for his suspension from practice is for that reason not entitled to any consideration. If the petitioner is correct in this proposition, his further contention as to the order of the superior court committing him for contempt for his disregard of that judgment is also correct. Having been once admitted to prac-

tice law in all the courts of this state, a court could not adjudge him guilty of contempt for the mere act of practicing law in its presence. The grounds urged by the petitioner in support of this contention are that the transactions which were alleged in support of the charges against him constituted felonies, viz. embezzlement and subornation of perjury; that he could not be convicted of these offenses except by the verdict of a jury; that this court could not entertain a motion for his disbarment on account of these transactions until after such conviction had been had; that at the time the proceedings for his disbarment were instituted his conviction for the offenses had been barred by the statute of limitations; and that, as no conviction could be had therefor, this court had no jurisdiction to hear the charges. It has been held in many cases, and the rule is perhaps sustained by the weight of authority, that when an attorney has violated the laws of the state in a matter distinct from his professional conduct, when the act or offense is committed in his private capacity, and not by virtue of his office as an attorney, courts will not entertain any proceedings for his disbarment until after he shall have been convicted of the offense charged. In *Tilden's Case* (Cal.) 25 Pac. 687, the charge against him was of an act wholly disconnected with his oath or duty as an attorney, nor was the act alleged to have been committed in the discharge of any professional relation; and we held that, as we had no jurisdiction to try him for the offense charged, we would not entertain a motion to suspend or remove him for the commission of the offense until after his conviction, and that we would not anticipate his trial for the offense by taking proceedings for his disbarment. Whether in such a case the court would, under any circumstances, entertain a motion for disbarment when no conviction had been had, was left an open question, and is not involved in the present case. See, however, *Weeks, Attys. at Law*, § 80; *State v. Winton*, 11 Or. 456, 5 Pac. 337; *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569. The case last cited shows that the petitioner's objection that he was deprived of his office as attorney "without due process of law" is untenable. See also, to the same effect, *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105. If, however, an attorney is charged with a violation of his professional obligations, either to his client or to the court, or with professional delinquency in matters pertaining peculiarly to the relations between him and his client, it is no defense to a proceeding for his suspension or disbarment that the same transactions may render him liable to a criminal prosecution. The court is authorized to strike him from its roll of attorneys, notwithstanding the same cause may form a basis for an indictment. Its power in this respect is not suspended until after his conviction, although the court may

in its discretion withhold the exercise of this power, as the facts of any particular case may suggest would be appropriate. Upon this proposition it was said in *Treadwell's Case*, 67 Cal. 358, 7 Pac. 724: "In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counselor in the courts under the license which has been granted to him, and not for the purpose of judging whether he is guilty of the commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar an attorney. If an attorney be found by a court guilty of acts indicating professional moral depravity, the court can, without previous conviction of a criminal offense, prevent the repetition of such official acts by taking away the license under which they have been committed." In *Stephens' Case*, 102 Cal. 264, 36 Pac. 586, we held that we would not entertain a charge against an attorney at the instance of a client who claimed that he had failed to pay over certain moneys that had been collected until the client had first established his claim against the attorney.

The provisions in the Code of Civil Procedure for the disbarment of an attorney are based upon these principles. Subdivision 1 of section 287 renders his conviction of a felony or misdemeanor involving moral turpitude a ground for his disbarment, whether such offense was committed in his private capacity or by virtue of his professional relation. The provisions of the two succeeding sections, that the clerk of the court in which such conviction is had shall transmit a copy of the record to the supreme court, and that upon the receipt thereof proceedings must be taken for his removal, leave this court no alternative, under section 290, to striking his name from the roll of attorneys. Subdivision 2 of section 287 authorizes the court to take action for the removal or suspension of an attorney whenever he is shown to have been guilty of "any violation of the oath taken by him, or of his duties as such attorney." There is no limitation upon the power of the court to entertain a motion under this subdivision for the removal or suspension of an attorney, nor is it required to defer its action until after the conviction of the attorney of a charge which might be sustained by the same evidence.

An examination of the proceedings under which the petitioner was suspended, and also of the opinion of the court rendered therein, shows that the charges against him were brought under subdivision 2 of section 287. There was no accusation that he had been convicted of any offense, nor was it sought

to convict him of any offense. The charges against him were of the violation of his duties as attorney and counselor, and of unprofessional conduct. Whether the evidence offered in support of these charges would have sustained an indictment or not was immaterial, nor was this question considered by the court. The court found that the evidence was sufficient to sustain the charges, and under subdivision 2 of section 287 its jurisdiction to entertain the charges and to render the judgment it pronounced must be regarded as unquestioned. The same principles which authorize the court to entertain charges against an attorney of violating his professional duties, irrespective of any civil or criminal proceedings against him, render the bar of the statute of limitations against a civil or criminal proceeding an immaterial element. The statute of limitations never deprives a court of jurisdiction, even in cases where it is a defense to the action or proceeding. The writ is discharged, and the petitioner remanded to the custody of the sheriff.

(5 Cal. Unrep. 6)

In re BURDICK'S ESTATE. (No. 15,869.)¹
(Supreme Court of California. April 2, 1895.)

SETTLEMENT OF ESTATE—APPEAL BY EXECUTOR—
DISTRIBUTION TO TRUSTEES—RIGHTS OF SOLE
LEGATEE—COMMUNITY PROPERTY.

1. An executor, who has appealed from all of a decree made in the final settlement and distribution of the estate, except that part settling such executor's account with the estate, cannot, on such appeal, object that the funds in his hands were found to be community property, and distributed accordingly.

2. A distribution of a part of a devised estate to trustees at the special request of the sole devisee will not be declared void on appeal because the record fails to show that such trustees established a legal claim to the property.

3. Under Civ. Code, § 1402, the probate court has jurisdiction to declare certain property devised to testator's son to be community property, and to distribute it to the wife, who is not a legatee or devisee.

4. The additional right acquired in community property by either the husband or the wife upon the death of the other is acquired by inheritance. Civ. Code, §§ 1383-1402.

5. Persons claiming to be trustees of a devised estate, but who are neither heirs, devisees, nor legatees, and who have presented no claim against the estate, cannot appeal from a decree rendered in the final settlement of the estate.

6. An appeal cannot be taken from an order of the probate court refusing to postpone the final decree.

7. A surviving wife cannot be deprived of her rights in community property by an act of the husband subjecting such property to the control of trustees for the use of others.

Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Appeals by the executor of the estate of Stephen Powell Burdick, deceased, by A. W. Burdick and A. M. Sutton as trustees, and by A. W. Burdick individually, from a de-

creed rendered in the final settlement of the estate, distributing one-half of the funds in the executor's hands to the wife as her interest in the community property. Appeal of the trustees dismissed, and decree affirmed.

J. H. Craddock and R. S. Gray, for appellants. Clarken & Ross, for respondent.

TEMPLE, J. The executor of the above estate filed his final account with a petition for settlement and for a distribution of the estate, December 12, 1892. He reported that he had in his hands, after payment of debts and expenses, \$1,855.41, from which he asked to be allowed attorney's fees and accruing costs, and prayed that the balance be distributed to the parties entitled thereto; that the testator left one child, Arthur W. Burdick, and a widow, Alice H. Burdick; that by his will his entire estate was left to his son. January 31, 1893, Alice H. Burdick filed her petition, claiming that there was other property belonging to the estate, and asked to have such property recovered for the estate. August 30, 1893, A. W. Burdick and A. M. Sutton asked to have the money in the hands of the executor distributed to them as surviving trustees of a trust, or that the entire estate be given to A. W. Burdick as sole legatee and devisee. The petitions were submitted, and taken under advisement. July 20, 1893, Burdick and Sutton filed a more elaborate petition, asking the court to distribute the money to them as trustees. October 9, 1893, the court denied the application of the widow to compel the executor to include other property, and ordered a distribution of the estate as community property. One-half of the money, at the special request of A. W. Burdick, was distributed to A. W. Burdick and A. M. Sutton, trustees, and the other one-half to the widow. At that time counsel for A. W. Burdick and A. M. Sutton, trustees, and for A. W. Burdick individually, asked the court to suspend entry of the order of distribution until the title of the fund could be determined by proper action in a court of general jurisdiction. This application was denied, and the court proceeded to settle the final account of the executor, and to distribute the property. Appeals are taken from this decree by the executor, by A. W. Burdick and A. M. Sutton as trustees, and by A. W. Burdick individually. The appeals are brought here together, and by stipulation all use the same transcript, and they have been argued and submitted as one appeal.

The executor states in his notice of appeal that he appeals from the whole decree, "except so much of said decree as settles the account of said executor, from which last-named portion he does not appeal." The executor claims that the decree distributes the estate to strangers; that neither the trustees nor the wife, as to community prop-

¹ Rehearing granted.

erty, are heirs, legatees, or devisees of S. P. Burdick, deceased, and those claiming through them are the only persons to whom distribution can lawfully be made. The executor cannot, on this appeal, claim that the court erroneously found the money to be the property of the estate, rather than the property of the trustee; for the court, in settling the final account, adjudged that he had the amount in his hands belonging to the estate, and from that part of the decree he does not appeal.

1. At first sight it would appear as though the court could not distribute property to the trustees. They are not named in the will, and could not, as such, be heirs. But the bill of exceptions does not profess to state all the evidence, and, in the absence of a contrary showing, we should presume that they made out a claim through some one legally entitled. If the statement that it was done at the special request of A. W. Burdick shows that there was no other warrant for the distribution, still I think it is not void. It shows that A. W. Burdick was the person entitled to it, and, if the other direction be void, still the distribution complies with the Code. It describes the property, and names the person entitled to it, viz. A. W. Burdick. No other person could complain of it, and he cannot, for it was done at his instance. The executor questions the jurisdiction of the probate court to determine the common property, or to distribute it to the widow. He argues that the wife claims adversely to the estate, and not as heir, legatee, or devisee. The estate can only be distributed to such persons, and those who have acquired title from them. He cites in support of his contention *Estate of Rowland*, 74 Cal. 525, 16 Pac. 315. It was not decided in that case that the wife does not take one-half the community property upon the death of her husband as his heir, but that, when the community is dissolved by the death of the wife, the probate court, while administering the estate of the wife, has no jurisdiction of the community property. The Civil Code declares that in such case the community property goes to the husband without administration. Civ. Code, § 1401. Notwithstanding some unnecessary language in *Estate of Rowland*, it was only held that a controversy between the representative of the deceased wife and the surviving husband as to whether certain property was common property or the separate property of the wife could not be determined by the probate court. It would not be necessary to concede that the probate court has not the jurisdiction claimed here, even if the wife does not take as heir. The question, then, would be, has the statute conferred the jurisdiction, and was it within legislative power? The jurisdiction is expressly conferred. Civ. Code, § 1402. For 30 years before the adoption of our present constitution by the people the probate court

had exercised the power without question. The constitution gives probate jurisdiction to the superior court. But I think, within the meaning of our laws, both husband and wife take such additional right as they acquire to the common property by the death of the other by inheritance. The dispositive to hesitate to accept this conclusion does not arise from any ambiguity in our statutes, which I think, and shall presently show, are very clear upon the subject, but from the fact that during the existence of the community the relation of the wife to the property is, in some respects, quite different from that of a mere heir apparent. She has rights with reference to it which the courts will interfere to protect, and in case of the dissolution of the community by divorce her right to one-half the property immediately attaches, subject to the power of the divorce court to deprive her of it for her delinquency. But these statutory provisions do not show that the additional right which she acquires upon the death of her husband is not as heir, and the Code seems quite clear upon the subject. Section 1334, Civ. Code, reads as follows: "A testamentary disposition to 'heirs,' 'relations,' 'representatives,' 'legal representatives,' or 'personal representatives,' or 'family,' 'issue,' 'descendants,' 'nearest' or 'next of kin' of any person, without other words of qualification, and when the terms are used as words of donation and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession in this Code." Section 1383 defines "succession": "Succession is the coming in of another to take the property of one who dies without disposing of it by will." The next section shows that the person taking by succession is an heir, and that his right is subject to the control of the probate court and the possession of the administrator. Certain provisions then follow in regard to succession, down to section 1400, which is as follows: "The provisions of the preceding sections of this title as to the inheritance of the husband and wife from each other apply only to the separate property of the decedents." The next section provides for the succession to the community property in case of the dissolution of the community by the death of the wife. Section 1402 provides for the succession in the case of the death of the husband. It is as follows: "Upon the death of the husband, one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and, in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the sep-

(107 Cal. 144)

ROHRBOUGH v. JOHNSON. (No. 15,776.)
(Supreme Court of California. April 15, 1895.)COMMON-LAW MORTGAGE—VALIDITY AS AGAINST
CREDITORS—CHANGE OF POSSESSION.

1. After removing a hop crop to the curing to be dried and baled, the owner mortgaged it to plaintiff, giving him authority to take possession of the crop at any time he felt insecure. When the hops were cured and baled, plaintiff satisfied the curer's lien thereon, and removed them to his warehouse, with the mortgagor's consent. *Held* that, though the mortgagor subsequently gave instructions regarding the hops, their delivery to plaintiff was "immediate," and followed by an "actual change of possession," within the meaning of Civ. Code, § 3440, providing that every transfer of or lien on personal property, other than a mortgage allowed by law, is conclusively presumed to be fraudulent as against creditors, unless accompanied by an "immediate delivery, and followed by an actual and continued change of possession."

2. A power of attorney to execute a chattel mortgage is the best evidence of the agency for that purpose.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by J. S. Rohrbough against J. R. Johnson. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

T. L. Carothers, for appellant. J. H. Seawell, for respondent.

HAYNES, C. Action in claim and delivery for 50 bales of hops. Judgment for the plaintiff was entered upon the findings, and defendant appeals from the judgment, and from an order denying his motion for a new trial. Joel Eveland, a hop grower, removed and delivered his crop of 1893 to one Felix Purcell at his hop house, to be by him dried and baled. On September 11, 1893, Eveland executed to the plaintiff his promissory note, payable 90 days after date, for the sum of \$1,200, which sum the plaintiff had advanced to Eveland to enable him to pay for picking the hops; and, to secure the payment thereof, Eveland also executed to the plaintiff an instrument purporting to be a chattel mortgage, in which the mortgaged property is described as "consisting of the whole of the said mortgagor's hop crop for the year 1893, and now being and lying in the hop house of Felix Purcell, situated in Round Valley township, Mendocino county, California." Said mortgage also provided that, if the mortgagee should thereafter deem himself insecure, he might take possession of said property, and sell the same in the manner provided by law, without foreclosure, and from the proceeds pay the whole amount due, as specified in the note and mortgage. This mortgage was recorded on the 13th. When the hops were dried and baled, plaintiff sent his teams to remove them, but Purcell refused to deliver them until his charges for curing and baling were paid. Plaintiff thereupon paid said charges, amounting to \$180.25, whereupon Purcell, who had been informed by Eveland that he had mortgaged the hops to plaintiff, delivered them

separate property of the husband. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration." The sections following provide for other cases of succession, and the heading of the title is "Succession." The statute therefore indicates very plainly that the wife acquires her right of absolute property in one-half of the community property, upon the death of her husband, by inheritance. Nor does this conclusion narrow or in any way limit the views which have hitherto prevailed in regard to the rights of the wife with reference to the community property during the life of her husband. From what has already been said, it is quite obvious that the appeal of the trustees must be dismissed. They are not named in the will, could not be heirs, and have presented no claim against the estate. Nor do they show any right acquired from heir, legatee, or devisee. They are not, and could not have been, aggrieved persons. The order refusing to postpone the final decree is not appealable. Indeed, I do not now think of any order made in the course of the administration from which these trustees could appeal. Arthur W. Burdick, as devisee or heir, was not aggrieved because the court did not distribute the money to the trustees, or because the court erroneously distributed it as part of the estate of S. P. Burdick. On the hearing, Arthur W. Burdick announced through his counsel that he claimed nothing as devisee. Nor has such claim been made on this appeal. But, waiving this, and supposing appellant here contending that the court erred in holding that the property was community property, but should have decided that it was the separate property of S. P. Burdick, deceased, and that, therefore, he was entitled to the whole of it as sole legatee and devisee, there is nothing in the record upon which a decision in his favor could be based. The bill of exceptions does not purport to state all the evidence taken, and the decision may have been fully sustained by evidence not brought up. But, conceding that all the evidence is there set out, the conclusion of the court is correct. There is no evidence tending to show that any property was the separate property of S. P. Burdick, unless it was converted into such by the creation of the trust set out in the petition of the trustees. Conceding that the money there invested was community property, as we must presume it was, we have no difficulty in determining that the surviving wife could not be deprived of her rights with reference to it by any such device. The appeal of the trustees is dismissed, and as to the other appellant the decree is affirmed.

We concur: HENSHAW, J.; MCFARLAND, J.

and they were thereupon placed upon plaintiff's wagons, and hauled to Ukiah, in the same county, where they arrived on October 2, 1893. On September 30, 1893, one Marks commenced an action in the superior court of Mendocino county against said Eveland to recover the sum of \$879.53 and interest, upon a promissory note made by Eveland in 1890, and procured a writ of attachment to be issued and placed in the hands of J. R. Johnson, the defendant in this action, who was then the sheriff of said county. Upon the arrival of the hops at Ukiah, and while upon plaintiff's wagons upon the street, the defendant, as such sheriff, seized the hops under said writ, and afterwards sold them under the judgment procured by Marks in said action as the property of Eveland. Upon the refusal of the sheriff to surrender the hops to plaintiff upon demand duly made, this action was brought. Plaintiff had judgment for the return of the hops, or for \$1,107.75, the value thereof, in case a delivery could not be had.

Appellant contends that plaintiff's mortgage was void, and conferred no right to the possession of the property, or to a lien thereon, because taken upon property not authorized to be mortgaged; citing section 2,955 of the Civil Code. It is conceded that a valid statutory mortgage could not be made upon the hops after they ceased to be a growing crop; but what is frequently called "a common-law chattel mortgage" may be taken upon any species of personal property, if it is accompanied by a delivery of the property to the mortgagee, and followed by such actual and continued change of possession as is required by section 3440 of the Civil Code; the difference being that, as to the property enumerated in section 2955, Civ. Code, the due execution, acknowledgment, and recording of the chattel mortgage dispenses with a change of possession, and permits the property to remain in the hands of the mortgagor. The expression "common-law mortgage" is not a happy one, and under the Code is inaccurate. At common law, a chattel mortgage amounted in effect to a conditional sale. By it the legal title to the goods passed to the mortgagee, subject to be divested upon performance of the condition. See note to *Lucketts v. Townsend*, 49 Am. Dec. 731, and cases there cited. The Civil Code (section 2,920) defines a mortgage to be a contract by which specific property is hypothecated for the performance of an act, "without the necessity of a change of possession," and cannot be properly applied to a security dependent upon possession by the creditor, which the Code denominates a "pledge." Section 2,924, Civ. Code, is as follows: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by an actual change of possession, in which case it is deemed a pledge." Whether the instrument be called a "mortgage" or

a "pledge" does not, however, affect its efficacy as a security.

The question, therefore, is whether there was such delivery to and possession by the plaintiff as is required by section 3440 of the Civil Code, which, so far as pertinent here, is as follows: "Every transfer of personal property, other than a thing in action, * * * and every lien thereon, other than a mortgage, when allowed by law, * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, * * * and against purchasers or incumbrancers in good faith subsequent to the transfer." It has been repeatedly held that a sale of personal property, not accompanied by an immediate delivery and an actual and continued change of possession, is fraudulent and void as to any creditor who was such during any of the time the property remained in the seller's possession, and that such property may be seized by such creditor in the hands of the buyer in the same manner as though there had been no attempted transfer by the debtor. *Watson v. Rodgers*, 53 Cal. 401; *Edwards v. Bank*, 50 Cal. 148. This construction of said section is equally applicable to chattel mortgages, other than those authorized by statute; and the same rule must apply in determining what is an immediate delivery and actual and continued change of possession, viz. that these questions must be determined upon the facts of each particular case. *Claudius v. Aguirre*, 89 Cal. 503, 26 Pac. 1077; *Byrnes v. Moore*, 93 Cal. 394, 29 Pac. 70. At the time this mortgage was made, the hops were not in the possession of Eveland, but were in the possession of Purcell, a bailee, for the purpose of being cured and baled by Purcell, and his possession was actual and exclusive, for the purposes of the bailment, and he had a lien thereon, dependent also upon possession, for the value of his services in curing and baling them. Actual possession could not be delivered to the plaintiff by Eveland until the hops were dried and baled, and Purcell's charges were paid, without the latter's consent. For aught that appears in the record, the plaintiff took possession of the hops as soon as the bailee's work was accomplished, and certainly as soon as his lien was discharged, and such actual possession could not have been had without payment of his charges. The plaintiff sent his wagons for the hops, and Purcell refused to deliver them without payment, and thereupon plaintiff satisfied his lien, and immediately took them into his actual possession. Neither Eveland, the owner, nor the defendant, as sheriff, with his writ of attachment, could have obtained possession of the hops

without first discharging the lien of the ballee.

The contention that the plaintiff did not rightfully obtain possession because the debt secured by the mortgage was not due is without merit. He was expressly authorized, under the terms of the mortgage, to take possession at any time he deemed himself insecure; and, as his security depended upon possession, no question as to the construction of that condition in the mortgage can arise. Purcell testified that Eveland informed him of the mortgage; hence no question is made as to his right to deliver the hops to the plaintiff, and the plaintiff, being thus compelled for his own security to discharge the prior lien of Purcell, became subrogated to his lien as against the attachment, and upon this ground also he was rightfully in possession of the hops at the time they were attached.

The evidence sustains the findings, and no question is made as to the sufficiency of the findings to support the judgment. The note and mortgage and the power of attorney from the plaintiff to White were properly admitted in evidence. White transacted the business for the plaintiff, and the power of attorney was the best evidence of his agency. Nor did the court err in sustaining plaintiff's objection to the questions put to Eveland by the defendant as to instructions sent by the witness to the warehouseman at Ukiah concerning the hops after plaintiff had taken possession. Such instructions, whatever they were, could not affect the plaintiff, who was rightfully in possession by his express authority.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(5 Cal. Unrep. 19)

HEIM et al. v. BUTIN. (No. 15,796.)¹

Supreme Court of California. April 4, 1895.)

ENFORCEMENT OF DEFICIENCY JUDGMENT — INJUNCTION TO RESTRAIN — BREACH OF AGREEMENT BY MORTGAGEE — CONSIDERATION.

1. Plaintiffs, having executed a note and mortgage to defendant, conveyed the mortgaged property to another, who assumed the payment of said note and mortgage, but, he having defaulted thereon, defendant agreed with plaintiffs to purchase the land at the foreclosure sale for the full amount of his claim, and not to take a personal judgment against plaintiffs, and the latter, relying on such promise, allowed default to be entered, and refrained from attending the sale. *Held*, that there was a sufficient consideration for such agreement.

2. Such agreement was not void as altering the terms of the note and mortgage.

3. Nor was it void as an agreement to prevent bidding at the sale.

4. The complaint in a suit to enjoin the enforcement of a deficiency judgment, obtained against plaintiffs in such foreclosure suit, alleged that plaintiffs, relying on defendant's promise, failed to appear in the suit, or to be present at the sale, or make any bid thereat,

though they were able to purchase the property and protect themselves. *Held*, that the complaint showed that plaintiffs were damaged by their reliance on defendant's promise, they having a right to demand that the deficiency judgment be entered also against the owners of the property.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by Ella M. Heim and another against James M. Butin to restrain the enforcement of a personal judgment. From a judgment of nonsuit, plaintiffs appeal. Reversed.

William H. Jordan and W. A. Richardson, for appellants. W. E. McConnell and J. A. Barham, for respondent.

BELCHER, C. The plaintiffs brought this action to obtain a perpetual injunction restraining the enforcement of a deficiency judgment entered against them in a suit to foreclose a mortgage. The facts stated in the complaint are in substance as follows: On or about December 30, 1887, the plaintiffs, Ella M. Heim and Julius F. H. Heim, her husband, executed to the defendant their promissory note, bearing interest at the rate of 6 per cent. per annum, payable monthly in advance, and, if not so paid, to become immediately due, at the option of the holder thereof. At the same time, to secure payment of the note, they executed to the defendant a mortgage upon certain real property in Sonoma county. Subsequently they conveyed the mortgaged property to other parties, upon the express condition that the grantees should assume the payment of the said note and mortgage. Thereafter, about September 1, 1891, the grantees having failed to pay the interest on the note, "and the said defendant herein having elected and declared said note to be due and payable, defendant herein, being requested by plaintiff Ella M. Heim to commence proceedings for the foreclosure of said mortgage, did agree with her that he would commence an action for such foreclosure, and, upon obtaining judgment in said cause and a decree of court directing the sale of said property to satisfy said judgment, he, this defendant, would at such sale purchase the same for the amount of such judgment obtained, including interest and costs at that time accrued; and he, the said defendant, did expressly agree with the said plaintiff that no personal judgment in said action should ever be entered or docketed against plaintiffs, or against either of them." On September 11, 1891, defendant commenced an action in the superior court of Sonoma county to foreclose his said mortgage; and such proceedings were had therein that on January 4, 1892, judgment, foreclosing the mortgage, and directing a sale of the mortgaged premises to satisfy the same, was duly given and made against the defendants therein (plaintiffs herein), for the sum of \$4,702.25, and \$250

¹ Rehearing granted.

attorney's fees. Thereafter, on February 29, 1892, the mortgaged property was sold by the sheriff of the county under and by virtue of said judgment. "That these plaintiffs relied upon said promise and agreement of the said defendant, and, so relying and believing that said defendant would keep and perform the same, these plaintiffs, and both of them, failed to appear or answer in said foreclosure suit though made parties thereto, and permitted their defaults to be entered therein; and thereafter, so relying and believing in said promise of defendant, they abstained from being present at said sale, or taking any step whatsoever to obtain a purchaser for said property, so that their interests in said judgment might be protected and exonerated; and these plaintiffs, and both of them, furthermore did, by reason of their reliance upon said promise of defendant, refrain from making or causing to be made any bid at said sale, although at that time they were fully able to purchase said property for the amount of said judgment, and thereby to protect themselves against said judgment." Notwithstanding his said promise, and in violation thereof, the defendant failed to purchase the property at said sale for the amount of said judgment, but instead thereof purchased the same for the sum of \$4,200. From this sum were deducted the sheriff's commissions and expenses in making the sale, leaving \$4,195.95, which was credited upon the judgment; and thereafter, on the same day, in violation of his said agreement, the defendant caused a personal judgment to be docketed in said cause against these plaintiffs, and each of them, for the sum of \$918.43, which personal judgment has since remained and still is in full force and effect against them. Defendant has refused to cancel said judgment so far as these plaintiffs as concerned, and now threatens to take out an execution against them, and to satisfy the same by the sale of other property belonging to them, to their great and irreparable detriment and harm. No demurrer to the complaint was interposed. Defendant answered, denying that he made the promise or agreement set out in the complaint, admitting that he caused a deficiency judgment for \$918.43 to be docketed in the said action on February 29, 1892, and that the judgment so docketed has been and still is in full force and effect against the plaintiffs, but denying that the same was docketed in violation of any such promise or agreement as is alleged in the complaint, or in violation of any promise or agreement of defendant with plaintiffs, or either of them, or with any one else. At the trial it was proved, without objection, that the plaintiff Ella M. Helm purchased the mortgaged property from the defendant for the sum of \$5,500, and that the terms of the purchase were \$600 cash, one note for \$500, due on or before January 1, 1889, and one note for \$4,400, due on or before January 1, 1893; both notes draw-

ing interest at 6 per cent. per annum, payable monthly in advance, and secured by a mortgage on the property executed by her and her husband. The plaintiffs then sought to prove the agreement as alleged, and that they relied and acted upon it, and therefore did not appear in the foreclosure suit, the improvements placed upon the property during the time Mrs. Helm owned it, and its value at the time of the foreclosure, and that but for the agreement they or one of them would have been present at the sale, and bid in the property for the purpose of protecting themselves. This evidence was all objected to by defendant, upon the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action, and the objections were sustained, the plaintiffs reserving exceptions. No further evidence was offered by the plaintiffs, and the cause was then submitted on their behalf. Thereupon counsel for defendant moved for a nonsuit, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and the plaintiffs had not proved anything that would entitle them to recover. The motion was granted, and from the judgment and an order denying their motion for a new trial the plaintiffs appeal.

The question, then, is, did the complaint state a cause of action? If it did, the court erred in excluding the offered evidence and in granting the nonsuit. It is claimed for respondent that the complaint was insufficient, because the agreement set up was without any consideration and void. Section 1605 of the Civil Code provides: "Any benefit conferred, or agreed to be conferred, upon the promisor by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." Under this provision, if, as alleged, the plaintiffs, in reliance upon the defendant's agreement, allowed their defaults to be entered and refrained from being present and bidding at the sale, thus surrendering their legal rights, a benefit was conferred upon the defendant, and a prejudice suffered by them, which, in our opinion, constituted a good and sufficient consideration for his promise to purchase the property for the full amount of his judgment, and that no deficiency judgment should be entered against them. See *Montgomery v. Gibbs*, 40 Iowa, 652.

It is also claimed that the complaint was insufficient for the following reasons: (1) Because the effect of the agreement set out was to alter the terms of the note and mortgage, which, under section 1608 of the Civil Code, could only be done by a contract in writing, or by an executed oral agreement; (2) because the direct effect of the agreement was to prevent bidding at the execution sale, and it was therefore against public policy and

void. We are unable to see how either of these points can be sustained. The agreement did not in any way alter the terms of the note or mortgage. It simply, as in *Montgomery v. Gibbs*, supra, obligated the defendant to limit his remedy to the property sold. Nor did it prevent bidding at the sale, but only required the defendant to bid for the property the full amount of his judgment.

It is further claimed that the complaint was defective because it contained no allegation that defendant made the agreement with intent to deceive or mislead the plaintiffs, or with any fraudulent intent whatever, but shows that the agreement was made before the foreclosure suit was commenced, and that plaintiffs had an opportunity to appear therein, and neglected to do so, and that they lost their rights, if any they had, under the agreement, by reason of their own negligence. We do not perceive that it can make any difference whether the agreement was made before or after the suit was commenced. It was evidently made in view of the suit, and its purpose was to save the plaintiffs from the trouble and expense of appearing in the case, and being present and bidding at the sale; and, being made, plaintiffs had a right to rely upon it, and to expect the defendant to carry it out in good faith, and were guilty of no negligence in doing so. If, however, the allegations are true, the defendant's failure to carry it out constituted an actionable fraud or wrong, which entitled the injured parties to relief.

Finally, it is claimed that the complaint was insufficient, because it does not appear therefrom that the plaintiffs had any defense to the foreclosure suit, or that they could have prevented the entry of the deficiency judgment, or that the land mortgaged was worth more than the sum for which defendant bid it in, or that plaintiffs could have procured any one to bid more, or that they would have bid more themselves if present at the sale, and hence that there is no showing that plaintiffs had been damaged. The complaint avers that the plaintiffs relied upon the promise and agreement of the defendant, and, so relying and believing that he would keep and perform the same, they "failed to appear or answer" in the foreclosure suit, and that thereafter, so relying and believing in said promise, "they abstained from being present at said sale, or taking any steps whatsoever to obtain a purchaser for said property," and, "furthermore, did, by reason of their reliance upon said promise of defendant, refrain from making or causing to be made any bid at said sale, although at the time they were fully able to purchase said property for the amount of said judgment, and thereby to protect themselves against said judgment." The fair import of this language, it seems to us, is that, but for the agreement of defendant, plaintiffs would have appeared and answered in the suit, and would have been present and bid for the property

at the sale, or would have procured some one else to do so. The language, of course, is somewhat ambiguous and uncertain, but, as no demurrer was interposed, that ground of objection was waived. That the plaintiffs were damaged by their failure to appear and answer in the foreclosure suit, and to be present and have an opportunity to bid at the sale, is clearly shown, inferentially at least. After the mortgage was executed, they sold the property, and the grantees assumed the payment of the mortgage debt. As between themselves, the grantees thereupon became the primary debtors, while the mortgagors occupied the relation of sureties, responsible to the mortgagee alone. *Wills. Mortg. Forec.* § 223. Both the purchasers and the mortgagors were proper parties to the action to foreclose, and the plaintiff therein was entitled to have the deficiency judgment entered against the former. *Pellier v. Gillespie*, 67 Cal. 582, 8 Pac. 185. It would seem, therefore, that the mortgagors would have been entitled, if present, to claim and insist, for their own protection, that such judgment should be entered against the purchasers as well as against themselves. And that the property was worth more than \$4,200, the price bid by defendant, may be assumed from the fact that the plaintiffs were able and willing to purchase the same for the amount of the judgment. We conclude, therefore, that, in the absence of a special demurrer, the complaint was sufficient, and the objection that it did not state facts sufficient to constitute a cause of action should not have been sustained. The law applicable to the case is very clearly stated by Mr. Freeman in his work on Judgments (section 492, 4th Ed.), as follows: "It has frequently happened that one of the parties litigant has failed to present his claim or defense because he relied upon some agreement or understanding between himself and his adversary which, if observed, rendered such presentation unnecessary. And with more than occasional frequency, if we may judge from the reports, these agreements have been designed to lull a party into security and inactivity in order that some unconscionable advantage could be taken of him. In all such cases courts of equity, when asked to do so, have invariably restored the injured party to his rights under the agreement, and have wrested from his opponent all those fruits he had hoped to harvest and enjoy through fraud and duplicity. * * * Where A was sued upon a note and mortgage, and the plaintiff, for a valuable consideration, released him from personal liability, but took judgment in violation of his contract, and issued execution thereon, such execution was restrained on the ground 'it was against conscience for the mortgagee to retain his advantage;' " citing *Hibbard v. Eastman*, 47 N. H. 507. "It makes no difference that the agreement is void because made on Sunday, or was oral, when the rules of the court required all stipulations to be in writ-

ing. If it can be shown that it was successfully employed to prevent the defendant from making his defense, then the plaintiff will not be allowed to retain the advantage it has secured him;" citing *Blakesley v. Johnson*, 13 Wis. 530. And see *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752, a case somewhat analogous to this.

The judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

(107 Cal. 67)

HOWE v. JOHNSON. (No. 15,919.)

(Supreme Court of California. April 5, 1895.)

FRAUDULENT CONVEYANCE—DELIVERY OF POSSESSION—INTEREST OF JOINT TENANT—TROVER AGAINST SHERIFF—ANSWER—ALLEGATIONS OF FRAUD.

1. An alleged sale of personal property to a daughter of the vendor in payment for her services, no delivery of the property being made until two weeks after the sale, is conclusively presumed to be fraudulent as against creditors of the vendor.

2. When a joint tenant sells his interest in the property, and retains possession thereof, and there is no evidence that the other joint tenant has actual possession, no presumption of constructive possession by the purchaser arises which will take the place of the actual delivery of the property required by Civ. Code, § 3440.

3. In an action by one who had purchased certain personalty and the realty on which it was being used, against the sheriff, who afterwards sold the personalty under an execution issued on a judgment against the vendor, the evidence showed that a part of the property so sold by the sheriff was the produce of the realty after its purchase by the plaintiff. *Held*, that though the sale of the personalty was void as to creditors of the vendor, there being no immediate delivery thereof, plaintiff was entitled to recover for the produce of the realty after its purchase, upon proving that the purchase was in good faith and for a valuable consideration, and not otherwise.

4. The answer of a sheriff in an action against him to recover for property sold on an execution issued on a judgment against plaintiff's vendor need not allege that the sale to the plaintiff was fraudulent, when the complaint makes no claim of title based on such sale.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by Elizabeth A. Howe against J. R. Johnson. Judgment for plaintiff, and defendant appeals. Reversed.

J. A. Cooper and J. M. Mannon, for appellant. T. L. Carothers and G. A. Sturtevant, for respondent.

VANCLIEF, C. Action of the nature of the common-law action of trover to recover damages for an alleged wrongful taking and conversion of personal property. At the time of the alleged taking, the defendant was

sheriff of Mendocino county, and in his answer alleges that he was justified in taking the property, by virtue of an execution issued to him on a judgment against Montgomery Howe (plaintiff's father) in favor of Phoebe Blair, and denies that plaintiff was the owner of the property so taken, or entitled to the possession thereof. The cause was tried by the court, whose judgment was in favor of plaintiff for the sum of \$1,512, with interest and costs. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The plaintiff claimed title to the property by an alleged sale thereof from her father, Montgomery Howe. Appellant makes the point that the sale was fraudulent and void as against the creditors of Montgomery Howe, because not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property, and that the finding to the contrary by the court is not justified by the evidence. The property in question consists of one-third undivided part of certain farming utensils, farm produce, and live stock, situate at the time of the alleged sale to plaintiff on a farm in Mendocino county, known as the "Clay Ranch." On March 14, 1893, the ranch and all said personal property thereon were owned in equal parts by Montgomery Howe, Samuel Howe, and Mrs. Given. On that day, Montgomery Howe and Samuel Howe (brothers) conveyed by deed all their interests in the ranch, and verbally sold all their interests in said personal property, to the plaintiff. At the time of the sale the plaintiff was at her father's residence in Oakland, where she also resided, and the business of the sale on her part was transacted on the Clay ranch by her agent, Frank Teichman, to whom she was then engaged to marry. Teichman did not receive possession of either the ranch or the personal property at the time of the sale, though the Howe brothers were then in actual possession of both, and were working on the ranch and using the personal property. Immediately after the execution of the deed for the land, Teichman recorded it in Mendocino county, and returned to Oakland, whence he had been sent by plaintiff, and there delivered the deed to her. The only consideration for the deed for the land and the sale of the personal property was the personal services of plaintiff in keeping house for her father, as to which she testified as follows: "I made the contract with my father for wages when I was thirteen. The woman he had working left, and I told him I would do the work if he would pay me. During the first year he paid me sometimes three dollars, sometimes four dollars, not the full amount. I kept no memorandum of it. Could not tell how much he paid me. He bought my clothes and boarded me. I was to receive five dollars a month for a time. Occasionally he gave me as much as five dollars per month. This continued until I was eighteen. When

I was eighteen I was to get more. No sum was stipulated, but a different contract was made. My father said: 'When I am able I will pay you.' At the time the ranch and personal property were conveyed to me, the value fixed was a little over five thousand dollars,—about five thousand five hundred dollars. There was an agreement made to pay me so much a year for the time that I had worked,—one thousand dollars a year. The ranch was valued at five thousand five hundred dollars. My uncle had been on the ranch in charge of the personal property since February, 1891, and my father since July, 1891, but father was there only a portion of the time. I was in Oakland when the deed was made. My father and uncle were both upon the ranch, in charge of the property." She testified further that, "besides the deed to the ranch and personal property, my father gave me a note for seven thousand five hundred dollars. That made thirteen thousand dollars,—a note for \$7,500 and \$5,500 worth of property. That was the way I accepted it at the time." And also testified as follows: "It was in the agreement when I took the ranch and personal property from my father and uncle that they should stay and help me out for a time. I did not understand farming. They agreed to stay on the place and help me out. That was the contract. My uncle, Samuel Howe, was to receive fifty dollars per month, and my father was to receive fifty dollars per month. They continued to work on the place, and I afterwards paid them their wages. They were both busily engaged on the ranch, and it was a part of the agreement with them that they should have such employment. Under this agreement, I purchased a two-thirds interest in this personal property and in the ranch. Mrs. Given owned the other undivided one-third interest." Between the day of the sale (March 14th) and April 1st,—that is, from 10 to 17 days after the sale,—plaintiff again sent Mr. Telchman to the ranch as her agent, with written instructions to take possession for her of the personal property and the ranch, which he assumed to do by remaining on the ranch directing the work, and doing a part of it, until about June 1st, when he went to Oakland, and brought plaintiff to the ranch; and thereafter, until the personal property was levied upon by the sheriff, he and plaintiff formally directed the work, kept the books, employed and paid the help, bought supplies, and sold whatever of the property that was sold. But during all that time the Howe brothers lived and worked on the ranch the same as before Telchman took possession. As to this Samuel Howe testified: "After Mr. Telchman came there, my brother and I worked on the ranch just the same as we did before, except that after Mr. Telchman came up we had a boss. Previous to that I was boss. After that I was the servant. * * * Sometimes my views were asked about running the place, but I had no

authority." The testimony of plaintiff and Samuel Howe was fully corroborated by Montgomery Howe, but none of them could remember any definite agreement between the father and daughter as to what wages he was to pay her for her services, or how much he had paid her before the sale in question. No accounts were ever kept between them. He testified: "My wife died in 1876. Some time after my wife died, my housekeeper talked of going away. The plaintiff and my eldest daughter came into the office, and they said they would do the work and it should not cost any more than it did to hire housekeepers. I told them all right. * * * They were to receive pay, but how much we agreed to pay them I do not remember now. I suppose we intended to pay them what it was reasonably worth. They did the work ever since that time. My oldest daughter is now dead. She has been dead some six or seven years. After plaintiff became of age, I had a conversation with her. I do not remember how much I was to pay. I do not remember that we set any definite price. I cannot tell how long after she became eighteen years of age that her employment continued. * * * I think the services were reasonably worth from fifty to one hundred dollars per month. * * * When my wife died, plaintiff was eight or nine years old. My family consisted of three daughters and one son and a housekeeper. The plaintiff went to school until she was eighteen, and I wished her to go to school longer. I furnished her with clothes, and sent her to school, and she kept house and worked there. Ques. 'You say no particular arrangement was made?' Ans. I do not recollect any set sum. Q. You do not recollect any particular time that you made any express bargains? A. They came to the office, and told me what they would do. They would talk to me. I would agree to it. Q. Did you pretend to keep any account of the money you gave them? A. No, sir. I think sometimes they told me for so long a time they had had so much money. Q. Did you make any different arrangements with this daughter to what you had with your older daughter? A. My recollection is that she came in and talked with me sometimes, but I do not recollect what it was. I was not very particular." The plaintiff testified that both her father and uncle agreed to pay her for housekeeping, though it does not appear that her uncle was a member of the family. But there is no evidence that her uncle so agreed until about the time of the sale in March, 1893. As to this he testified as follows: "About the month of March, 1893, myself and my brother made a sale of the personal property to the plaintiff, who is my niece and my brother's daughter. We made that sale for services that were rendered in keeping house for a goodly number of years. My brother and I were partners in business—in the railroading business—in Oakland. I think plaintiff's services com-

menced two or three years after her mother's death. At the time we made the agreement we let her have the ranch and the personal property, and we gave her notes at the same time for seven thousand five hundred dollars, in payment of the services she had rendered, and in full of those services; I think for about thirteen years' services. We sold her all our right, title, and interest in the Clay ranch, and the personal property on the ranch. We owned a two-thirds interest, and Mrs. Given owned the other one-third. When we made the deed, we delivered it to Mr. Telchman, the agent of plaintiff, at Hopland. That was at the time the sale of the personal property went into effect. Plaintiff asked me to continue on the ranch, and my answer was, 'I would stop for a time.' There was no agreement at that time about our wages, but there was afterwards. * * * I knew very well that after my brother's wife died that the children had to be paid from the very start. I mean the plaintiff and her older sister. I do not know that we have agreed with her as to the rate of wages. We have put her off, and have never paid her for her services. It was all the time implied that she was to receive pay. I cannot say when was the first time that we had a talk with plaintiff about settling with her. It must have been about the commencement of the year 1893. At the time the deed was made, my brother and I had talked over the matter, but I do not know whether we had talked with plaintiff about it or not. I cannot say when was the first time I talked with her about it. I think I had a talk with her before Mr. Telchman came up to take possession of the property, but I don't know." It thus appears by her uncle's estimate that plaintiff was allowed, in addition to her personal expenses, board and schooling, \$1,000 a year from the time she was about 12 years of age; for she testified at the trial that she was then (February 15, 1894, 11 months after the sale) only 26 years of age. But she estimated the value of her services at only \$30 per month after she was 18 years of age, and at only \$5 per month before.

It clearly appears from the evidence that the alleged sale was not accompanied by an immediate delivery of the property, as required by section 3440 of the Civil Code. On this point there is no conflict of evidence. The plaintiff, her father, her uncle, and Mr. Telchman all testified that the sale of the personal property was made on March 14, 1893, at the same time the deed of the ranch was executed; and that the Howe brothers were then in actual possession of both the real and personal property; and, also, that there was no attempt to deliver to plaintiff the personal property until about two weeks after the sale. It follows that the sale is conclusively presumed to be fraudulent and void against Phoebe Blair, who is admitted to have been a creditor of Montgomery Howe at the time of the sale; and consequently the finding that plaintiff

was the owner of the property by virtue of that sale is not justified by the evidence. *Cahoon v. Marshall*, 25 Cal. 201; *Bell v. McClellan*, 67 Cal. 283, 7 Pac. 699; *Newell v. Desmond*, 63 Cal. 243; *Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167; *Etchepare v. Aguirre*, 91 Cal. 238, 27 Pac. 668; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857.

The only attempted answer by respondent's counsel to this view of the case is that, at the time of the sale, Mrs. Given was a tenant in common of one-third of the property; that upon the sale of the other two-thirds to plaintiff Mrs. Given's possession became plaintiff's possession, by construction of law; and that such constructive possession of plaintiff satisfied the requirement of immediate delivery. As authority for this, counsel cites *Freem. Coten*, § 167, which cites, and seems to rest upon, *Brown v. Graham*, 24 Ill. 630, alone. But the Illinois case is not in point. The decision in that case is fully expressed in the syllabus, as follows: "The possession of one of several tenants in common of personal property which is incapable of division is constructive possession of all. And when a tenant in common, not in possession, sells his interest, the possession of another tenant in common becomes the constructive possession of the purchaser." And this was held in that case to satisfy the statute of frauds. Conceding, for all purposes of this appeal, that a constructive possession thus acquired would satisfy section 3440 of our Civil Code, which, in view of the decisions of this court in *Newell v. Desmond* and *Bunting v. Saltz*, supra, seems extremely doubtful, still the Illinois case is not applicable, for the reason that the Howe brothers were in actual possession at the time they sold to plaintiff, and there is no evidence that Mrs. Given was ever in actual possession. *Brown v. O'Neal*, 95 Cal. 262, 30 Pac. 538.

The evidence shows that a portion of the property in question was produce of the ranch during 1893, after the sale, and therefore not the identical property sold, the value of which is shown to be \$627.61; and it is claimed that respondent is entitled to recover this sum, even though the sale of the personal property should be held void. If the conveyance of the ranch was not void against creditors on the ground of actual fraud, I think this point well taken. While the evidence tends to prove that the conveyance of the ranch was actually fraudulent, as having been made to delay or defeat creditors of the vendors, it cannot be held that there was not such a conflict of evidence on this issue as to justify the finding of the court. Should it be found on a new trial, however, that the conveyance of land was intended by the vendors to defraud their creditors, and that plaintiff did not purchase in good faith for a valuable consideration, and without notice of the intended fraud, then such conveyance should be held

void as against all persons who were creditors of the vendors at the date of the conveyance; and in that case the produce of the land during 1893, under the circumstances of this case, should be held subject to the execution by virtue of which the defendant took it.

The answer contains no allegation of fraud, actual or constructive; nor was such allegation necessary; for, since there was no indication in the complaint that plaintiff claimed title by sale from her father and uncle, the defendant was not bound to anticipate that she would do so. *Grum v. Barney*, 55 Cal. 254. But, now that defendant has notice of the nature of plaintiff's alleged title, it may be questionable whether he should expressly plead the fraud on which he relies for his defense before the new trial.

I think the judgment and order should be reversed, and the cause remanded for a new trial, with leave to defendant to amend his answer if so advised.

We concur: HAYNES, C.; BELCHER, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial, with leave to defendant to amend his answer if so advised.

(107 Cal. 55)

FIRST NAT. BANK OF BRIDGEPORT v. PERRIS IRRIGATION DIST. (CORONADO FOUNDRY & MACHINE CO. et al., Interveners. No. 19,501).¹

(Supreme Court of California. April 5, 1895.)

MECHANIC'S LIEN — CLAIM BY MATERIAL-MAN — RIGHTS OF INNOCENT PURCHASER — COUNTERCLAIM BY OWNER — COSTS OF REPAIR.

1. Under Code Civ. Proc. § 1184 (as amended in 1887), providing that a mechanic or material-man may give written notice of his claim to the owner of the structure "at any time," and requiring him to retain, from the money "due or that may become due" such contractor, a sufficient sum to answer claimant's demand, the notice may be served at any time before the money is due, though the claim has been assigned, or even after it is due, if the amount is still owed to the original contractor; but an assignment for value, with notice to the owner, after the time for payment has arrived, without knowledge on the part of the assignee of any unpaid demand, will defeat the rights of material men, and make ineffectual any subsequent notice.

2. The fact that a contract to construct a pipe line for defendant was void, for want of filing, or otherwise, does not render defendant liable to a personal judgment in favor of a material-man.

3. The right of a material-man to serve notice of his demand on the owner, requiring him to retain a sufficient sum to pay it, as provided by Code Civ. Proc. § 1184, is not affected by failure to file notice of lien within 30 days, as provided by Code Civ. Proc. § 1187, nor by Code Civ. Proc. § 1190, declaring that no lien shall be binding longer than 90 days unless proceedings to enforce it be commenced within such time.

¹ Rehearing denied.

4. Under Civ. Code, § 1439, providing that, before a party to a contract can compel another to perform any act under it, he must fulfill all conditions precedent imposed upon himself, one who has agreed with a contractor to furnish "all the couplings to be used in the construction of a pipe line," at a fixed rate per pound, cannot enforce payment before all the material has been delivered, and hence his cause of action against the owner of the structure does not accrue till the last delivery.

5. One furnishing materials to a contractor for the construction of a pipe line cannot recover against the owner of the structure, as a charge on the contract price, for patterns used in the manufacture of couplings, or boxes in which the latter are shipped, they not being used in the structure, and their price not included in that of the couplings.

6. Where a contract to construct a pipe line, and to keep it in repair for one year after completion,—the contract price to be paid 35 days after its completion,—was assigned to plaintiff after the money became due, with notice thereof to the owner, the latter's right to counterclaim for subsequent expenditures made necessary by the contractor's failure to repair was lost as against the assignee.

7. Where a contract for the construction of a pipe line included an agreement to keep it in repair for one year after its completion, and the assignee of the contractor sues for the balance of the contract price, an averment in the answer, filed more than a year after the work was finished, that "it will be required to spend more than" such balance to keep the line in repair, is insufficient to sustain a judgment for a counterclaim.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the First National Bank of Bridgeport, Ohio, against the Perris Irrigation District. The Coronado Foundry & Machine Company and another intervened. From a judgment for the intervener named, and for plaintiff, after allowing defendant's counterclaim, plaintiff appeals. Reversed.

Code Civ. Proc. § 339, subd. 1, provides that "an action upon a contract, obligation or liability, not founded upon an instrument of writing, * * *" shall be commenced within two years. Code Civ. Proc. § 1190, declares that no lien provided for in the chapter binds any building for a longer period than 90 days after the same has been filed, unless proceedings be commenced within that time to enforce the same, etc. Code Civ. Proc. § 1187, provides that one who claims a lien upon a structure for work or materials must, within 30 days after the completion of such structure, file with the county recorder a claim containing a statement of his demand, etc. Civ. Code, § 1439, provides that, before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself, etc.

Trippett, Boone & Neale, for appellant. Crowe & Anderson and Parrish & Mossholder, for respondents. O. B. Morris and W. R. Guy, for interveners.

PER CURIAM. Plaintiff, a corporation, commenced this action July 22, 1893, to recover of defendant a sum of money alleged to be due the plaintiff under an assignment

of a claim therefor to it made by the Aetna Iron & Steel Company, also a corporation, on May 16, 1893. The defendant is an irrigation district formed under the statute providing for the organization and government of such districts, approved March 7, 1887. One W. L. Ewing filed a complaint in intervention, but the findings and judgment were against him, and he has not appealed. The case comes here on the judgment roll alone.

From the record it appears that on March 28, 1891, defendant made a contract with the Silver Gate Manufacturing Company, a corporation, whereby such company agreed to construct for defendant a line of wood pipe 6.5 miles in length, and to keep the same in repair, free from leakage, for the period of one year after the completion thereof. The price to be paid by defendant for such work was by the contract made payable 35 days after the completion of the pipe line. The construction of such pipe was completed by the Silver Gate Manufacturing Company, or by said Aetna Iron & Steel Company, acting for and in the stead of said manufacturing company, on the 9th day of January, 1893. Previously, on September 14, 1892, said manufacturing company, the original contractor, assigned its claims due, or to become due, on account of the contract, to the said Aetna Iron & Steel Company. On May 2, 1893, the defendant, by its board of directors, allowed and approved the account of the Aetna Iron & Steel Company, as assignee of the original contractor, for the balance due under the said contract, amounting to the sum of \$11,692.05, of which amount \$7,500 was paid, and the sum of \$4,192.05 remains unpaid, and is the subject of the action. The demand of said Aetna Iron & Steel Company for such balance was assigned to plaintiff May 16, 1893, as stated above. The interest of the intervener, the Coronado Foundry & Machine Company, arose in this wise: Subsequently to March 26, 1891, the date of the contract, said intervener entered into an oral agreement with the contractor, the Silver Gate Manufacturing Company, whereby said intervener promised to furnish to the contractor all the iron couplings to be used in the construction of said pipe line, the quantity of such material so to be furnished being not otherwise specified, at the price of 4¼ cents per pound, which price the contractor agreed to pay. The court found that such agreement "also included the making by said intervener of all patterns for said couplings, and the furnishing of boxes in which to ship said couplings, said Silver Gate Manufacturing Company agreeing to pay the reasonable value of said patterns and boxes to said intervener." No time of payment was specified in said agreement. The intervener made such patterns to the value of \$111.05, and boxes to the value of \$99.05. Patterns, boxes, and couplings were made and supplied by the intervener to the contractor in divers quantities, and at divers times, from April

13, 1891, to November 9, 1891 (except a single item of patterns, amounting to \$7.65, found to have been furnished February 19, 1891); the last item of couplings, \$10.60 in amount, being supplied November 9, 1891. The couplings were actually used in the construction of the pipe line, but no patterns or boxes were so used. It seems that the patterns were used by the intervener in molding the couplings at its own works, and were necessary for that purpose. They were charged to the contractor, though it never had actual possession of them. The boxes were necessarily employed in the shipment of the couplings from the place of manufacture to the place of use. Payments were made to the intervener on account in the month of July, 1891, amounting to \$300; and on October 26, 1893, after this action had been begun, said intervener served written notice on the defendant that it, the intervener, "furnished materials to the Silver Gate Manufacturing Company, to be used, and which actually were used, in the construction of the pipe line for the Perris Irrigation District, under the contract between the said Perris Irrigation District and the said Silver Gate Manufacturing Company; that said material was cast couplings, to be used in the construction of said pipe line, and that the value of the materials so furnished was \$2,439.58;" also, that only \$300 had been paid on account thereof, and that a balance of \$2,139.58 remained due and unpaid; and required defendant to retain in its possession sufficient funds due under its contract with the Silver Gate Manufacturing Company to pay such balance. A few days later, November 4, 1893, said intervener filed its complaint in intervention herein. The plaintiff pleaded, among other defenses to intervener's action, that the same is barred (1) by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure; (2) by the provisions of section 1190 of the same Code. Regarding the controversy between plaintiff and defendant, the court found that default was made in performance of that term of the contract between defendant and the Silver Gate Manufacturing Company by which the latter agreed to keep the pipe in repair for one year after the completion thereof, and that defendant necessarily expended for that purpose, during such period, from January 9, 1893, to January 9, 1894, the sum of \$1,223.15. The only averment in the pleadings setting up a counterclaim for this sum is contained in the defendant's answer filed January 13, 1894, and its most material language is that defendant "will be required to expend more than the sum of \$4,192.05, withheld by defendant herein, to keep said pipe line in repair for one year from its completion." The court gave judgment in favor of the intervener, the Coronado Foundry & Machine Company, for the amount of its demand,—\$2,139.58,—and in favor of plaintiff for \$829.32, besides interest from February 13, 1893;

the remainder of the fund in the hands of defendant—\$1,223.15—being allowed to it in virtue of the counterclaim referred to. Plaintiff appeals.

1. Was the notice served on defendant by the intervener, October 26, 1893, in sufficient time to fix the right of the intervener in the fund yet remaining in the hands of defendant? Such notice was given more than eight months after the completion of the contract for the construction of the pipe; more than seven months after the balance due under said contract became payable, according to its terms; more than one year after the original contractor had assigned its rights to such balance; and more than three months after plaintiff, as a subsequent assignee thereof, had commenced this action to recover the same. Appellant maintains that, these circumstances considered, the notice was too late. The decision of this question turns upon the proper construction of the statute (section 1184, Code Civ. Proc.) as amended in 1887. What that construction should be is not discussed in the briefs filed on behalf of either the intervener or the defendant. Said section 1184 provides that: "Any of the persons mentioned in section 1183, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. * * * Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor * * * sufficient money due, or that may become due, to such contractor or other person, to answer such claim." The intervener is a material-man, within the category of persons authorized to give such notice; and, by the wording of the section, those persons "may at any time give" the specified notice. It seems reasonable to say that no assignment made by the contractor of the amount to become afterwards due to him in the course of performance of the contract could, before the arrival of the time of payment, defeat the right of the material-man to give the notice in question and obtain the benefit thereof. If an assignment so made could have that effect, then the provisions of the statute in this regard could in most cases be evaded. The section requires the owner, on receipt of the notice, to withhold sufficient money "due, or that may become due," to answer the claim; and doubtless the notice may be effectually given, so long as the money is owed to the contractor himself, although the time when it should have been paid has passed. Board of Edu-

cation v. Blake (Cal.) 38 Pac. 536. In this case the contractor assigned his claim, September 14, 1892, and before the completion of the work, to the Aetna Iron & Steel Company, and the defendant on May 2, 1893, audited and approved the claim of such assignee for the balance of the contract price then unpaid. The Aetna Company then had, at least, the rights of the original contractor. After the expiration of 35 days from the time of completing the contract, the Aetna Company was, therefore, by the terms of the contract, entitled to be paid the full amount of the contract price then remaining unpaid. As has been seen, a portion of this price was paid in May following, and on the 16th of that month the claim for the residue was assigned to plaintiff. Undoubtedly the plaintiff then had the right to receive the unpaid balance of the money; and, if payment had actually been made at any time after it was due and before the intervener served its notice of October 25, 1893, such payment would have been valid, and the intervener could not have pursued the fund in the hands of the plaintiff, or held the defendant liable in any way on account thereof. There is nothing in the record to show that plaintiff possessed any information that the intervener had or claimed even a contingent interest in such fund, or knew that anything was unpaid for work or materials used in the construction of the pipe. Why should the assertion by intervener of its latent equity, months after the assignment, toll plaintiff's right to the money, and make the act of payment unlawful, which had before been lawful? The law does not require that the assignee for value of a thing in action shall take it subject to the latent equities of third persons of which he has no notice; but only that the assignment shall be subject to the equities existing in favor of the debtor,—in this case the defendant. Code Civ. Proc. §§ 368, 440; Civ. Code, § 1459; Wright v. Levy, 12 Cal. 257. If the contractor, previous to the giving of the notice, has transferred to another, who takes the assignment for value, and without notice of the latent equities of the material-man, the amount then actually due and payable on the contract, there is then nothing either due or to become due to him, and there is no fund on which the notice can operate. It is true that the statute declares that the material-man or other person dealing with the contractor may give the notice "at any time"; but this expression must be construed in connection with the other provisions relating to the subject, and the general scheme of the Code chapter of which they form a part. That chapter contemplates throughout that the privileges it allows to those who furnish material or labor for the construction of buildings and other improvements shall be exercised with promptitude, and so as not to hamper either the owner or the contractor, or those who deal with them, in the free disposition of the property rights affected by or

arising from the contract, beyond such time as may be convenient for the assertion of those privileges. It cannot be supposed that the legislature, while requiring a portion of the contract price to be withheld from the contractor for the period of only 35 days after the completion of the contract, and making it incumbent on the material-man desirous of acquiring a lien to give public notice thereof by filing his verified claim therefor in the proper office within 30 days from the actual or presumed completion of the structure or other work, and to begin his action in the proper court for the enforcement of his claim within 90 days following the filing, yet designed that the same material-man may, without imparting notice in any manner to the public, retain a latent lien for an indefinite time after completion of the contract, and after payment is due thereunder on the compensation earned by the contractor, and that this secret equity "may at any time" be asserted, not only against the contractor, but also against those who have acquired his property interests therein by assignment or otherwise. We hold in this behalf (1) that the right of the intervener to give the notice of its demand, and thus to charge the contract price in the hands of the owner, was not affected by any assignment made by the contractor until after the time when the demand assigned became due, in this case upon the expiration of 35 days from the completion of the contract; (2) that the assignment made by the original contractor, the Silver Gate Manufacturing Company, to the Aetna Iron & Steel Company, before the completion of the work, vested the latter company, prior to the expiration of 35 days from the date of such completion, with no rights anywise different from or superior to those of the original contractor, nor even then if such assignment was made as part of a mere substitution of the Aetna Company for the contractor in the original contract,—a matter on which the findings are not clear; (3) but that the assignment by the Aetna Iron & Steel Company to the plaintiff of the contract price or the balance thereof, and notice to defendant of such assignment after the balance was due and payable under the terms of the contract, cut off all rights of the intervener in the fund so assigned, and any notice afterwards given by the intervener was futile, provided the plaintiff took such assignment for value and without notice of the unpaid demand of the intervener. We think such proviso just. If the plaintiff was a mere volunteer or trustee for the Aetna Company, or did not render value for the assignment, there is no reason why it should not stand precisely in the shoes of its assignor, subject to any right of the intervener, within the doctrine asserted in *Bush v. Lathrop*, 22 N. Y. 535. This qualification of the immunity of the assignee is commonly found in the authorities which, with the better reason, as it seems to us, affirm the right of the assignee, in good faith

and for value, to take the subject of the assignment free from the latent equities of third persons (*Redfearn v. Ferrier*, 1 Dow, 50, which Lord Eldon declared to be "a most important case"; *Livingston v. Dean*, 2 Johns. Ch. 480; *Mullison's Estate*, 68 Pa. St. 212; *Moore v. Holcombe*, 3 Leigh, 597), and has, along with the rule it qualifies, been approved in this state (*Wright v. Levy*, 12 Cal. 262, 263). The argument of the intervener that it must be presumed, in support of the findings and judgment, that some notice other than that expressly found by the court, and prior to it in point of time, was served on the defendant, is without foundation. *Railroad Co. v. Reynolds*, 50 Cal. 90. So of its contention that, since there is no finding that the contract of defendant with the Silver Gate Manufacturing Company was filed with the county recorder, it is therefore to be treated as void; and, as subsidiary consequences, that the defendant became personally liable to it, the intervener, for the materials furnished (*Code Civ. Proc. § 1183*), and no notice of its claim was necessary. The court found that a contract was entered into for the construction of the pipe line, and that it was performed. It will not be presumed in such case, without proof, that the contract was void for want of filing, or for any other reason. Even if it were void, the consequence claimed—personal liability of the defendant in the sense that could uphold the judgment in favor of the intervener—would not follow. *Lumber Co. v. Schmitt*, 74 Cal. 825, 16 Pac. 516.

2. Our conclusion on the branch of the case above considered necessitates a reversal of the judgment in favor of the intervener; but, as there may be a new trial, some other points presented should be noticed. Appellant maintains that the intervener should have filed notice of its claim in the office of the county recorder, as in cases where a lien is claimed against a building or other structure under section 1187, *Code Civ. Proc.* But the remedy provided by section 1184 of the same Code, for intercepting the contract price in the hands of the owner, is not dependent upon proceedings to enforce a lien against the property affected by the contract. *Bates v. Santa Barbara County*, 90 Cal. 547, 27 Pac. 438. Counsel question the authority of that case, but we think it construes the statute correctly. For similar reasons the intervener's action was not barred by the provisions of section 1190, *Code Civ. Proc.* The contract of the intervener was entire; it agreed to furnish to the contractor "all the iron couplings to be used in the construction of said pipe line" at a fixed rate per pound (see 2 Pars. Cont. slide p. 519, and cases cited); it could not have enforced payment in an action on the contract for any part of the couplings delivered until it had furnished all necessary for the use indicated, or had offered so to furnish the same, and the contractor had refused the offer (*Civ. Code, § 1439*); the last delivery of couplings was on November 9, 1891, and appears to

have been made in performance of the agreement of the intervener with the contractor. The complaint in intervention filed November 4, 1893, was therefore not barred by subdivision 1 of section 339, Code Civ. Proc. The court erred in allowing to the intervener the value of the patterns used in the manufacture of the couplings, and the value of the boxes in which such couplings were cased for shipment. Both the patterns and the boxes were made the subject of separate charges by the intervener, and not included in the price of the couplings; they remained the property of the contractor, and were not incorporated in the structure,—in these respects, and perhaps others, differing from the cartage considered lienable in *Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231, as being included in the value of the materials furnished. We regard the boxes and patterns here as too remote from the actual work of construction to permit their cost to be made a charge in this action against the contract price in the hands of the owner.

3. There is no pleading on the part of the defendant sufficient to sustain the judgment allowing a counterclaim in its favor for the expense of keeping the pipe in repair during the period of one year after completion. The averment that "it will be required to expend more than" a sum specified for that purpose, contained in the answer filed January 13, 1894,—after the period of one year in question had elapsed,—amounts to nothing; and we discover no other allegation by which the defect is supplied. It is found that the expenditures made by defendant for such repairs occurred between January 9, 1893, and January 9, 1894. Unless the damage thus arising from the failure of the contractor to keep the pipe in repair accrued at least as early as notice to the defendant of the assignment to plaintiff of the demand sued upon, then such damage could not be counterclaimed in this action at all,—assuming that the substance of the contract between defendant and the Silver Gate Manufacturing Company is correctly set forth in the findings before us,—for it appears that the agreement of the defendant to pay the contract price in 35 days after completion of the contract was in no manner dependent upon the contractor's engagement to keep the pipe in repair for one year after such completion. See *Wallace v. Maples*, 72 Cal. 356, 14 Pac. 19. And, upon notice to defendant of the transfer to plaintiff of the contractor's right to the money due for the work, defendant's right to counterclaim for subsequent repairs was lost as against the assignee. No right of recoupment or set-off for expense of future repairs existed in favor of defendant. Code Civ. Proc. §§ 368, 438, 440. It is not clear whether like effect would follow the assignment made by the original contractor to the Aetna Iron & Steel Company in 1892, and of which notice was had by defendant at least as early as May 2, 1893; for it may be surmised from some parts of the

record that there was perhaps a mere novation of the Aetna Company for the Silver Gate Company in the contract; and, if so, of course, such assignment would not affect the right of set-off. If it becomes material, the nature of that assignment can be determined on another trial.

The judgment and order appealed from are reversed, and the cause remanded for a new trial, with leave to any of the parties to amend its pleadings, and it is so ordered.

(21 Colo. 16)

ROSENFELD v. ROSENFELD.

(Supreme Court of Colorado. Feb. 20, 1895.)

APPEAL—REVIEW—DIVORCE—CRUELTY—PLEADING—WAIVER OF DEFECTS.

1. Where a party fails to except to a decree, the sufficiency of the evidence to sustain the decree is not reviewable on appeal.

2. Extreme cruelty, as a ground for divorce, may consist of words only, and of personal treatment short of acts of violence, causing mental suffering.

3. By answering a complaint, defendant waives his right to object thereto on the ground that its allegations are indefinite.

4. Where, in an action for divorce, the complaint alleged that defendant accused plaintiff of illegal acts, of which he was innocent, without relying on the same for relief, and the answer denied such charge, the admission of evidence to show plaintiff guilty of forgery was properly refused.

5. The causes entitling one to divorce for extreme cruelty are such as render life a great burden.

Error to district court, Arapahoe county.

Action by Edward I. Rosenfeld against Katie J. Rosenfeld for divorce. From a judgment for plaintiff, defendant brings error. Affirmed.

This action was brought by Edward I. Rosenfeld against his wife, Katie J. Rosenfeld, for a divorce on the ground of extreme cruelty. The defendant filed an answer, specifically denying the material allegations of the complaint. She also filed a cross complaint, but, as counsel claims nothing thereunder, it need not be considered. Upon the issues thus joined trial was had before a jury, and a verdict returned for the plaintiff, upon which a decree was rendered by the court dissolving the marriage bond, and ordering the plaintiff to pay the defendant's counsel fees and the costs of this action, and awarding permanent alimony to the defendant in the sum of \$5,000. The defendant brings the case here upon writ of error, and assigns numerous errors, the principal ones being that the complaint does not state facts sufficient to constitute a cause of action; that the court erred in admitting certain evidence offered by plaintiff, and refusing certain evidence offered by defendant, and in giving and refusing certain instructions; that the evidence is not sufficient to warrant the verdict; and that the alimony awarded to defendant is not sufficient.

L. C. Rockwell, for plaintiff in error. John G. Taylor, for defendant in error.

CAMPBELL, J. (after stating the facts). An examination of the voluminous record reveals the fact that the defendant failed to save any exceptions to the decree of the court dissolving the bonds of matrimony, or to the award of alimony. Under these circumstances it is the well-settled practice of this court not to review the decree upon the evidence. *Jerome v. Bohm* (Colo. Sup.) 40 Pac. 570. Hence we are precluded from determining the sufficiency or insufficiency of the evidence to sustain the decree of divorce or the judgment for alimony. Other errors, however, have been assigned relating to the rulings of the court during the trial, to which exceptions were properly taken and preserved, and these we shall proceed to consider. The principal objection urged is to the sufficiency of the complaint. There is in it no allegation that the defendant visited any act of physical or personal violence upon the plaintiff, but the allegations of cruelty refer to words spoken by the defendant of and concerning the plaintiff, and to ill treatment and conduct towards plaintiff, destructive of his peace of mind, health, and happiness, and endangering his life, which conduct was continued by the defendant throughout the existence of their married life. In its essential features the complaint is substantially similar to that in the case of *Sylvia v. Sylvia*, 11 Colo. 319, 17 Pac. 912. Counsel for plaintiff in error apparently contends that that case is not authority for the doctrine that extreme cruelty may consist of words only, and of personal treatment and conduct short of acts of personal or physical violence, and he cites a number of cases in support of his theory. Without attempting a review of the authorities, it is sufficient to say that this court adheres to the rule announced in the *Sylvia* Case, *supra*, and the cases therein cited. That case is against the defendant, and we shall not attempt to repeat the argument of the decision.

The defendant objected to the introduction of any testimony by the plaintiff in support of the allegations of the complaint for the reason just stated, but the court properly overruled the objection. In his brief, counsel criticises the complaint because of the indefiniteness of its allegations. Had timely and proper application been made by the defendant for an order requiring the plaintiff to make more specific the allegations of cruelty, the court might properly have granted such request; but by neglecting to make such application, and by answering the complaint, the defendant has waived such objection, if it be good at all, and no error was committed by the court in so deciding.

In the first instruction asked by the defendant a summary of the allegations of the complaint is made, and, after defining to the jury the meaning of extreme cruelty, the instruction concludes with this sentence: "The causes which the law deems extreme cruelty must be grave and weighty, and such as show an

absolute impossibility that the duties of the married life cannot be discharged." We suppose that the use of the word "cannot" was the result of an error in transcribing, and that counsel employed the word "can." In the same connection the instruction also states that the acts of defendant towards the plaintiff must have been such as to have destroyed his peace of mind or injured his health "to such an extent as to make the married state impossible to be endured, and rendered life itself almost unendurable." The court modified the instruction as asked by striking out the words which are italicized in the first quotation above, and substituting in the second quotation for the words "almost unendurable" the words "a great burden." The law does not require that these acts of cruelty shall show an absolute impossibility of the parties being able to live together as husband and wife, or that life should thereby be rendered "almost unendurable" for the one against whom they are perpetrated. As was said in the *Sylvia* Case: "To authorize a divorce on the ground of cruelty, the evidence should show that the acts complained of are such as that danger to life, limb, or health will naturally arise from the continued commission of such acts; but it is not necessary that the evidence should show that actual physical violence has been used. Extreme cruelty may be as effectually caused by conduct which produces mental suffering, and robs complainant of his or her peace of mind, as by blows inflicted; and to many persons the burden of the mental suffering will be much harder to bear than the burden of any ordinary physical suffering. These views are sustained by many recent and well-reasoned decisions." All of the words quoted could have been safely stricken out, as the court had elsewhere fully instructed the jury on the law of the case in this particular, and the modifications were properly made.

In the complaint there is, among others, a general allegation that the defendant had unjustly charged the plaintiff with the commission of illegal acts, of which he was innocent; but no particular act is mentioned. In proving his case, plaintiff offered a letter, written by defendant to a Mrs. Waddell, which was admitted by the court. In this letter is a brief reference to the plaintiff as a forger. The evident object of introducing this letter was not to prove that defendant had charged plaintiff with the commission of forgery, but the letter was admitted to establish other legitimate issues involved. Nothing is claimed by plaintiff by reason of such charge in that letter, if such it be, and in the instructions to the jury the court practically withdrew it from their consideration. On the cross-examination of plaintiff, as well as when defendant was introducing her own testimony, she offered to prove that plaintiff was guilty of a number of forgeries for which he had been indicted by the grand jury of Arapahoe county, but upon which trial was never had.

The court refused such offer, and the plaintiff in error with much earnestness complains of this ruling, because, as she says, if the illegal act, or crime, which she preferred against plaintiff was in fact committed by him, then such charge is true, and to speak the truth of plaintiff cannot constitute extreme cruelty, or be taken as any evidence thereof. Without so holding, but conceding, for the sake of the argument, the soundness of this contention, let us see if there is any issue making such evidence admissible. Giving to the denials of the answer a construction most favorable to defendant, there is only a specific denial that the defendant ever made the accusation of forgery against the plaintiff. The complaint alleges that the defendant accused plaintiff of illegal acts of which he was innocent. The answer merely denies that defendant made such charge. There is nothing in defendant's pleading in the nature of a plea of confession and avoidance. Therefore the defendant, having denied that she made such accusation, and neither having admitted the making of the same nor having alleged the truthfulness thereof, and the plaintiff not relying upon the same for relief, there was no error in the court's refusing to admit evidence to show that the plaintiff had been guilty of forgery.

The other errors assigned, only some of which are discussed by counsel in his brief, we have examined with care, and find that no substantial error was committed by the court. The jury was fairly instructed as to the law of the case, and the rulings of the court in admitting testimony and refusing the same were proper, and based upon the doctrine announced in the *Sylvia Case*, *supra*. Instructions which the defendant asked and which were refused by the court were properly refused, some because they had already been given by the court in so far as applicable to the cause, and others because they were drawn upon the theory which the defendant has sought to maintain in this court, to the effect that acts of physical violence must be committed before extreme cruelty can result, which contention is not only not upheld by this court, but has been heretofore expressly repudiated. For these reasons the decree of the court dissolving the bonds of matrimony, and awarding the defendant alimony in the sum of \$5,000, is affirmed. Affirmed.

(6 Colo. App. 57)

METZ et al. v. PEOPLE, to Use of REID et al.¹

(Court of Appeals of Colorado. March 11, 1895.)

CLAIMS AGAINST DECEDENT'S ESTATE—PROCEDURE—ACTION ON ADMINISTRATOR'S BOND—PARTIES.

1. Where a creditor filed his claim against an estate after the time set therefor, without any attempt to have its validity determined by the court, his right to share in the distribution

was barred, and he has no right of action against the sureties on the administrator's bond, notwithstanding a failure by such officer to file his inventory, as required by Gen. St. Colo. 1883, § 3557.

2. The absence of the administrator at the time the claim was filed will not save the creditor from the consequences of his neglect to have his claim adjudicated.

3. A joint action cannot be maintained against one of the sureties on an administrator's bond personally, and the administrator of another surety in his representative capacity.

Appeal from district court, Arapahoe county.

Action by the people of the state of Colorado, for the use of Simon Reid and others, against Rachel Metz, administratrix of the estate of Richard Metz, deceased, and another, to recover on an administrator's bond. From a judgment for plaintiffs, defendants appeal. Reversed.

Fillius & Davis, for appellants. Reuben E. Robinson, for appellees.

BISSELL, P. J. This suit against the sureties of the administrator of Newman Metz, to compel them to pay a judgment alleged to have been obtained against the decedent, has resulted in a record which abounds in legal informalities and some very significant errors. In March, 1891, Henry Metz, who was the father of Newman, filed a petition in the county court wherein he stated the death of his son, the estimated value of the personal estate, the absence of wife or children, and prayed an appointment as administrator. The petition was granted. He filed a bond in the sum of \$1,000, conditioned according to the statute, and letters of administration were issued. The bond was signed by Richard Metz and M. Hyman as sureties. Subsequently the administrator published a statutory notice to creditors, requiring them to present their claims at the May term of the county court in Arapahoe county on the second Monday of May. Reid, Murdoch & Co., who are the appellees, took no steps under the advertisement. In the July following they filed their claim in the county court, but neither gave, nor undertook to give, any notice to the administrator of their proceeding. The claim, as filed and proved in this suit, was simply a transcript of the judgment docket. This transcript contained nothing but the title of the case; its number; a statement of the judgment debtors, H. Metz and Newman Metz, partners as H. Metz & Son; the names of the judgment creditors, Simon Reid et al.; and the amount of the judgment, which was about \$740. This account was verified in Cook county, Ill., by the affidavit of Simon Reid. The affidavit simply stated that the annexed account was just and unpaid. It appeared by the testimony of the claimants' attorney that on some day, but whether before or after the claim was filed is not made manifest, an inquiry was made at the residence of Henry Metz as to his whereabouts. The attorney was informed by some one that the administrator

¹ Rehearing denied April 8, 1895.

had gone to Chicago, and was probably living there. It was conceded the administrator did not file an inventory as required by section 3557 of the General Statutes of 1883. During the course of the proceedings, Richard Metz, one of the sureties, died. Thereupon the plaintiffs' attorney moved to substitute Rachel Metz as his administratrix. No objection was interposed, and an order was entered making Rachel Metz a party. When the case was submitted, the jury were directed to find for the plaintiff such damages as they might conclude he had sustained by reason of the administrator's failure to file an inventory. They promptly found a verdict for a sum which happens to be the exact equivalent of the estimated value of the personal property according to the administrator's petition. There was no evidence tending to prove that the administrator ever received any money, personal property, or estate of any description which belonged to the decedent. After the rendition of the verdict, judgment was entered against both Rachel Metz and M. Hyman for the amount of the penalty of the bond. The right to collect was limited to the damages assessed by the jury. The entry contained no reference to the capacity in which Rachel Metz defended, and, so far as concerns its terms, execution might go against her personally as well as against Hyman, the cosurety.

The whole theory of the plaintiffs' case seems to be that the sureties on the administrator's bond can be held for the benefit of any creditor of the estate on the simple proof of a failure of the administrator to file his inventory. There may be some little basis for the contention, because of the stringent provisions in sections 3632 and 3633 of the General Statutes of 1883. This legislation permits a recovery on an administrator's bond by any person who may be injured by the conduct of the representative. The enactment is a very broad one, and, in general, provides that any violation of the provisions of the chapter shall be treated as a devastavit, and shall entitle the party to maintain his suit. Even though this be conceded to be true in its broad scope, the deduction which counsel makes, that since, on proof of a devastavit, the common law made the administrator liable for all claims which the estate owed, therefore he is liable under this statute, is a non sequitur in its application to proceedings under our statute. Without specific reference to the sections, it may be said that chapter 95 of our General Statutes has provided a plan for the management of the affairs of the estates of deceased persons. Claims against an estate must be filed in the county court, and they stand in a certain relative order, and are entitled in that order to priority of payment. It is quite as necessary that the alleged creditor should file his claim with the county court, and have it allowed, or a judgment passed upon it, as it is that the administrator should do the things prescribed. The non-

claim feature of the statute has received a very rigid construction. It was recently construed by the supreme court in the case of *Reid v. Sullivan*, 39 Pac. 338, at the last December term, though that case does not touch this particular feature of it. Reasoning by analogy from the doctrine expressed in that decision in an evidently well-considered opinion by Chief Justice Hayt, it is manifest the creditor must file his claim, and have it allowed in order to preserve his rights. If he fails, he will be barred from any share in the distribution, and this whether his claim is secured or unsecured. In the present suit the plaintiffs proved the filing of a claim. They did not file it at the time designated by the administrator in his notice, nor did they appear then and ask to have it allowed. They had the right to file it subsequently, but then they must give notice to the administrator, and have their debt passed on. The absence of the administrator, if it were proved,—and there was no evidence of this fact,—does not excuse the creditor from procuring an allowance of his claim. The necessity to obtain an adjudication respecting these claims is apparent from the general provisions of the statute. The creditor must file his claim in the usual way, and the court is bound to render a judgment respecting its validity without further pleading. The entry which the court may make has all the force and effect of a judgment against the estate. If this were not true, it would follow that, in a case like the present, a party, without obtaining a judgment against the estate respecting the validity of his claim, might proceed against the sureties on the bond, and, making no proof respecting the existence, the justness, or the validity of his claim, obtain satisfaction from the sureties, when neither the principal nor the estate was in any wise responsible for the debt. *Bank v. How*, 28 Minn. 150, 9 N. W. 626.

The gross injustice which might result from the adoption of any other rule will be made quite manifest from the consideration of the present case. *Reid, Murdoch & Co.* filed a claim in the county court, which consisted simply of a transcript of the judgment docket. Of the filing they gave no notice to the administrator, and its validity was never passed on. So far as appears from the transcript, the judgment debtors were H. Metz and Newman Metz, partners as H. Metz & Son. This transcript did not establish any liability on the part of Newman Metz. If H. Metz and Newman Metz, copartners as H. Metz & Son, were sued as a firm for a firm liability, and only H. Metz was served, the judgment would simply bind the firm property, and only justify an execution against the personal assets of H. Metz. Under these circumstances, the judgment would in no event be a claim against the estate of Newman Metz, deceased, since the creditor, to establish Newman Metz's liability, must establish a transaction out of which a personal responsibility would arise. This the transcript

does not do. If it should be held these creditors might recover without a filing of their claim, they produced no evidence which entitled them to a judgment, for they did not prove that they were creditors of the estate. They should have produced the judgment, and showed that Newman Metz was served, or that he appeared in the action, and that judgment was rendered against him. Again, it might possibly turn out to be true that the claim had been paid by the copartnership, or that Reid, Murdoch & Co. had accepted the responsibility of H. Metz for the debt, and released Newman. It is thus seen that the filing of the claim in the county court proved nothing, and, unless there is an allowance and an adjudication, there is no establishment of the debt as against the estate, and no proof of its liability to pay. Without this, how Reid, Murdoch & Co. can recover the amount of their debt from the bondsmen is not easy of apprehension. *People v. Hunter*, 89 Ill. 392; *People v. Allen*, 8 Ill. App. 17; *Peveler v. Peveler*, 54 Tex. 53; *Com. v. Wenrick*, 8 Watts, 159. It is true the Hunter Case adjudges that the plaintiff may recover nominal damages, where he proves a breach of the bond resulting from a failure to comply with some technical requirement. That is a case where the plaintiff had a claim against the estate. When he proved a breach, but did not establish that the administrator had gotten any funds, the court held he might recover nominal damages. The present case does not show that Reid, Murdoch & Co. had any claim against the estate of Newman Metz, and, although they proved a breach of the bond, it is not easy to see how they acquired any right of action. They are not charged with the duty of seeing that the personal representative properly administers the estate which is intrusted to him. The statute only gives strangers a right to sue on the bond, when they have sustained some damage which they show. When the plaintiffs failed to prove that they had a claim against the estate, or that the administrator had received any assets, they failed to establish some of the essential elements of their cause of action. They were not injured by the misconduct of the administrator, and consequently there came to them no cause of action on the bond.

We are quite at a loss to understand the proceedings which were taken to make Rachel Metz a party to the suit. It is true counsel made no objection to the entry of the order, and we are probably under no obligations to express an opinion concerning it. Since this suit goes back for a new trial, it seems best to us to make a suggestion of the irregularities which have resulted from this procedure. It seems quite well settled in this state that the Code has not changed the common-law rule respecting the right to join people who are sued in their individual right with those who are brought in in a representative capacity; this matter very early received the con-

sideration of the supreme court. *Mattison v. Childs*, 5 Colo. 78; *Lamping v. Keenan*, 9 Colo. 390, 12 Pac. 434. These cases hold that a separate action could be maintained against the survivor, Hyman, or probably a separate action against Rachel Metz, as the administratrix of the deceased surety, Richard Metz. But those cases clearly decide that a joint action cannot be maintained, and that no joint judgment can be rendered against them. As the distinction is very clearly expressed in the first case, if the suit is against Hyman, the judgment would be in reality *de bonis propriis*, and, if against the administratrix, it must of necessity be *de bonis testatoris*. In no event could the plaintiffs recover against Rachel Metz save in her representative capacity, and then, of course, only to the extent of the estate which may have come to her. The form of the judgment is likewise irregular, and should never have been entered. It runs against M. Hyman and Rachel Metz jointly, is in form a personal judgment, and would warrant the issuance of an execution against the administratrix as well as against the survivor. That such a judgment is bad in form is clearly settled in the Childs Case, and the rule should have been observed in the preparation of the entry. We do not intend by what we have said to adjudge that of necessity there can be no such thing as a judgment or claim against an estate save what may follow from the filing of a statement in the county court and the procurement of a judgment thereon. It might happen that a suit begun against the decedent in his lifetime would be continued as against the administrator after his death, and result in a judgment against the estate which would be as conclusive as any judgment which might be obtained in the county court. What the law would be with reference to such a matter we do not determine. We deem it wise, however, to limit this decision respecting the necessity to file claims in the county court to cases like that at bar. There are numerous provisions in the statute respecting the estates of decedents, and we do not desire to extend our conclusions beyond the necessity of the present inquiry. The judgment was not warranted by the case made; it is irregular and bad in form, and the case must be reversed, and sent back for a new trial. Reversed.

(4 Idaho, 422)

SCHILLER v. SMALL et al.

PETERS v. SAME.

(Supreme Court of Idaho. April 6, 1895.)

DISMISSAL OF APPEAL—BOND.

1. An appeal taken after the statutory time has elapsed will be dismissed.

2. Where two appeals are taken,—one from the judgment, and the other from an order refusing a new trial,—and an undertaking is given "on the appeal," without designating which appeal, both will be dismissed.

Appeal from district court, Shoshone county; J. Holleman, Judge.

Appeals by Albert Small and another from a judgment and from an order denying motion for new trial. Dismissed.

Wm. H. Clagett, W. T. Stoll, and John R. McBride, for appellants. A. G. Kerns and W. W. Woods, for respondents.

HUSTON, J. These are appeals from the same judgment and order denying motion for new trial. A motion to dismiss in each case is made upon the grounds—First, that the appeal was not taken in time; second, that no undertaking on appeal has been filed.

The action was for a foreclosure of a mortgage. Decree was entered June 27, 1893. Notice of appeal was filed on June 29, 1894, and served on July 21, 1894. The appeal was not taken within the year prescribed by statute. The appeal was taken from both the judgment and the order denying motion for a new trial. The undertaking is conditioned for the payment of all damages and costs which may be awarded against appellants "on the appeal," without designating which appeal. This question has been so often and so recently decided by this court that it is strange we should be again called upon to repeat the decision. *McCoy v. Oldham*, 1 Idaho, 465; *Mathison v. Leland*, Id. 712; *Eddy v. Van Ness*, 2 Idaho, 93, 6 Pac. 115; *Cronin v. Mining Co.*, 2 Idaho, 1146, 32 Pac. 53. Motion to dismiss allowed, with costs to respondents.

MORGAN, C. J., and SULLIVAN, J., concur.

(4 Idaho, 423)

ROSENBAUM et al. v. SMALL et al.

(Supreme Court of Idaho. April 6, 1895.)

Appeal by Albert Small and others from a judgment in favor of Isaac Rosenbaum and others. Dismissed.

Wm. H. Clagett, W. T. Stoll, and John R. McBride, for appellants. W. R. Stokes, for respondents.

HUSTON, J. This is an appeal from the same judgment and like order overruling motion for a new trial as the two preceding cases against the same defendants. *Schiller v. Small*, 40 Pac. 53; *Peters v. Small*, Id. The decree was entered June 27, 1893, and notice of appeal filed on June 29, 1894, and served on July 21, 1894. The appeal not having been taken within the time prescribed by statute, to wit, one year, this court has no jurisdiction to hear it. Appeal dismissed, with costs to respondents.

MORGAN, C. J., and SULLIVAN, J., concur.

(4 Idaho, 438)

GREEN v. CHRISTIE.

(Supreme Court of Idaho. April 6, 1895.)

DEFAULT JUDGMENT—EJECTMENT—ADVERSE POSSESSION—SUFFICIENCY OF EVIDENCE.

1. Where it is shown that a court of limited jurisdiction has obtained jurisdiction of the person by proper service of summons, the judgment rendered will not be held void for the

reason that the record fails to show that a continuance was had for two days, and not noted in the docket of the probate judge.

2. *Held*, under the evidence, that the plaintiff had neither the legal nor equitable title to the land in controversy.

3. Adverse possession of land cannot be considered established under any of the provisions of the Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land according to law.

4. There being not a scintilla of evidence supporting plaintiff's claim, the cause should have been taken from the jury, and judgment entered for the defendant.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action in ejectment by Arthur Green against George C. Christie. Plaintiff had judgment, and defendant appeals. Reversed.

Forney, Smith & Moore, for appellant. James W. Reid, for respondent.

SULLIVAN, J. This is an action of ejectment, brought by the plaintiff, Arthur Green, against the defendant, George C. Christie, to recover the possession of certain lands in Latah county, and for damages. The cause was tried by the court with a jury, and a verdict rendered in favor of the plaintiff for the possession of said land and \$1,000 damages, and judgment was entered in accordance with said verdict. A motion for a new trial was made and denied. This appeal is from the judgment and the order denying the motion for a new trial.

It is conceded that the respondent, Green, had both the legal and equitable title to said land on November 29, 1879, on which date a transcript judgment from the probate court of Nez Perces county, wherein one Raymond Saux was plaintiff and Arthur Green, the plaintiff herein, was defendant, was filed and docketed in the office of the clerk of the district court in and for Nez Perces county; that an execution was issued thereon, and the land in question levied upon under said execution, and sold to one Bernard Lowenburg in satisfaction of said judgment. A sheriff's deed by virtue of said sale was executed to said Lowenburg for the premises in dispute on the 6th day of December, 1880. Whatever title the defendant, Christie, had to said land was obtained from said Lowenburg, and all the title Lowenburg had was procured through the sheriff's sale and deed aforesaid. All of the files and record entries of the probate court of Nez Perces county in said cause of Raymond Saux v. Arthur Green were introduced in evidence in the trial of the case at bar on behalf of defendant, Christie, which show that summons in said case in the probate court was issued on November 15, 1879, returnable in 10 days; that it was served on defendant on the date of issue. The record so introduced fails to show that anything

whatever was done in said case on the 20th day of November, the return day of said summons. Judgment by default was taken on the 28th day of November. The record fails to show any continuance from 26th of November to 28th day of November. It is contended by respondent that, as the record fails to show a continuance from November 26th to November 28th, the probate court lost jurisdiction, and for that reason said judgment was void. The record shows that the court acquired jurisdiction by personal service of summons, and it further shows that default was entered, the defendant having failed to appear and demur or answer. No jurisdiction need be presumed. It is shown by the record. The principle that the law presumes nothing in favor of the jurisdiction of a court of limited jurisdiction has no application here, for the reason that jurisdiction is shown. And we do not think jurisdiction was lost after it was acquired. While it is true that section 4759, Rev. St., prescribes what the docket must contain, and the probate judge failed to note a continuance from November 26th to November 28th, we do not think the court lost jurisdiction for that reason. The evidence shows that Bernard Lowenburg purchased at sheriff's sale the land in dispute on the 20th day of March, 1880, and a sheriff's deed therefor was duly executed, conveying the same to him, on the 6th day of December, 1880, and that on the 22d day of August, 1884, said Bernard Lowenburg, by his attorney in fact, duly conveyed said land to the defendant, George C. Christie. Arthur Green testified in his own behalf: "That he was in the possession of the land in dispute until 1889, when he was drove off them by one Knapp. That Knapp said he got the place from Christie; that Knapp threatened, if he did not leave the land, he would write to Christie, and have the sheriff put him off. That he gave him (Knapp) possession of the cabin on said land. That he was afraid the sheriff would put him (Green) off. That he got possession of the land again the following spring. Nobody was in possession when he went in. There was then only one house or cabin on the land. That he occupied it, and was in possession until about the 20th or 25th of June of the same year. That he lost possession then by George Christie's moving on the land with his family." We have reviewed the mass of testimony in this case with great care, and it would be of little use for us to review it in this opinion, and we will not do so. The evidence shows that the defendant, Christie, expended several thousand dollars in putting fences, houses, and other improvements on said land, without any protest or objection from the plaintiff, Green. He (Green) testified on his own behalf as follows: "Certainly I let him [Christie] go on and build his buildings, thinking it was his land, and never said, 'No.'" And further: "I always was under a mis-

understanding whether that place was mine or Lowenburg's, or any other body's but my own." He further testified: "No, I never gave this property in to the assessor as my property. I told the assessor that that land was sold, and he said he knew it was; that he assessed it to Lowenburg. I told him it was sold. I paid taxes on the strip land and the pre-emption before that sale was." The evidence shows that the land was assessed to Christie from 1884 to the time of bringing this suit, and that he had paid the taxes except for the year 1893. The whole evidence shows that the plaintiff did not claim to own the land until about the time this suit was brought, and that he had repeatedly said that the land belonged to Lowenburg and Christie; that he stood quietly by and permitted Christie to expend from \$3,000 to \$6,000 in placing improvements upon said land, without claiming the land, or making any objection to Christie's improving said land; and to hold, under such circumstances, that Green is the owner of said land, would be most unjust, and in utter violation of good conscience. The plaintiff lost title when the land was conveyed by sheriff's deed to Lowenburg, and seeks to establish adverse possession under claim of title not written. Section 4043, Rev. St., provides, *inter alia*: "That in no case shall adverse possession be considered established under the provisions of any sections of this Code unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county or municipal which have been levied and assessed upon such land according to law." Under this statute the plaintiff did not establish adverse possession, nor could he, for the reason that he failed to pay the taxes. Not only failed to pay the taxes, but informed the assessor that the land belonged to Lowenburg or Christie. He did not claim to own the land.

The court erred in sustaining the objection to the following question, asked the witness Arthur Green: "Question: And you told the assessor it had been sold?" Also in sustaining plaintiff's objection to the following question, asked the witness James E. Miller: "Question, You may state, Mr. Miller, if in the month of July, 1892, you had a conversation with Mr. Green with reference to the ownership of the premises in controversy." Also the court erred in not permitting the witness Kincaid to answer the following question: "Have you had any transaction with plaintiff, Mr. Green, as the agent of Mr. Christie, since the year 1884?" We can see where the answer might tend to show that he, Green, was occupying the land in controversy as tenant of Christie, and should have been allowed. The court erred in denying defendant's motion, at the conclusion of the testimony, to instruct the jury to return a ver-

dict for the defendant, as there was not a scintilla of evidence showing that the plaintiff had a record title to said land, or any title whatever, nor that he had acquired title by adverse possession. In our view of this case, it is not necessary for us to pass upon the various errors specified in regard to the instructions given, for at the close of the evidence the case should have been taken from the jury, and judgment entered in favor of defendant, or the jury instructed to return a verdict in favor of the defendant. The judgment of the court below is reversed, with instructions to enter judgment in favor of defendant.

MORGAN, C. J., and HUSTON, J., concur.

(4 Idaho, 443)

SPOKANE & P. RY. CO. v. HOLT.

(Supreme Court of Idaho. April 6, 1895.)

DEATH OF MINOR CHILD—DANGEROUS PREMISES—INSUFFICIENCY OF EVIDENCE.

1. Where damage is claimed for death of a minor child by reason of the negligence and carelessness of defendant, it must affirmatively appear from the evidence that the accident resulted from the negligence and carelessness of the defendant, and that the imprudence or negligence of the plaintiff did not contribute to the result.

2. When the evidence clearly shows that plaintiff has not made his case, the case may be taken from the jury, or the jury may be instructed to bring in a verdict in favor of the defendant.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. Piper, Judge.

Action by Samuel H. Holt against the Spokane & Palouse Railway Company to recover for the death of plaintiff's infant son. Plaintiff had judgment, and defendant appeals. Reversed.

John R. McBride and Ashton & Chapman, for appellant. James W. Reid, for respondent.

SULLIVAN, J. This case was before this court at its November term, 1893, and the decision is reported in 35 Pac. 39. The cause was remanded for a new trial, and a new trial was had upon the issues made by the original complaint and answer, before a jury, and a verdict found in favor of the respondent for the sum of \$2,620, for which sum a judgment was entered. Thereafter a motion for a new trial was made and denied. This appeal is from the judgment and the order overruling the motion for a new trial. The appellant assigns 19 errors alleged to have been committed in the trial of the cause.

It is insisted that the complaint does not state a cause of action. This question was passed upon in the former opinion of this court (35 Pac. 39), and the court there held that the complaint stated a cause of action. It would seem to us that that decision settled the question, so far as that complaint was

concerned; but, as this question is urged with so much zeal, we have again carefully considered it, and are fully convinced that our former decision upon that point was correct.

The first error assigned is the insufficiency of the evidence to justify the verdict. The evidence shows that the well in which the plaintiff's child was drowned was upon the private grounds of the defendant, and remote from any street or sidewalk, and that at the time of the accident the child was not traveling on any public street or sidewalk, but was upon the private land of defendant, without the knowledge, invitation, or consent of defendant. Nor is it shown that the defendant had any machinery or other improvements upon said lot, whatever, that would attract children there. The evidence shows that the defendant company purchased the lot upon which the well was situated with the intention of using it, with other lots, for depot grounds; that the roadbed was graded along the northerly side of said lot, along the southerly bank of the Clear Water river. Thereafter, about February, 1891, work was stopped. The contractors quit work, and nothing further has been done towards the completion of said road. No depot was erected, and the lots purchased for its site remained the same as when the former owners left them, after removing their improvements therefrom. The defendant did not occupy said lots for any purpose whatever. The evidence also shows that, when the person from whom the defendant company purchased the lot on which said well was situated removed her improvements therefrom, she put a table top over the mouth of said well. It is also shown that said well was covered many times, by divers persons, with planks spiked down, and with boards covered with cord wood; that campers or others would remove the covering, and leave the well open. It is shown that the well was covered as late as the 15th day of April, 1891, with boards, with a stick of timber across them. The mouth of the well was entirely covered. The evidence shows that the well was properly covered, and was afterwards uncovered by strangers, without the knowledge or consent of the defendant. The evidence further shows that it is about 1,300 feet from the premises where the plaintiff resided to the well in question; and for a parent to permit his 2½ year old child to stray away from home that distance shows that the parent was very careless, to say the least. We are fully satisfied from the evidence that the defendant company exercised due care in keeping said well covered. If the rule contended for by respondent prevailed, the defendant would be liable for damages if a child climbed one of the trees growing on said lot, and fell therefrom, and was injured or killed. The tree in the case should be considered as something attractive to children, and the owner must cut it down, or so protect it that a child could not reach it to climb it, or be

liable in damages. There is nothing in the evidence showing how the child came to fall in the well. It does not show whether it was thrown in, or accidentally fell in. It appears that a playmate was with the child, and the evidence does not show but that the child was carelessly pushed into the well. This question is left wholly to speculation, inference, or conjecture. In *Sherman v. Lumber Co.*, 45 N. W. 1079, 77 Wis. 22, the court says: "Every party to an action at law has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of the evidence, upon mere inference, conjecture, or personal experience." In *Lehman v. City of Brooklyn*, 20 Barb. 234,—which is a case where a child was found drowned in a well, the cover of which had been left open, and it was admitted to have been negligence to leave the well open, it being situated in a public street,—the court says: "To entitle plaintiff to recover, it must appear affirmatively that the accident resulted wholly from the negligence of the defendant, and that the negligence or imprudence of the plaintiff did not contribute to the result." If that rule be applied to the case at bar, the plaintiff has totally failed to make his case. He has failed to show negligence on the part of the defendant, and has failed to show that negligence on his part did not contribute to the death of the child.

The ninth error assigned is that the court erred in refusing to give to the jury the following instruction requested by defendant at the time both parties rested the case, to wit, "You are instructed that there is not sufficient evidence in this case to justify a verdict for the plaintiff, and you will therefore return a verdict for defendant." This instruction should have been given, and it was prejudicial error to refuse it.

In our view of the case, it is not necessary for us to pass upon all the errors assigned. The evidence clearly shows that the plaintiff is not entitled to recover. The judgment is reversed, and the court below is ordered to enter judgment in favor of the defendant.

MORGAN, C. J., and HUSTON, J., concur.

(4 Idaho, 424)

CURTIS et al. v. RICHARDS, Judge.
(Supreme Court of Idaho. April 6, 1895.)

APPEAL—SUBSTITUTION OF ATTORNEYS.

1. A motion to change attorneys in a suit pending is a special proceeding, and a judgment rendered on such motion is a final judgment, from which an appeal to this court may be taken.

2. An attorney is a sworn officer of the court, and therefore something more than a mere agent of the client. In his sphere he is as independent as the judge of the court, and in the line of his duty superior to an ordinary agent.

3. A party has no right to arbitrarily change his attorney without paying or securing fees earned, and an original attorney is not bound to consent to a substitution, or deliver papers upon which he has a lien, until the amount of his

just demands is ascertained by a court or referee, and paid or secured.

(Syllabus by the Court.)

Error to district court, Ada county; J. H. Richards, Judge.

In an action by Richard Cable against William B. Knott defendant moved to discharge E. J. Curtis and Texas Angel as his attorneys of record. The motion was granted, and such attorneys bring error. Reversed.

A. A. Fraser and W. E. Borah, for plaintiffs in error. M. C. Athey and Wm. H. Clagett, for defendant in error.

MORGAN, C. J. This is a proceeding under section 3999, Rev. St. Idaho. The original action from which this arose was one wherein Richard Cable was plaintiff and William B. Knott was defendant, then pending in the district court in and for Ada county, in which the petitioners, who are attorneys at law, were employed by the defendant to act as his attorneys in defense of his rights in said suit, and they acted as such from the 25th day of January, 1894, until the 15th day of February, 1895, when defendant served a notice upon said attorneys that he discharged them as attorneys in said action, to which notice petitioners replied that, as a condition precedent to said discharge, they required him to pay their fees in said cause, or secure the same. Thereupon the defendant in said cause filed a motion asking that petitioners be discharged by order of the said court. The allowance of this motion was resisted by the petitioners, for the reason that defendant had not shown any dereliction of professional duty on the part of the said attorneys in the defense of said suit, nor had he paid or secured the fees of said attorneys for services rendered in said cause. Upon the hearing of said motion the district court finds as follows: "That there has been (1) no dereliction of duty on the part of said attorneys in defense of said cause; (2) that there exists between said defendant and his said attorneys such a condition of mutual ill will as will prevent them from acting together properly in the confidential relation of attorneys and client; and ordered, that said motion of said defendant to change his attorneys of record be granted,"—to which order defendants excepted, and bring said matter to this court on a writ of error.

Counsel for respondent contends that this court has no jurisdiction to review the action of the court below herein. Section 3999, Rev. St. Idaho, gives the district court authority to order a change of attorney upon the application of the client, after notice to the attorney at any time before judgment or final determination. In this case the defendant filed a motion asking for an order changing his attorneys, and substituting M. C. Athey as the attorney for said defendant. This motion, as is stated above, was resisted for the reasons given. This, then, became

a special proceeding for the removal of said attorneys, in which the defendant in the court below was the proponent and these attorneys were defendants. By the provisions of subdivision 1 of section 4807 an appeal may be taken to the supreme court from a final judgment in an action or special proceeding commenced in the court in which the same is rendered. As to these parties (the attorneys) this judgment is final; they are dismissed from this case absolutely. The petitioners therefore have a right to bring their cause to this court for review.

It is further contended that the attorney is simply the agent of his client. To a certain extent, this is true; but he is more than an agent. He is also an officer of the court, and within his sphere and in the line of his special powers he is as independent as the judge of the court, and has not only his duties and obligations to the court and to his client, but he has rights and powers entirely different from and superior to an ordinary agent. An agent receives his orders from, and is directed absolutely and wholly by, his principal, in the management of his business. On the other hand, the business of the client which is submitted to his attorney is managed entirely by the attorney, and the client is advised and directed by him. As to the business committed to his care, the attorney is the sole manager and director. Hence his responsibilities are much greater than those of an ordinary agent. His reputation and his abilities are at stake to some extent in every case he undertakes. Hence the law says the client shall not discharge him arbitrarily in the midst of the performance of his duties. But if you desire to change attorneys, you may do so with the consent of the court in a proper proceeding. As in this case the court examines into the reasons for said change, and when he ascertains that the attorney has prosecuted his client's business to the best of his ability and with fidelity to the trust imposed upon him, he so finds. Then, if the substitution is made, there is no reflection upon the ability or faithfulness of the attorney. As to his right to fees or security for the same as a condition precedent to his discharge, the law says—and this court is in accord with this view—"that a party has no right arbitrarily to change his attorney without paying or securing fees earned, and the original attorney is not bound to consent to a substitution, or deliver papers upon which he has a lien, until the amount of his just demands is ascertained by a court or referee, and paid or secured." Weeks, Attys. §§ 250, 267, and cases there cited; Meachem, Ag. § 856; In re Herman, 50 Fed. 517; Ronald v. Association, 30 Fed. 228; Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co. (La.) 6 South. 309; Gardiner v. Tyler, 36 How. Pr. 63. The substitution, however, of attorneys is a matter largely in the discre-

tion of the court, and we do not say that there may not be a case in which attorneys may be discharged without paying or securing fees already earned. We do say that the rule of law is that fees or commissions already earned must be paid or secured before substitution can be had. If this is impossible in any given case, this fact must be shown by the party moving the discharge and substitution, and then it should appear that justice to the client or attorney demands the change. We do not say that there does not exist in this case such a state of facts as renders a change necessary and proper, and therefore do not condemn the judgment of the court below; but this change should not be made without first paying or securing the fees earned, unless, as is stated, the court below should deem this impossible or impracticable. For these reasons the judgment of the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

HUSTON and SULLIVAN, JJ., concur.

(4 Idaho, 462)

STATE v. GRIFFIN.

(Supreme Court of Idaho. April 6, 1895.)

PRELIMINARY EXAMINATION—DESIGNATION OF MAGISTRATE BY PROSECUTING ATTORNEY.

It is the province of the prosecuting officer to designate the precinct where, and the magistrate before whom, a preliminary examination upon a criminal charge shall be had, within the county wherein the offense is alleged to have been committed, and most convenient to a majority of the witnesses for the prosecution.

(Syllabus by the Court.)

Appeal from district court, Logan county; C. O. Stockslager, Judge.

Lafayette M. Griffin, having been convicted of grand larceny, appeals. Affirmed.

Texas Angel, for appellant. Geo. M. Parsons, Atty. Gen., for the State.

HUSTON, J. The defendant was convicted, at the May term, 1894, of the district court for Logan county, of the crime of grand larceny. This appeal is from the judgment of conviction. The errors alleged are that the defendant did not have the preliminary examination provided by statute, in this: that the warrant of arrest was issued by and made returnable and the examination had before a justice of the peace of another precinct (in the same county) than that in which the offense was charged to have been committed. It is not charged or contended but that the preliminary examination was in strict accordance with the provisions of the statute. It is contended that the defendant had the absolute right, under the statute, to insist upon an examination before a magistrate of the precinct in which the crime was charged to have been committed. This contention has nothing to support or recommend

It is predicated upon the erroneous idea, which seems to have obtained in the minds of some people in this country, that the primary object of the criminal laws is the protection of criminals. The limit of the county is the limit of jurisdiction in matters of preliminary examinations, and the prosecuting officer will designate the precinct where, and the magistrate before whom, such examination will be had; "but all hearing on preliminary examinations must, as far as possible, be had before the magistrate most convenient to the majority of witnesses for the prosecution, unless, for good cause shown, it is ordered to be held elsewhere." Rev. St. § 7525. There being no error in the record the judgment of the district court is affirmed.

MORGAN, C. J., and SULLIVAN, J., concur.

(4 Idaho, 456)

DELSOL v. SPOKANE & P. RY. CO.

(Supreme Court of Idaho. April 6, 1895.)

LIABILITY OF RAILROAD COMPANY FOR EXPENSE OF MOVING BUILDING FROM RIGHT OF WAY.

A railroad company having purchased a right of way across the land of plaintiff, and obtained a deed for the same, is entitled to use the whole thereof for any of the purposes of said road; and the plaintiff having any buildings thereon, in the absence of any agreement with said company providing for the expense of removal thereof, must, if he desires such buildings, remove the same at his own expense.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. Piper, Judge.

Action by Louis Delsol against the Spokane & Palouse Railway Company. There was judgment for defendant, and plaintiff appeals. Affirmed.

Rand & Howe and Jas. W. Reid, for appellant. John R. McBride and Ashton & Chapman, for respondent.

MORGAN, C. J. It appears from the finding of the court in this cause that the defendant, in the month of June or July, 1890, surveyed and located the definite line of its railroad over and across the land of the plaintiff. That the road was, in the fall of 1890, constructed over and across said land without any change of the center line of said road. On the 28th day of November, 1890, the plaintiff entered into an agreement with defendant to sell and convey a strip of land along said road 40 feet wide,—25 feet on the south side of said center line of survey, and 15 feet wide on the north side of said line,—for and in consideration of the sum of \$2,500; that said sum was paid, and the land conveyed to the company. Thereupon said company took possession of said strip of land, and no more, and used said strip of land, and no more, for all its purposes, including the construction of the ditch. No other agreement was made. The plaintiff testified that he had

a greenhouse on the south side of said right of way, and located right up to the railroad grade, and, had it not been for moving the ditch to the south side of the grade, the plaintiff could have left his greenhouse where it was, but was obliged to move said greenhouse off the right of way by reason of the moving said ditch. It appears also from the evidence that plaintiff had a conversation with one Fletcher, who seemed to have charge of the construction of said road, in which said Fletcher said that the company would pay plaintiff for the removal of said greenhouse. This conversation with Fletcher took place before the deed of right of way was made to the company. It appears, also, that Fletcher had no authority to make any arrangement whatever with reference to the right of way for said road, and that said alleged conversation between Fletcher and plaintiff was never reported to the company. On this state of facts the court gave judgment in favor of the defendant, and against the plaintiff, for costs. A motion was made for new trial, and overruled by the court. Plaintiff appeals to this court, both from the order overruling the motion for new trial and from the judgment.

In brief, the facts appear to be thus: The defendant railway company located its line of road over and across the land of the plaintiff, establishing the central line of said road, and built the railroad grade on said central line; that thereafter the plaintiff sold and deeded to the railway company a strip of land 40 feet wide, along said center line, being 25 feet wide on the south side of such center, and 15 feet wide on the north side thereof, for and in consideration of the sum of \$2,500, which was paid to said plaintiff for said right of way; that after the construction of said road it was found necessary to change a ditch that ran along the north side of said line, to the south side thereof; that said ditch was changed and constructed wholly on the right of way so purchased, on the south side of the grade; that at the time the grade was constructed the plaintiff had a greenhouse situated partly on this right of way so sold to plaintiff; that, by reason of the changing of the ditch, the plaintiff was obliged to move his greenhouse off said right of way, and estimates the expenses of said removal and rebuilding of said greenhouse at the sum of \$341; and demanded of the company that it reimburse him, which the company refused to do. It appears, also, that plaintiff had a conversation with one of the engineers of said road, in which the engineer said that the company would pay him for removing the greenhouse. Said engineer had no authority to make any such statement, and nothing was said to the company concerning the same. The company having used no more of the land of the plaintiff than they had purchased and paid for, and the plaintiff having no agreement with the company for the paying of any expenses of moving his greenhouse, he has

no cause of action against the defendant. The judgment of the court below is affirmed, with costs awarded to respondent.

SULLIVAN and HUSTON, JJ., concur.

(4 Idaho, 454)

MORRIS v. MILLER.

(Supreme Court of Idaho. April 6, 1895.)

APPEARANCE — WAIVER OF DEFECTS IN SUMMONS.

A party appearing specially, and moving to quash the summons on account of insufficiency or irregularity of the same, if he afterwards enters general appearance by filing demurrer or answer, or both, waives any irregularity or insufficiency in the summons.

(Syllabus by the Court.)

Appeal from district court, Idaho county; G. W. Piper, Judge.

Action in claim and delivery by N. M. Morris against Charles Miller. Plaintiff had judgment, and defendant appeals. Affirmed.

Ailshie & Hall, for appellant. H. F. Samuels, for respondent.

MORGAN, C. J. Plaintiff brought suit in claim and delivery for the possession of a colt; alleged ownership, possession, and right of possession, wrongful taking by defendant, and demand, and refusal to return; brought suit for a recovery of possession, or for the sum of \$30, the value of the property, in case delivery cannot be had, and for \$25 damages. Summons was issued and served upon defendant. The defendant appeared specially, by Ailshie & Hall, his attorneys, and moved to quash the summons for the following reasons: First, that it does not give the notice required by law; second, that it does not give notice of the time at which defendant is to appear. The motion was heard by the judge of the probate court, and decided against the defendant. Defendant then placed on file a general demurrer to the complaint, and also an answer denying generally and specifically each and every allegation of the complaint. The demurrer was overruled by the probate court, and the case went to trial, both parties appearing. After hearing the evidence and argument of counsel, the court decided the case in favor of the plaintiff (respondent in this court), and gave judgment for the return of the property to plaintiff, and against the defendant for costs. Defendant then appealed to the district court, wherein defendant again appeared, and moved to quash the summons and service, which was again denied by the district court. The defendant refused further to appear. Testimony of plaintiff was taken, and judgment again rendered in his favor. Defendant now brings the cause to this court by appeal, and seeks to take advantage of his motion to quash the summons.

When, on the hearing in the probate court, in the motion to quash the summons, the court denied the motion, the defendant filed

a general demurrer and answer. By filing said papers he entered a general appearance in the action. A general appearance in the action waives any irregularity in the summons. The defendant having waived the irregularity in the summons, if such existed, such irregularity cannot be taken advantage of either in the district court or in the supreme court. The judgment of the court below must be affirmed, and it is so ordered.

HUSTON and SULLIVAN, JJ., concur.

(4 Idaho, 459)

STATE v. GRIFFIN.

(Supreme Court of Idaho. April 6, 1895.)

CRIMINAL LAW—APPEALABLE ORDERS—AMENDING MINUTES.

1. No appeal lies from an order refusing to vacate an appealable order.

2. The trial court has authority to amend its minutes or records to conform to the fact at any time during the term.

(Syllabus by the Court.)

Appeal from district court, Logan county; C. O. Stockslager, Judge.

Lafayette M. Griffin was convicted of grand larceny, and appeals from an order refusing to allow him to change his plea. Affirmed.

Texas Angel, for appellant. Geo. M. Parsons, Atty. Gen., for the State.

HUSTON, J. The defendant was convicted at the May term, 1894, of the district court for Logan county, of the crime of grand larceny, and was on the 27th day of June, 1894, a day in said term, sentenced to the state penitentiary for the period of seven years. In the minutes of the court, under date June 21, 1894, appears the following entry: "It appearing to the court there is an omission in the record of the proceedings had in this court on Monday, the 30th day of April, 1894, in the matter of the state of Idaho against Lafayette M. Griffin, case No. 9, it is by this court ordered that the clerk insert in the record of the proceedings of this court on said day the following: 'The defendant, Lafayette M. Griffin, being called upon in open court to plead to the information, for plea said he was not guilty as charged; whereupon the court ordered that said plea be entered, and the same be set for trial, May, 3, 1894.'" On the 18th day of October, 1894, defendant's counsel filed motion to set aside the foregoing order, which motion was denied by the court, and from such action of the court this appeal is taken. This was an order made after judgment, and an appeal, therefore, must be taken within 60 days after entry. Section 8044, Rev. St. The appeal was not taken in time, nor can this result be cured or avoided by making a motion to set aside the order, and then appealing from the action of the court denying such motion.

California S. R. Co. v. Southern Pac. R. Co., 65 Cal. 395, 4 Pac. 12; Tripp v. Railroad Co., 69 Cal. 631, 11 Pac. 219; Symons v. Bunnel (Cal.) 35 Pac. 770. The trial court has authority to amend its minutes to conform to the fact at any time during the term. *Rodriguez v. State* (Tex. Cr. App.) 22 S. W. 978; *Wight v. Nicholson*, 10 Sup. Ct. 487; *People v. Samario*, 84 Cal. 484, 24 Pac. 283; *State v. Blake* (Wyo.) 38 Pac. 356. The order of the court below denying defendant's motion to set aside the order to amend the record is affirmed.

MORGAN, C. J., and SULLIVAN, J., concur.

(4 Idaho, 453)

PARKER v. BEAGLE.

(Supreme Court of Idaho. April 6, 1895.)

WAIVER OF FINDINGS—PRESUMPTIONS.

When the record fails to affirmatively show that findings of fact were not waived, the presumption is that they were waived.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by G. J. Parker against Rachel E. Beagle to foreclose a mortgage. Plaintiff had judgment, and defendant appeals. Affirmed.

James W. Ried and G. G. Pickett, for appellant. Forney, Smith & Moore, for respondent.

SULLIVAN, J. This action was brought to foreclose a mortgage. The appeal is from the judgment presented on the judgment roll. The error assigned is: "The court erred in giving its decision, and not making findings of fact as well as conclusions of law, and stating them separately." The record contains no findings of facts or conclusions of law, separately stated, and none whatever, except those contained in the decree and judgment. Section 4408, Rev. St., provides that findings of fact may be waived, and, as the record does not show affirmatively that findings of fact were not waived, the presumption is that they were. If they were not waived, that fact must affirmatively appear in the record. *Squier v. Lowenberg*, 1 Idaho, 785; *Toulouse v. Burkett*, 2 Idaho, 265, 13 Pac. 172. Error will not be presumed, but must appear affirmatively from the record. The judgment of the court below is affirmed, with costs of this appeal in favor of respondent.

MORGAN, C. J., and HUSTON, J., concur.

(4 Idaho, 448)

WODDY v. JAMIESON.

(Supreme Court of Idaho. April 6, 1895.)

ATTACHMENT—WHEN PROPER.

W. at one time held real estate as security for money furnished by him to J. After-

wards this real estate was delivered up to J., and received by him, and thereafter W. brought suit upon his debt, and issued attachment. Held, that as the security had been delivered up to defendant, and received by him, plaintiff was entitled to his attachment.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action in attachment by J. T. Woddy against L. D. Jamieson. From an order dissolving the writ, plaintiff appeals. Reversed.

Plaintiff filed complaint on 24th day of May, 1894, alleging that defendant was indebted to plaintiff in the sum of \$929.53. On the same day affidavit and undertaking for attachment were made and filed. Attachment was thereupon issued, and placed in the hands of the sheriff, who levied the same upon real estate belonging to defendant. On June 1, 1894, defendant filed his motion to dissolve the attachment in said action, alleging as a reason therefor that the debt sued upon in this action was secured by a lien upon real estate which was voluntarily surrendered by plaintiff. The facts concerning the so-called security are sufficiently set forth in the affidavit of defendant in support of his motion for the dissolution of the attachment, and the counter affidavit of plaintiff, as follows: "State of Idaho, County of Latah—ss.: I, L. D. Jamieson, being first duly sworn, on oath depose and say that I am the defendant in the above-entitled action; that the amount of money for which this action is brought was for money had and received by me upon a contract for the sale of certain real estate, wherein and whereby it was agreed between me and the plaintiff that he should pay me the sum of \$603.68, and on taking possession of the hereinafter described real estate, and that the defendant herein was to execute to plaintiff herein a good and sufficient warranty deed for the premises, which were described as follows, to wit: The east half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$), and lots No. 1. (1) and two (2), all in section twelve (12), township forty-two (42) north, range six (6) west B. M. That the defendant herein did make and tender a good and sufficient deed of warranty to the plaintiff herein, and it was mutually agreed between the said parties, and so contracted at the time, that the plaintiff should give his promissory notes secured by real-estate mortgage on the aforesaid real estate, to secure the payment of whatever balance should remain due this defendant and unpaid on the sale of said real estate; and that by the terms of the said contract entered into it was mutually agreed and contracted between the plaintiff and defendant that the plaintiff herein should enter into the immediate possession of the said premises, and farm and hold and keep possession of the same; and that the plaintiff, acting under the terms of the said agreement, did enter into the possession of the said premises, and did hold and have a lien upon the

said premises for the amount of money so paid. Affiant would further show that the plaintiff herein utterly failed to perform his part of the agreement by making, executing, and delivering to this affiant his certain promissory note and real-estate mortgage upon the said premises for whatever balance might be found to be due; and, further, that the plaintiff herein did voluntarily surrender the possession and whatever lien he held upon the said premises to this defendant. L. D. Jamieson." Counter affidavit of plaintiff is as follows: "State of Washington, Whitman County—ss.: I, J. T. Wooddy, being first duly sworn, on oath depose and say, in reply to the affidavit made by the defendant to dissolve attachment in the above-entitled action, that I am the plaintiff in said action; that I admit there was an oral agreement between the defendant and myself, whereby I was to have the premises described in defendant's affidavit, to wit: The east half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$), and lots one (1) and two (2), in section 12, township forty-two (42), range six (6) west B. M. That I paid said defendant the sum of \$603.68, in pursuance of said agreement. That I took possession of said premises, but I deny that defendant at any time made or tendered to me a warranty deed or any kind of a deed, though I requested him so to do. I further deny that I voluntarily surrendered possession of or lien on said premises to said defendant, but that I surrendered possession to said defendant at his request, he, defendant, representing to me at the time that he had sold said premises to another party, and that he would pay me whatever sum I was out on said premises. He is now due me, and was at the commencement of this action, the amount prayed for in my complaint in said action. James T. Wooddy." Various other affidavits were filed in support of and against the allowance of the motion, which do not materially change the conditions so far as this motion is concerned. Upon the hearing of the motion the court sustained the motion and dissolved the attachment. From the order dissolving the attachment, plaintiff appeals to this court.

Thorne, Forney & Smith, for appellant.
Elder, Freund & Denning, for respondent.

MORGAN, C. J. (after stating the facts). From these affidavits it appears that an oral contract was made between the parties for the sale of certain real estate by defendant to the plaintiff, on which plaintiff paid defendant the sum of \$603.68, and went into possession of the land, agreeing to give notes and mortgage for balance due. As appears by these affidavits the balance due was not paid, nor were notes and mortgage given to secure it. The defendant alleged in his affidavit that he executed and tendered to the plaintiff herein a good and sufficient warranty deed for the premises so contract-

ed to be sold. It was also agreed that the plaintiff should enter into immediate possession of the premises; that he did so enter into possession, and held the same. The defendant further states that the plaintiff voluntarily surrendered the possession and whatever lien he had upon the premises to the defendant. The plaintiff in his affidavit admits the making of the oral agreement between the defendant and himself for the purchase of the premises, and that he paid the \$603.68 in pursuance of said agreement, and took possession of the premises, but denies that the defendant at any time made or tendered the plaintiff a warranty deed or any kind of a deed, and alleged that he (the plaintiff) surrendered the possession of the premises to the defendant at his request, he (defendant) representing at the time that he had sold the premises to another party; that he would pay plaintiff whatever sum he was out on said premises. The other affidavits, to some extent, corroborate the statements of the principals in the matter of the tender of the deed. However that may be, the material question to be considered by the court is as to whether at the time of the bringing of the suit the plaintiff held any security or pledge of personal or real estate for the payment of the money claimed to be due from the defendant to the plaintiff. Upon this material point the plaintiff and defendant seem to practically agree,—the defendant alleging that the plaintiff surrendered the real estate to him for the reason that he (plaintiff) feared that if he took a deed to the property his creditors would seize it upon his debts, while plaintiff claims that he surrendered the property to the defendant at his (defendant's) request, defendant claiming that he had sold the property to another party. So far as the question at issue before this court is concerned, it would seem to be immaterial as to whether the property was surrendered by the plaintiff to defendant upon either the one excuse or the other. The only point in the case is, did the plaintiff hold the security, as before stated, when the suit was commenced? Evidently he did not, the property having been delivered up before that time and received by defendant. It follows, therefore, that upon the facts alleged in the complaint and shown by the affidavits the plaintiff was entitled to his attachment.

The contention of the appellant that the filing of an amended complaint renders the original complaint *functus officio* as a pleading, and takes the place of the original, and by relation dates back to the time of the filing of the original complaint, is correct. The amended complaint supersedes the original when purporting to contain a complete statement of the cause of action, and becomes the complaint upon which the cause is to be tried. See *People v. Hunt*, 1 Idaho, 433; *Barber v. Reynolds*, 33 Cal. 497; *McFadden v. Mining Co.*, 8 Nev. 57. Judgment of the court below

dissolving the attachment is reversed, and the cause remanded for further proceedings.

HUSTON and SULLIVAN, JJ., concur.

(16 Mont. 63)

COTTER v. COTTER et al.

(Supreme Court of Montana. April 15, 1895.)

APPEALABLE ORDER—TEMPORARY INJUNCTION—DISSOLUTION.

1. An order refusing to appoint a receiver is not appealable.

2. Plaintiff filed his complaint for an accounting and for a temporary injunction. One of the defendants filed an answer denying all the allegations of the complaint, and alleged that plaintiff had no interest in the property involved. The other defendants demurred. Plaintiff filed no replication to the new matter set up in the answer. The motion to dissolve the temporary injunction was heard upon the complaint and answer, which were both verified. *Held*, that an order dissolving the temporary injunction was within the discretion of the court.

Appeal from district court, Silver Bow county; W. O. Speer, Judge.

Action by Daniel P. Cotter against Julia Cotter and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Waldron & Campbell and Shropshire & Burleigh, for appellant.

PEMBERTON, C. J. This is an action for an accounting, and for the cancellation of certain deeds to real estate. The plaintiff also asks for an injunction restraining the defendants from transferring or disposing of the property mentioned in the complaint, and for the appointment of a receiver pendente lite. On the filing of the complaint the court issued a temporary restraining order. The defendant Julia Cotter filed her answer, denying all the allegations of the complaint, and containing affirmative allegations showing plaintiff had no interest in any of the property mentioned in the complaint. The Laytons demurred to the complaint. Plaintiff filed no replication to the new and affirmative matter contained in the answer of Julia Cotter. Upon a hearing to show cause why a receiver should not be appointed, and upon a motion to dissolve the temporary restraining order which had been issued in the cause, the court refused to appoint a receiver, and dissolved said temporary restraining order. From this action of the court the plaintiff appeals. The order of the court refusing to appoint a receiver is not appealable. Code Civ. Proc. § 444; *Wilson v. Davis*, 1 Mont. 98; *Stebbins v. Savage*, 5 Mont. 253, 5 Pac. 278. There were no affidavits filed or proofs taken in support of the application for an injunction. In refusing to issue an injunction, or ordering the dissolution of the temporary restraining order, the court had before it the complaint and answer, both verified. Acting upon these pleadings alone, which were doubtless treated as the affidavits of the re-

spective parties, we are unable to discover any abuse of discretion on the part of the court in the action complained of in this particular. The granting or refusing of an injunction is a matter of discretion in the court, dependent upon the facts of the case. See *Mining Co. v. Murray*, 9 Mont. 475, 23 Pac. 1022, and cases cited; *Klein v. Davis*, 11 Mont. 155, 27 Pac. 511. There being no error shown in the action of the court below, the judgment is affirmed. Affirmed.

DE WITT and HUNT, JJ., concur.

(16 Mont. 33)

STATE v. McCAFFERY.

(Supreme Court of Montana. April 15, 1895.)

ASSAULT WITH DEADLY WEAPON — INDICTMENT—OBJECTIONS TO COMPLAINT—MOTION TO QUASH—PLEA—FORMER JEOPARDY—DISCHARGE OF JURY.

1. An indictment for assault with a deadly weapon, under Comp. St. p. 511, § 60, is not rendered invalid by an omission to use "feloniously," in averring the assault itself, where the assault is charged to have been made with intent feloniously to inflict the injury.

2. The right to object to the verification of the complaint made before the committing magistrate, or to that of the information subsequently filed in the district court, is waived by pleading to the merits in said court.

3. Since Cr. Prac. Act, § 206, provides that an indictment shall be set aside, upon defendant's motion, when not presented as prescribed by the act, the fact that the information was filed before defendant was examined and committed should be taken advantage of by motion to quash.

4. Under Cr. Prac. Act, § 208, providing that, if the motion to set aside the indictment is not made before the defendant demurs or pleads, the grounds of objection which might have been made in such manner are waived, where a defendant, upon the second trial of a case, did not ask to withdraw a plea of not guilty interposed at the first trial, his right to move to quash the indictment was lost.

5. Where the jury, on a trial for assault with a deadly weapon, did not deliver any verdict into court, evidence, on a plea of former jeopardy interposed at a second trial, that on the former trial the jurors agreed to acquit defendant of the charge, and find him guilty of simple assault only, and that their disagreement was as to the amount of the fine to be imposed, is inadmissible.

6. The action of the court in discharging the jury because of their disagreement, as authorized by Cr. Prac. Act, § 331, cannot be reviewed, when it does not appear how long the jury had the case under consideration.

Appeal from district court, Jefferson county; Frank Showers, Judge.

The defendant, Roger McCaffery, appeals from a judgment of the district court entered October 16, 1893, adjudging him guilty of the crime of assault, and sentencing him to pay a fine of five dollars and costs. Affirmed.

The bill of exceptions contains the original complaint made by the sheriff of Jefferson county, on information and belief, charging the defendant with having made an assault upon one John F. Smith, with the intent,

then and there, feloniously to inflict upon the person of the said John F. Smith a bodily injury, no considerable provocation then and there appearing for said assault. It appearing to the justice of the peace, "from the evidence, that there was probable cause for believing the defendant guilty," the defendant was held to answer for the offense set forth in the complaint. On November 16, 1892, the county attorney filed an information against the defendant, the charging part of which is as follows: "With a certain deadly weapon, a dirk knife, then and there had and held in his hand, did make an assault in and upon one John F. Smith, then and there being, with the intent, then and there, feloniously to inflict upon the person of said John F. Smith a bodily injury, no considerable provocation then and there appearing for said assault."

T. J. Walsh and C. B. Nolan, for appellant.
H. J. Haskell and Ella L. Knowles, for the State.

HUNT, J. (after stating the facts as above). The appellant contends that the information charged a simple assault, and not an assault with a deadly weapon to do a bodily injury, as defined by section 60¹ of the Criminal Laws of Montana. The ground of his objection is based upon the omission in the information of the technical word "feloniously," in the averment of the assault itself. For the purpose of considering this point, we may grant that the offense charged is a felony, and that the word "feloniously" is indispensable to the validity of the information; yet, when the whole charge is carefully considered, we find that the intent with which the assault was made is specifically alleged to have been, "then and there, feloniously to inflict upon the person of the said John F. Smith a bodily injury," etc. We are of opinion that an assault with a dirk knife, with an intent at the time thereof to "feloniously" injure another, is, by all reasonable rules of construction, nothing but a felonious assault, and that the information is good, as against the objection interposed. The essence of the crime charged is the intent with which the assault is made. Where, therefore, the intent, at the time of the assault, is alleged to have been feloniously to inflict the bodily harm, it follows that the expression of such intent, which was the attempt to do the injury, must have been with that wickedness of heart and mind contemplated by the law pertaining generally to felonies. So that, when the information averred and imputed to the defendant a felonious intent to do

the bodily harm which he sought to inflict when he made the assault, it necessarily imputed a felonious intent in the assault itself then and there made, and the rules of criminal pleading are complied with by the alleged felonious character of the whole offense charged in the information.

After the information was filed, a trial was regularly had. The jury disagreed, and were discharged. Upon a second trial the defendant moved to strike the information from the files, for the reason that no leave of court was ever obtained to file the same, nor had the defendant ever been examined or committed by any magistrate for the commission of any crime. The motion was overruled. Thereupon the trial proceeded. After the state had introduced at least one witness, defendant objected to the introduction of any evidence because the information "was verified by the county attorney only on information and belief, though no leave of court was ever had, nor was there ever any examination or commitment by any magistrate." The objection was overruled. The point made by defendant is that, because the sheriff verified the original complaint before the justice on information and belief, the whole proceeding before the magistrate was a nullity, and that, therefore, there was no examination and commitment as required by section 8, art. 3, of the constitution of the state. It is unnecessary to decide, in this case, whether a verification of a complaint before a magistrate, by an officer, on information and belief, is good or bad, because the question was not raised before the magistrate, or before plea by the defendant in the district court. And by failure to raise the point before plea to the merits the defendant waived any rights he may have had to object either to the original verification of the complaint before the committing magistrate, or to the verification of the information in the district court. *People v. Harris* (Mich.) 61 N. W. 871; *Lambert v. People*, 29 Mich. 71; *State v. Fall*, 56 Wis. 577, 14 N. W. 596; *State v. Ruth*, 21 Kan. 583; *In re Lewis*, 31 Kan. 71, 1 Pac. 283; *State v. Blackman*, 32 Kan. 615, 5 Pac. 173; *State v. Otey*, 7 Kan. 69; *State v. Stoffel* (Kan.) 29 Pac. 685; *State v. Osborn* (Kan.) 38 Pac. 572. In *State v. Barnes* (N. D.) 54 N. W. 541, it was decided that, where a defendant had waived a preliminary examination before a committing magistrate, he had placed himself in a position which authorized the state's attorney to file an information against him for the same offense charged in the original complaint. The provision of the Dakota constitution requiring examinations before informations are filed is substantially like our own, and it was held that where an examination has been tendered a defendant, even upon a fatally defective complaint, yet if he has the privilege of an examination, and interposes no objection to the complaint, the constitution and the laws have been complied with. The case is applicable

¹ Comp. St. p. 511, § 60, provides that "an assault with a deadly weapon, * * * with an intent to inflict upon * * * another a bodily injury, where no considerable provocation appears, or where the circumstances * * * show a * * * malignant heart, shall subject the offender to imprisonment," etc.

to the one at bar. This defendant, according to the record, exercised the privilege, and after testimony was introduced the magistrate bound him over. The defendant is correct in his argument that the information in this case could only have been filed after examination and commitment. Leave of court never having been obtained, these two steps must necessarily have been taken before any right was conferred upon the county attorney to file or present an information. But, if these preliminary requisites had not been correctly pursued, an appropriate remedy was by motion to quash upon the ground that the information was not presented as prescribed by law. Section 206, Cr. Prac. Act,² applies to informations, and the statute includes and contemplates, as a reason for quashing, such a defect (if it was a defect at all) as the defendant here complains of, provided the question of the regularity of the original complaint had not already been waived altogether by the failure of the defendant to object thereto before the committing magistrate. *People v. Dowd*, 44 Mich. 488, 7 N. W. 71; *People v. Murphy*, 56 Mich. 546, 23 N. W. 215; *People v. Gardner*, 62 Mich. 307, 29 N. W. 19. The record does not show that any leave was asked or granted to withdraw the plea of not guilty interposed at the first trial, and substitute another and different one at the second trial. Defendant, therefore, by the statute, waived any grounds of objection to the information which might have been properly raised by motion to quash. Cr. Prac. Act, § 208.³

In deciding the foregoing question of practice, the court by no means intend to hold that the verification of the original complaint in this case by the sheriff of Jefferson county, on information and belief, was defective. There is much force in the argument that, where a man verily believes that a crime has been committed, it is the best knowledge of which he may be possessed. It has been the practice, for years and years, for officers to swear out warrants based upon information and belief, and we are not prepared to hold that the oath or affirmation required by the constitution to be made to any complaint charging a person with felony, for the purpose of causing an arrest and examination to answer to a charge in another court, must be made upon the direct knowledge of the person taking the oath. A sheriff is seldom in possession of facts within his own positive knowledge. Again, those who are in possession and knowledge of the exact facts are often unwilling to become complainants

themselves. It seems to us that the proper construction of the words "probable cause," as used in the constitution, may be facts embodied in a complaint which charges the offense upon information and belief. See Washb. Cr. Law, p. 107; *State v. Davie*, 62 Wis. 305, 22 N. W. 411; *State v. Bennett* (Mo. Sup.) 14 S. W. 865; *State v. Ellison*, 14 Ind. 380; *Franklin v. State*, 85 Ind. 99; *Com. v. Phillips*, 16 Pick. 211.

The defendant, before the jury were impaneled, interposed a plea of former jeopardy, upon the ground that heretofore, "on the — day of January, 1893, a jury was duly impaneled and sworn to try the defendant upon the information herein filed, and that said cause was thereupon tried before the said jury, which said jury, after hearing the evidence submitted on behalf of the state and of the defendant, retired, in charge of an officer, to deliberate on their verdict; that the said jury, upon so deliberating, unanimously agreed that the said defendant be acquitted of the charge, as set forth in full in the information, to wit, of assault with a deadly weapon with intent to do great bodily harm, so far as the same constitutes a felony, and thereupon agreed that he be found guilty of simple assault; that thereupon a disagreement ensued among the jurors upon said jury as to the amount of the fine which should be by the said jury imposed, eleven of the jurors comprising said jury voting and agreeing to impose a fine of fifty dollars and costs, and one jurymen of the said jury insisting upon a fine of five hundred dollars and costs; that, the state of deliberations of the said jury being as heretofore set forth, the said jury returned into court, and reported that they could not agree, whereupon the said jury was by the court discharged. And the defendant avers that the discharge of the said jury by the court was without actual necessity, in that not only could the said jury agree, but they had then actually agreed, for that they had unanimously agreed to acquit the said defendant of the felony charged in the information, and that he should not be punished by imprisonment in the state's prison, and more than two-thirds of the said jury, to wit, eleven, had agreed to return a verdict of guilty of assault simply, and to fix the fine at fifty dollars, and these facts said defendant is ready to verify. To which plea the state demurred, the demurrer was by the court sustained, and the defendant excepted." By the plea of former jeopardy, defendant substantially alleged that there might have been an acquittal or conviction if the jury had understood the law at the first trial, and if the trial judge had not erred in discharging them when he did. But whether they correctly or incorrectly understood their privileges, or whether they were or were not properly charged, is immaterial, in the light of the fact that they did not deliver

² Cr. Prac. Act, § 206, provides that the indictment shall be set aside, upon defendant's motion—"First. When * * * it has not been presented as prescribed by this act."

³ Crim. Prac. Act, § 208, provides that, if the motion to set aside the indictment is not made before the defendant demurs or pleads, the grounds of objection to the indictment which might have been made in such manner are waived.

or return any verdict at all into court, as required by section 334 of the Criminal Practice Act. And until a verdict is filed by the clerk of the court a jury may change their finding at pleasure, or one juror may dissent, and thus defeat the verdict entirely, unless they afterwards agree before a separation. Bish. Cr. Proc. § 1003; *Morris v. Burke* (Mont.) 38 Pac. 1065; *Grant v. State* (Fla.) 14 South. 757; *In re Thompson*, 9 Mont. 381, 23 Pac. 933. It logically follows that there having been no complete verdict by delivery, there was no legal verdict at all, and the offer of defendant to show an agreement of the jurors in their room was properly excluded by the court. Vide authorities supra; *People v. James* (Cal.) 32 Pac. 317; *State v. Clementson*, 69 Wis. 628, 35 N. W. 56. The jury stated to the court that they were unable to agree. How long they deliberated before making this statement, we cannot say, as the record contains no dates, except the ——— days of January, 1893. They may have deliberated only one hour, or the whole of that month, so far as we can tell. Indeed, the term of the court may have about come to an end when they were discharged. The appellant did not object to their discharge. It is therefore impossible for us to say that the court abused its discretion in discharging them when it appeared, as it did, that they could not agree on a verdict. The power to discharge them, under the facts disclosed, was in the court. Cr. Prac. Act, § 331. This power was apparently exercised within the limits of judicial discretion. *State v. Reinhart* (Or.) 38 Pac. 823; *State v. Jorgenson* (Idaho) 32 Pac. 1129; *Proff. Jury Trials*, §§ 475-491; *State v. Shaffer* (Or.) 32 Pac. 545; *People v. Goodwin* (N. Y.) 9 Am. Dec. 203; *People v. Olcott* (N. Y.) 1 Am. Dec. 168.

Our conclusion is that there never was any former jeopardy, and that the district court properly sustained the demurrer of the state. We find no error in the case. The judgment is affirmed.

PEMBERTON, C. J., and DE WITT, J., concurred.

(14 Mont. 396)

STATE ex rel. NIXON v. SECOND JUDICIAL DISTRICT COURT et al.¹

(Supreme Court of Montana. May 14, 1894.)

CONTEMPT—APPEAL FROM ORDER—COLLATERAL ATTACK—CERTIORARI.

1. The action of the court in committing a person for contempt for refusal to pay alimony pending a divorce case cannot be reviewed by certiorari from the contempt proceedings or by habeas corpus, since, the allowance being an appealable order, such methods are an indirect attack thereon.

2. The remedy in such case is by proceedings to have the judgment modified, as, under

Comp. St. 5th Div. § 1004, providing that the court in divorce cases may grant alimony pendente lite, and also make such alterations therein as are just, the court has continuing jurisdiction over such subject and the person of defendant.

Application by the state on the relation of S. M. Nixon for a writ of certiorari to review an order committing relator for contempt.

John W. Cotter, for relator. Geo. Haldorn and Oliver M. Hall, for respondents.

PER CURIAM. This is an application for a writ of certiorari to review the action of the district court in committing the relator to jail for contempt in disobedience of an order compelling him to pay alimony pendente lite to the plaintiff in the divorce action of May Nixon against the relator. This application is made in aid of an application of a writ of habeas corpus, in which relator alleges that he is unlawfully imprisoned by virtue of the order of the district court, committing him for contempt, as above cited. In that divorce action the court made an order that the defendant (relator herein) pay to plaintiff as alimony pendente lite \$40 a month, and as counsel fees \$60. This alimony was paid for some months, and no appeal was taken from the order; nor does relator now complain that the order as originally made was wrong in any respect. But the alimony was not paid for the month of March, nor since that time. Relator was accordingly cited in the district court to show cause why he should not be punished for contempt for the nonpayment of the same. On that hearing he recited facts which he claimed showed his inability, or his want of faculty, to pay the alimony. Notwithstanding this attempted showing on his part, the court ordered him imprisoned until the order for alimony was obeyed. This imprisonment relator alleges was illegal, and on this writ of certiorari he asks us to review the action of the district court in ordering him imprisoned on such contempt proceedings. He also asks a discharge on his application for a writ of habeas corpus.

The order to pay alimony pendente lite was a judgment which was appealable. In *re Finkelstein* (Mont.) 34 Pac. 847. No appeal was taken by defendant in the divorce case from that order or judgment. When that judgment was rendered, it must be presumed that the court passed upon and decided the matter of defendant's faculty to pay the alimony; that is to say, that action of the court adjudicated two matters: First, that the defendant should pay such sum as alimony; and, second, that he had the faculty to pay it. That judgment remained unattacked when the contempt proceedings were taken which resulted in this present imprisonment of the relator. That order for alimony was a judgment, and had the characteristics and attributes of a judgment. A judgment cannot be attacked, as it was sought to do in this case.

¹ Republished to supply omission.

by presenting affidavits on a proceeding seeking to enforce such judgment. When the affidavits were presented on the contempt proceeding, there stood against the defendant a valid, unchallenged judgment, requiring him to pay the alimony, as therein set forth. If he considered that judgment was wrong originally, he could have appealed therefrom. But, as above noted, he never appealed from that judgment, and does not even now contend that it was not properly rendered; but he urges before us at this time that when the contempt proceedings were taken in the district court circumstances had arisen, and changes in his affairs had taken place, which rendered a compliance with the judgment at that time—March, 1894—impossible. But he could not urge or present those facts while the integrity of the judgment was allowed to remain unassailed. It was practically attempting to avoid a judgment or order by ex parte affidavits in a proceeding not directed against the judgment. If the defendant in the divorce suit (relator herein) had become unable to pay the alimony adjudged against him, he had a remedy. A court would not imprison him for his inability or want of faculty to pay the alimony; but his remedy is not by habeas corpus or certiorari. He should have sought a modification of the judgment for alimony by a proceeding for that purpose. The alimony was pendente lite. The court had continuing jurisdiction over that subject, and over the person of defendant in that case. If any doubt could be presented as to this being the law generally, that doubt would be resolved by our statute, which provides, in reference to divorces, that the court "may also grant alimony pendente lite; and the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance as shall appear reasonable and just." Comp. St. 5th Div. § 1004. See, also, 1 Bish. Mar. & Div. §§ 489-493. If the relator herein had made a regular application for a reduction of the alimony to the district court in which the suit was pending, he could have presented all of this showing as to his want of faculty to pay the alimony, and plaintiff could have rebutted such showing, and the court would then have determined whether the alimony should be reduced. On such determination an order would be made, from which the defendant could have an appeal, and on such appeal this court would have made a review. But as the matter is now before us, the question of reduction of the alimony has never been tried or determined in a proper proceeding by the district court, nor was there opportunity offered to so try and determine. The court acted within its jurisdiction. It had jurisdiction to make the original order for alimony. That order had never been set aside or attacked by proper proceeding, and the court certainly had jurisdiction to enforce its order.

The order of commitment therefore appearing to be warranted by the proceedings as

shown on return to the writ of certiorari, and no ground being shown to warrant the prisoner's discharge, he must be remanded to custody, and judgment will be entered accordingly. The prisoner is therefore remanded. All concur.

(16 Mont. 24)

SHEPHERD v. FIRST NAT. BANK OF BUTTE.

(Supreme Court of Montana. April 15, 1895.)

FRAUDULENT CONVEYANCES—DEBT DUE WIFE—ACQUIESCENCE OF CREDITOR—FINDINGS OF JURY.

1. S., being insolvent, and owing both a bank and his wife, paid his debt to his wife in full by deeding to her property of less value than the amount of said debt, which property he obtained by money drawn from the bank. The bank took no steps to subrogate the real estate to the bank's claim until 14 months after the deed was made, and a considerable time after they knew the circumstances, and allowed the overdraft to continue at the bank, and to rise in the course of business at one time to \$2,000 more than it was when the first payment was made on the property. Held evidence to show that the bank did not regard the transaction as fraudulent during that time.

2. The transfer to the wife, who was demanding a settlement, and was offering a large discount, while the bank was extending the credit, was not fraudulent per se.

3. The court is justified in setting aside the findings of the jury when they are clearly against the evidence.

4. The court is justified in setting aside a special finding of the jury that the deed was taken in the wife's name to defraud creditors.

Appeal from district court, Silver Bow county; John J. McHatton, Judge.

Action by Flora E. Shepherd against the First National Bank of Butte to remove cloud on title. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in the nature of one to remove a cloud from the title of plaintiff to certain real estate. On December 9, 1891, the defendant, the bank, commenced an action in the district court against Frederick H. Shepherd, the husband of this plaintiff, praying judgment for the sum of \$10,000 and interest. The bank, as plaintiff in that suit, procured the issuance of a writ of attachment. Said writ was levied in the manner provided by law upon the interest of defendant therein, Frederick H. Shepherd, in and to the property known as "lot 6, block 32, in the city of Butte." The legal title of said property was in the name of this plaintiff, Flora E. Shepherd. The deed was made to her. The bank, by its attachment, took the position that, while the legal title was in Mrs. Shepherd, in fact the defendant Frederick H. Shepherd was the real and equitable owner of said premises. On the 10th of October, 1890, Patrick Talent owned said premises, and deeded the same to Flora E. Shepherd, under the circumstances as will appear below. The bank, in its action against Frederick H. Shepherd, obtained judgment against him on the 8th of February, 1892, for \$10,508.33. The plaintiff in this action claims

that Frederick H. Shepherd never had any interest whatever in said real property, and that the filing of the writ of attachment is a cloud upon her title, which injures the salable quality of the same. She asks that the levy of said writ, as against the said real estate, be declared void. In an answer filed by defendant, the bank, it set up that said Frederick H. Shepherd was indeed the equitable owner of the property described. It was upon this issue that the case was tried.

It appears that Frederick H. Shepherd, about October, 1890, was engaged in the business of buying ores in Butte. He had an overdraft account at the First National Bank. He was buying, selling, and shipping ores, and drawing money from the bank to pay for ore, and depositing funds therein again as he received returns from his ore sales. On October 10, 1892, his overdraft account was in the neighborhood of \$7,000. He claimed that he then had \$11,000 worth of ore on his platform. He consulted the cashier of the bank about buying a home. Finally, on October 10, 1892, he bought the house and lot now in controversy. The price was \$6,500. He further overdrew his account at the bank in the sum of \$4,000, and made a first payment for the premises. The remainder of the consideration was left for deferred payments. Mr. and Mrs. Shepherd both testified that he owed her, on October 10th, about \$8,000, without interest. When the purchase of the house and lot was made, the deed from the grantor was made to Mrs. Shepherd. Both the Shepherds testified that this house and lot was a full payment by Shepherd to his wife of the amount which he owed her, up to the time when the title of this house and lot was made to her.

Upon the trial special findings were submitted to the jury, which they answered as follows: "(1) Was Frederick H. Shepherd solvent on the 10th day of October, A. D. 1890? Answer. No. Robert Tait, Foreman. (2) Was Frederick H. Shepherd indebted to Flora E. Shepherd on the 10th day of October, A. D. 1890? Answer. Yes. Robert Tait, Foreman. (3) Did Frederick H. Shepherd and Flora E. Shepherd honestly and fairly agree between themselves that if Frederick H. Shepherd should pay Patrick Talent \$6,500 for the property in question that the debt from Frederick H. Shepherd to Flora E. Shepherd should be paid thereby? Answer. No. Robert Tait, Foreman. (4) Has Frederick H. Shepherd any interest in the property in question? Answer. Yes. Robert Tait, Foreman. (5) Was the agreement that Frederick H. Shepherd should pay for the property transferred from Patrick Talent to Flora E. Shepherd made for a valuable consideration? Answer. No. Robert Tait, Foreman. (6) Was the deed from Patrick Talent to Flora E. Shepherd taken in the name of Flora E. Shepherd with the intent on the part of Frederick H. Shepherd and Flora E. Shepherd to defraud, hinder, or delay the creditors

of Frederick H. Shepherd? Answer. Yes. Robert Tait, Foreman." The plaintiff moved to set aside these findings, and to substitute others, and for judgment in her favor. The defendant moved the court to adopt the findings. After consideration for more than a month, the court decided these motions by making the following order: "The motions of the respective parties to the above-entitled action for judgment having been heretofore argued and submitted, the court this day sustains the motion of plaintiff in so far as to make the following findings: (1) The court finds, as found by the jury, that Frederick H. Shepherd was insolvent on the 10th day of October, 1890, and said finding is adopted. (2) The court finds that Frederick H. Shepherd was indebted to Flora E. Shepherd on the 10th day of October, 1890, as found by the jury, and said finding is adopted; and the court further finds that said indebtedness exceeded in amount the price paid for the property in question: (3) The court declines to adopt any of the other findings of the jury. (4) The court finds that Frederick H. Shepherd and Flora E. Shepherd fairly and honestly agreed between themselves that if the said Frederick H. Shepherd should pay Patrick Talent \$6,500 for the property in question, that the debt from said Frederick H. Shepherd to Flora E. Shepherd should be paid thereby. (5) That Frederick H. Shepherd has no interest in the property in question. (6) That the deed from Patrick Talent to Flora E. Shepherd was for a valuable consideration, as between said Flora E. Shepherd and Frederick H. Shepherd, and was not taken in her name with the intent on the part of Frederick H. Shepherd and Flora E. Shepherd to defraud the creditors of said Frederick H. Shepherd. As conclusions of law the court finds: (1) That all the findings of the jury not herein found and adopted should be set aside, and they are therefore vacated and set aside. (2) That the plaintiff is entitled to judgment as prayed for in her complaint. Judgment is hereby ordered accordingly. Dated Dec. 3, 1892. John J. McHatton, Judge." In pursuance of the findings made by the court, the judgment was entered in favor of the plaintiff. The defendant now appeals.

Forbis & Forbis, for appellant. Corbett & Wellcome, for respondent.

DE WITT, J. (after stating the facts). We are as fully aware now, as we were when we wrote the opinion in *Lambrecht v. Patten*, 38 Pac. 1063, that money transactions between husband and wife, when creditors of the husband are concerned, should be scrutinized very carefully, lest the intimate relations of such persons should be the convenient means of working a fraud against creditors. The case before us seems to be, perhaps, somewhat a close one, and has received the careful consideration of this court, as well as

that of the court below. The jury found (and the court adopted the findings in this respect) two facts which are not now questioned: (1) That on October 10, 1890, when Frederick H. Shepherd bought the real estate in question, and had it deeded to his wife, he was insolvent. (2) At that same time Frederick H. Shepherd was honestly indebted to his wife. The court added to this finding that the debt from Frederick H. Shepherd to his wife was in a larger sum than the price paid for the real estate. This finding is amply sustained by the testimony. The Shepherds' testimony as to this was very much in detail as to the items and dates and memoranda and vouchers. We are clearly of opinion that this finding cannot be now disturbed.

We next examine the third finding of the jury in connection with the fourth finding of the court. The court's finding set aside that of the jury on this subject. The action of the court in this respect cannot be questioned. Both the Shepherds testified positively that the purchase by Frederick H. Shepherd of the real estate from Talent for \$6,500, and the deed of the same to Flora E. Shepherd, was in full payment of the debt owing from the husband to the wife. There was not a syllable of testimony to the contrary. The jury arbitrarily disbelieved the Shepherds. The court, on the other hand, believed them. There is nothing whatever in the case by which we can set aside the finding of the court in this respect. Thus we have the third fact in the case.

We now come to the fifth finding of the jury and the first paragraph of the sixth finding by the court. That the court was right in this follows from the view we have just expressed as to the third fact established. Thus we have the fourth fact in the case, namely, that the purchase of the real estate by Frederick H. Shepherd for Flora E. Shepherd was for a valuable consideration.

We next observe the sixth finding by the jury and the latter part of the sixth finding by the court,—that is, the court found, contrary to the finding of the jury, as follows: That the deed from Talent to Mrs. Shepherd was not taken in her name with the intent on the part of Frederick H. Shepherd and Flora E. Shepherd to defraud the creditors of Frederick H. Shepherd. To recapitulate up to this point, we may state the situation as follows: Frederick H. Shepherd, being insolvent, and owing both the bank and his wife, paid his debt to his wife in full by delivering to her property of less value than the amount of said debt, which property he obtained by money drawn from the bank. Under these established facts, and in consideration of the further facts in the case, which we will note below, must the district court be reversed in finding that the deed from Talent to Flora E. Shepherd was not taken in her name with the intent by the

Shepherds to defraud the bank? Mr. Shepherd consulted with the bank's cashier as to purchasing the real estate in question, which was a residence and a home. He did not tell the cashier that the deed was to be made to his wife. He owed the bank \$7,000 when he bought the house. He had \$11,000 worth of ore on his platform. The payment on account of the house of \$4,000 ran his overdraft to \$11,000. We speak in round numbers in giving these figures. The bank advanced the \$4,000 which was paid on the house. The bank people afterwards ascertained that the deed of the house was made to Mrs. Shepherd. It does not appear just when the bank cashier ascertained this fact. He himself, as a witness, did not state. The deed to Mrs. Shepherd was dated October 10, 1890. The bank commenced its action against Shepherd December 9, 1891. Fourteen months elapsed between these dates. Some time during this period of 14 months the bank's cashier ascertained that the deed had been made to Mrs. Shepherd. When he became aware of this fact he did not vigorously, or at all, protest to Mr. Shepherd as to his conduct. He simply spoke to Mr. Shepherd about it, and asked why he had the deed made to his wife. He did not then sue Shepherd. He did not demand or ask from Shepherd that he procure for the bank security upon the real estate for the overdraft. He took no step to subject the real estate to the bank's claim until 14 months after the deed was made, and until at least a considerable time after he knew that the deed was made to the wife. He allowed Shepherd's overdraft to continue at the bank, and to rise and fall in the course of business, and to increase at one time to the sum of \$13,000, which was \$2,000 more than it was after Shepherd had made his first payment on the house. While these facts may not have satisfied the district court that the deed of the house was made to Mrs. Shepherd with the bank's consent, yet they did tend to show to that court that the officers of the bank did not look upon the transaction as a fraud upon the bank. If the bank had at once, upon the discovery that the deed was made to Mrs. Shepherd, closed Mr. Shepherd's overdraft account, instead of allowing it to increase, and had sued him, and sought to subject the real estate to the payment of their claim, the district court would have had a different showing of a claim by the bank of a fraud by the Shepherds. Under these circumstances, the district court had evidence which tended to show that the bank did not regard the Shepherd transaction as fraudulent until Shepherd had closed his business in Butte by a sudden departure therefrom.

We will now examine for a moment Mrs. Shepherd's relation to the transaction. She testified that Shepherd always promised to pay his debts to her when he could, or when he had something "to the good," as they

both expressed it. Now, what was the situation, from Mrs. Shepherd's point of view, on October 10, 1890? On that date Shepherd owed the bank \$7,000, and had \$11,000 worth of ore. Mrs. Shepherd testified that she considered him \$4,000 "to the good" at that time; and it is to be observed that \$4,000 is the amount which Shepherd then put into the payment on the house. We cannot say that the district court erred in holding, under these facts, that there was not a fraudulent design between Mr. and Mrs. Shepherd. All the witnesses to the whole business were before the district court,—both of the Shepherds and the cashier of the bank, who attended to all of the business of the bank,—and also the memoranda and vouchers which Mrs. Shepherd produced. Frederick Shepherd's situation on October 10, 1890, was this: He was insolvent, as found by the court; he was overdrawn at the bank \$7,000, and owed his wife \$8,000, without counting interest; he had \$11,000 in ore as assets. Under these circumstances he paid one creditor rather than another. This one may do. Of these two creditors, his wife was pressing for a settlement, and the other creditor, the bank, was not so pressing, but, on the contrary, was extending his credit, and did later extend it \$2,000 more than the aggregate sum of \$7,000 and \$4,000. The creditor, the wife, agreed, in consideration of the delivery to her of the \$6,500 piece of property, to cancel a debt which amounted to \$8,000, without counting a large amount of interest. That was an advantageous settlement for Frederick Shepherd. That creditor—the wife—was demanding a settlement, and was offering this large discount. The other creditor, the bank, was not demanding a settlement. Shepherd paid the importunate creditor, and did not pay the lenient one. If the creditor the wife had been any other than a wife, we think that the transaction would never have been questioned by any one. We said in *Lambrecht v. Patten*, 38 Pac. 1005: "It is not fraud per se for a husband to pay his wife a debt which he honestly owes her." In the case at bar the district court was evidently of opinion that it must construe the payment to the wife as fraud per se, or not fraud at all. It certainly was not fraud per se. We can concede that the facts in this case, at first sight, demanded a close scrutiny from the district court. We think they were given a very close scrutiny. The court held the case five weeks after the trial before it made its findings. The court had the witnesses before it, and the memoranda and vouchers and papers which had been produced. We cannot say that the district court did not wisely exercise its discretion, in view of all the facts. On general principles it is not as strong a case for affirmance when the jury finds one way and the court sets aside the findings and reaches an opposite conclusion, as it would be if the jury had found

for the plaintiff, and the court had adopted that finding, or if the court had made the findings without a jury. But in this case, as we have observed above, some of the findings of the jury which the court set aside were absolutely and clearly against the evidence; and, taking the findings which the court finally adopted, we are of opinion that the evidence to sustain them is sufficient to prevent this court from disturbing the discretion exercised below. The judgment is therefore affirmed.

HUNT, J., concurs.

(16 Mont. 81)

FELTON v. WEST IRON MOUNTAIN MIN. CO.

(Supreme Court of Montana. April 22, 1895.)

CORPORATIONS—COMPENSATION OF OFFICERS.

Where a by-law authorizes the trustees of a mining corporation to employ and fix the salary of its superintendent, a trustee, who is also secretary of the corporation, may recover on an implied contract for services rendered as such superintendent, which were clearly outside his ordinary duties as secretary or trustee, and which were performed under circumstances showing that it was well understood by the corporate officers, as well as himself, that they were to be paid for.

Appeal from district court, Missoula county; C. M. Crutchfield, Judge.

Action by Charles Felton against the West Iron Mountain Mining Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

M. L. Crouch and H. D. Moore, for appellant.

PEMBERTON, C. J. This is an action brought by the plaintiff to recover for labor and services performed as superintendent of the defendant's mines, and for money expended and goods furnished for its use and benefit. The answer denies all the allegations contained in the complaint, as to the indebtedness sued for, and pleads a counterclaim against the plaintiff. The replication denies the counterclaim. The case was tried with a jury. The jury made special findings, and rendered a general verdict for the plaintiff. Judgment was rendered for the plaintiff. From the judgment, and an order overruling a motion for new trial, this appeal is prosecuted. The theory of the defense is that the plaintiff was a trustee of the defendant, a corporation, and a large stockholder therein; that he had never been appointed superintendent by the board of trustees, and his compensation fixed, as required by the by-laws of said corporation; that he was trustee and secretary of the company, and was employed by the day at \$3.50 per day for what time he actually worked in the mines, and that the service he seeks compensation for in this action, as superintendent, was rendered by him as

trustee, without any contract for pay therefor, either express or implied; that he had been paid all the company owed him on any account whatever. The defendant sets up a counterclaim against the plaintiff for stock of the company which it alleges plaintiff sold, and failed to account for the money obtained thereby. There were three questions of fact submitted to the jury: First. Did the plaintiff perform the service, expend the money, and furnish the goods, as alleged in the complaint, for the use and benefit of the defendant? Second. Did the plaintiff perform such service outside of his duties as trustee, secretary, and stockholder, and under such circumstances as to clearly raise the presumption that he and the trustees understood that he was to be paid therefor? Third. Was the defendant's counterclaim established by the evidence? These questions of fact were all submitted to the jury, under fair instructions, we think. It is true there was a conflict of evidence upon all these issues. But it was the province of the jury to settle this conflict. They determined the questions in favor of the plaintiff. We think there was sufficient evidence to support the findings.

The defendant contends that the plaintiff could not recover upon an implied contract for service as superintendent, insisting that, to entitle him to recover, he should show that he was employed by the board of trustees, acting in its official capacity. We think the court rightly interpreted the law governing this part of the contention in the following instructions given to the jury: "The jury are instructed that if they find from the evidence that the plaintiff was a trustee of the company at the time the services alleged by him were performed, and that by a by-law of the company the power to fix the compensation of the superintendent was given to the board of trustees, and that no compensation was ever fixed by them, and that the plaintiff had a large pecuniary interest in the management and success of the company, and that when he assumed the duties of the office of superintendent, without some agreement or provision for compensation, the presumption may properly arise that he performed the services gratuitously. In such case there may be presumed to exist a reason, in the fact of the relation and interest he has in the company, to induce him to assume duties and perform services in its behalf not dependent upon compensation, when nothing appears to the contrary." "The jury are further instructed that if they believe from the evidence that the plaintiff was, during the time he claims to have acted as manager or superintendent of the defendant company, the secretary or trustee of the defendant company, then plaintiff cannot recover compensation for services rendered by himself for defendant company upon an implied contract, unless it be established by a clear

preponderance of the evidence—First, that the services were clearly outside his ordinary duties as secretary or trustee; second, that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers; as well as himself, that the services were to be paid for by the defendant company." We see no reason why a party may not recover of a corporation for such service, under the same circumstances that would permit of a recovery against a partnership or individual.

The defendant also contends that the jury disregarded the instructions of the court, quoted above. There was a conflict of evidence as to the matter covered by the instruction, but we are not authorized by the record to conclude that the jury disregarded it. The errors assigned pertain principally to questions of the insufficiency of the evidence to warrant the findings of fact. Questions of the weight and sufficiency of evidence, as well as the credibility of the witnesses, are determined by the jury, and in this case we do not feel authorized to disturb their determination, or the judgment rendered in accordance therewith. The judgment is affirmed.

DE WITT and HUNT, JJ., concur.

(16 Mont. 90)

CHAMBERS et al. v. CITY OF BUTTE.
(Supreme Court of Montana. April 22, 1895.)

JUDGMENT BY DEFAULT—VACATION.

Where default against a city was entered more than five years after the time for filing an answer, and no attempt was made to set it aside until 15 months thereafter, an affidavit by one who was city attorney at the time the application to open the default was made, in which affiant stated that he had "received an impression from some source" that the matter had been disposed of, and that he was "unable to state why the city was allowed to be in default," was insufficient to show excuse for defendant's neglect.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by R. C. Chambers and others against the city of Butte. From an order granting defendant's motion to open a default, plaintiffs appeal. Reversed.

This is an appeal from the order of the district court granting a motion to open a default. The facts upon which the motion was granted are as follows: Complaint was filed July 31, 1882. The demurrer of the city of Butte was filed January 12, 1884. On October 3, 1885, the demurrer of the city was withdrawn, and that defendant granted until November 15th to answer. On March 4, 1891, no answer of that defendant being filed, its default was entered. On June 18, 1892, the plaintiffs proved up their case against the defendant, the city of Butte, and judgment was entered. The action was in the nature of ejectment. On August 2, 1892, the de-

defendant made a motion to set aside the default and the judgment. The motion was made upon the record, and also upon the affidavit of Mr. John W. Cotter, city attorney of Butte. After stating some formal facts, and also the facts of the record which are above recited, the affidavit continues as follows: "That, at the time said default was entered, I had no knowledge of the existence of the pendency of the action against the city of Butte until some time during the winter of 1891-92, or the spring of 1892, or later. That, when I first learned of said action, I was informed, or received an impression from some source, that the matter as to the said city of Butte had been disposed of, or that it was not to be pressed against the said city, and am unable to state from what source I received the said information or impression. That on or about the 18th day of June, A. D. 1892, the plaintiffs proved up in said action against the defendant, the city of Butte, and others, and that a judgment has been entered in said cause against this defendant and others. That affiant is informed and believes that the city of Butte has a good and valid defense against the said action so far as the said city is concerned, and, if it has an opportunity to defend the same, that it will be able to show a good and meritorious defense. Affiant is unable to state why the said city was allowed to be in default in this matter, as its default was entered before my term of office began, and during the incumbency of my predecessor in said office. Affiant herewith presents a verified answer of the defendant, the city of Butte, to the said action, said answer being verified by Lee Mantle, mayor of the said city, and asks leave to file the same, and asks that the said default and judgment be set aside, and that the city be allowed to defend the said action. [Signed] John W. Cotter." The default was opened.

Wm. Scallon, for appellants. John W. Cotter, for respondent.

DE WITT, J. (after stating the facts). It appears that the defendant's answer was due on November 15, 1885. About five years and a half elapsed without any answer being filed. Its default being entered, fifteen months elapsed without any effort to obtain leave to set aside the default, or to file answer when the application was made. We are of opinion that the facts set up do not show any excusable neglect. Seven years elapsed without the defendant's making an attempt to file an answer. It is a matter of which we have knowledge, from the laws of the state, that a municipal corporation like the city of Butte is constantly represented by an attorney. Nothing whatever appears to show why the city did not attempt to ask leave to file an answer. It is simply shown that the gentleman who was the city attorney of Butte, when the application to set aside the judgment and default was made,

had an impression from some source that the matter was disposed of. He, in his affidavit, says that he was unable to state why the city was allowed to be in default. We are of opinion that the city was utterly and absolutely without excuse, and that there is nothing in the record to show that the lower court exercised a reasonable discretion in setting aside the judgment and the default. *City of Helena v. Brulo* (Mont.) 39 Pac. 456; *Thomas v. Chambers*, 14 Mont. 423, 136 Pac. 814. The order setting aside the default is reversed, and the case is remanded, with directions that the judgment against the city of Butte be affirmed. Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 85)

NELSON v. DONOVAN et al.

(Supreme Court of Montana. April 22, 1895.)

BREACH OF APPEAL BOND—DEMAND—RES JUDICATA.

1. Where an appeal bond is conditioned on the payment of a judgment, a demand for its payment is not necessary before an action on the bond.

2. Where, pending a motion for a new trial, bond is given, to procure a stay of execution, conditioned on payment of the judgment, the taxation of costs, the new trial being denied, if unappealed from, is, in an action on the bond, *res judicata*.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by N. P. Nelson against James Donovan and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Donovan & Lyter, for appellants. Bishop & Martin, for respondent.

DE WITT, J. Since the decision of the motion in this case (14 Mont. 78, 35 Pac. 227) the case stands upon an appeal from the judgment. There is nothing before us but the judgment roll. Judgment was rendered in favor of the plaintiff upon the pleadings. If there was an issue in the pleadings, this was error. The appellants contend that there was an issue. The plaintiff sued upon a bond, alleging breach of the conditions of the same. The bond was given by appellants here to stay an execution pending a motion for new trial in the case of James Donovan (one of the defendants and appellants here) against N. P. Nelson (plaintiff and respondent here). The condition of the bond was that, if the motion for new trial was denied, the obligors would pay the judgment in the case. The bond was executed by Donovan, plaintiff in that case, and by the two other defendants in this case. The motion for new trial in that case was denied. The obligors have not paid the judgment. It further appears by the complaint in this case that plaintiff demanded from defendants payment of the judgment. This the answer denies. This, however, is not an issue. The demanding of the payment was

not a material allegation in the complaint, and there need be no demand for the payment of a judgment before bringing action against the judgment debtor and his sureties on the bond. *Brandt*, Sur. §§ 1, 97, 197, 198; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2; *Lomme v. Sweeney*, 1 Mont. 584; *Hoskins v. White*, 13 Mont. 70, 32 Pac. 163, and cases cited; *Pieper v. Peers*, 98 Cal. 42, 32 Pac. 700; *State v. Biesman*, 12 Mont. 13, 29 Pac. 534. In the case of *Pinney v. Herahfield*, 1 Mont. 367, there is a dictum, which was not necessary to the decision of the case, which it is claimed holds the contrary of the view now expressed. That dictum consisted of a quotation from *Parsons on Contracts*, but by a reference to that author it is found that his language referred to a subject different than that here before us.

Appellants claim that there is another issue in the pleadings, as follows: The judgment in the former case of *Donovan v. Nelson* was in favor of defendant for his costs, taxed in the sum of \$143.70. The defendants in this case set up that these costs were illegally taxed. But plaintiff *Donovan* in that case made a motion to retax them, which was denied. No appeal was taken from the judgment in that case for the purpose of reviewing the denial of the motion to retax costs. That matter cannot now be pleaded in defense in this case. It was *res adjudicata* in the former case. *McCormick v. Hubbell*, 4 Mont. 98, 5 Pac. 314. The judgment herein is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 70)

GRACE METHODIST EPISCOPAL CHURCH v. RICKARDS.

(Supreme Court of Montana. April 22, 1895.)

REVIEW ON APPEAL—NOTE—BONA FIDE HOLDER.

1 A verdict will not be disturbed on appeal unless it clearly appears that there was no evidence to support it.

2. Where a negotiable note was indorsed before maturity to a church society, without notice of any defense thereto, in consideration of the surrender of the indorser's individual note previously given as a subscription, the indorsee is a bona fide holder for value.

Appeal from district court, Silver Bow county; J. J. McHatten, Judge.

Action by Grace Methodist Episcopal Church against John E. Rickards on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

Suit upon promissory note made by John E. Rickards, defendant, on February 26, 1884, to the order of the Continental Oil & Transportation Company. The note was due January 1, 1890. The Continental Oil & Transportation Company indorsed the note to Samuel Theodore. Theodore indorsed it, without recourse, to Isaac E. Blake, who indorsed it, without recourse, to J. L. Cullin, secretary, and Cullin indorsed it

to the plaintiff. The defendant answered that the several transfers of the note were made without consideration, and that the church holds the note as a gift from Blake, and that the note was transferred to prevent Rickards from pleading any defense he might have as against the Continental Oil & Transportation Company, original payees. Defendant further says that the note was executed by him to the Continental Oil & Transportation Company for the purchase price of certain goods, and the good will of the Continental Oil & Transportation Company in its business at Butte and other Montana cities, but that the individuals, members of the Continental Oil & Transportation Company, after the sale to Rickards, and with the intention of escaping or of evading the obligations of the Continental Oil & Transportation Company, formed another corporation, called the Continental Oil Company, and about March, 1885, did business in Butte, in violation of the understanding between Rickards and the Continental Oil & Transportation Company, and solicited business from the customers of defendant, and by cutting prices and inducing customers to quit dealing with defendant ruined defendant's business, and damaged him in the sum of \$10,000. Plaintiff's replication denied all the new matter of the answer. The case was tried to a jury, and a verdict rendered for plaintiff. A motion for new trial was made, and overruled. Defendant appeals.

Forbis & Forbis, for appellant. Stephen De Wolfe, for respondent.

HUNT, J. (after stating the facts). In order to make plain the application of the legal principles which must govern in the determination of this case, it is proper to set forth the substantial facts as they appear in the record. On February 26, 1884, the defendant was an agent of the Continental Oil & Transportation Company, a corporation, in the oil business in Butte, Mont. The defendant, after negotiating with one Blake, president of the corporation, in San Francisco, in February, 1884, purchased of the Continental Oil & Transportation Company their business at Butte and Dillon, Mont. The consideration was \$16,000, evidenced by several promissory notes. One of these notes, for \$3,000, is the subject of this action. The notes were all made to the order of the Continental Oil & Transportation Company. That corporation, by its president, Blake, duly executed to the defendant a bill of sale, conveying all the property, real and personal, held by the corporation in the territory of Montana, and including likewise the good will of said company in all its business and patronage in said territory. In the spring of 1885, another corporation, the Continental Oil Company, with the said Blake as its president, com-

menced to do an oil business at Butte. They competed with the defendant in his oil business, and, it would appear, competed successfully. Blake, for the plaintiff, in the more important parts of his testimony, said: "Mr. Culin was the secretary of the church, the plaintiff corporation. I indorsed that note to Mr. Culin. I purchased it of the company; Mr. Theodore, to whom it was first sold, stating that he believed he could use it. It was first sold to Mr. Theodore, and afterwards he didn't wish to retain it, and wanted to return it, and I said to the company that I would purchase it. I indorsed this note to J. L. Culin, secretary, on behalf of the church. The consideration from the church to me for this note, was this: I attended the Grace M. E. Church at San Francisco. During that year the question was discussed of building a new church: I was asked what contribution I would make. I said to the trustees that if the money would be applied to the purchase of a pipe organ I would subscribe \$3,000, * * * on condition that they would give me plenty of time for the payment of it, * * * and we agreed that for that subscription I should give my note for five years, and I placed with them collateral security; * * * and the note bore interest at six per cent., due October 1, 1891." "The church people afterwards wanted the interest on their money. I told them that I owned the Rickards note for \$3,000, interest at eight per cent., due nearly two years before my paper; that I believed Mr. Rickards was an honorable man, and I would exchange the Rickards note for \$3,000, bearing eight per cent., for my own note to the church, and the collateral. The church people accepted. The Rickards note was transferred to Culin for the church, in September, 1887." Witness had heard from one Patterson, who was connected with the company, of Patterson's impressions that Mr. Rickards might attempt to evade the payment of the note. "Afterwards I talked with Mr. Rickards, about 1886 or 1887, and told him of Patterson's belief or impression. He disclaimed that he had ever made any statement to Patterson to the effect that he would not pay the note. Aside from that, I had no knowledge that Mr. Rickards did not intend to pay. These incidents occurred before I purchased the note. Mr. Rickards had never made any such claim as that. There was no defense to this note, so I could not inform Mr. Culin or the church that he did claim a defense. When I talked with Mr. Rickards, he disclaimed that he had ever made any statements to Patterson of that kind. I was then the owner of the note." On cross-examination he testified: "There was no agreement, outside of the written agreement, that we would not establish a business in competition with Rickards." At the time of the transfer of the note to witness he was president of the Continental Oil &

Transportation Company, and paid the company full value for the note. At the time of the transfer witness did not know that Rickards was disputing its legality. "Mr. Patterson was here [in Butte], and he said that it was his impression that Rickards would attempt to evade the payment of some of those notes. At that time [1886] the Continental Oil Company had established a business in Butte, but they were working friendly with Rickards at that time. At that time, too, Mr. Rickards was buying his goods of the Continental Oil Company. * * * In 1887 we were in open competition with him. At that time this note was transferred. The relations between Rickards and the company were friendly in 1887. Patterson came up, and afterwards reported to me that he believed Rickards would not pay the note,—I believe some time in 1886. The Continental Oil Company was in business at that time in Butte. * * * The starting of the new business occurred this way: The company, to avoid the large credits given to Rickards, proposed to establish a warehouse in Butte, to retain the goods, and thus reduce the credit, and Rickards could get the goods as he required them. Rickards was buying his goods from the Continental Oil Company,—the new company,—and was representing them as their agent, very much as he had represented the previous company, with no agreement that they should not sell here, but with an outside understanding that when a person is an agent he shall have the exclusive sale. Soon thereafter Rickards ceased purchasing from the company, whereupon the company sold to anybody." The witness Blake was president of the new company, and said that he believed that, even if the old company had no right to compete with the defendant under the terms of the sale to Rickards, yet he believed the new company, which was an entirely different institution, would have a perfect right to do business as it pleased. The control of the new business was different from the old, there being only one person (witness himself) connected with the two companies. The new company sold oil to the defendant, but when the defendant did not buy exclusively from the new company it entered the field against him. The witness owned 31.3 per cent. of the stock of the Continental Oil Company, the rest being held by the Standard Oil Company, who had no interest in the old company. In 1885 one E. R. Barton was an employé of the Continental Oil Company, but had no special authority, except to do such things as he was especially directed to do. The Continental Oil & Transportation Company was never disorganized. The Continental Oil Company was not organized as a consolidation of the Continental Oil & Transportation Company and the Standard Oil Company. The old company continued its business, but sold to the new company

its business in certain localities, but Montana was not mentioned as part of the sale, or part of the consideration. When the new company was formed it was understood that business interests would require the old company to retire from the place where the new company intended to do business, but there was no agreement that it should do so. "In using the words, 'matters of consolidation,' in addressing Mr. Rickards in February, 1885, I didn't mean a legal consolidation. I meant that they were getting the stock and offices of the Continental Oil Company and the Continental Oil & Transportation Company into one building. This note in question here was charged to my account with the Continental Oil & Transportation Company. I have paid up my account now. * * * The church and I have no understanding that I am to pay the amount of this note if this suit is not successful. * * * I didn't give this this note to the church as security. I transferred it to them as an absolute sale. * * * Neither I nor the Continental Oil & Transportation Company have any interest whatever in the result of this suit. * * * The Continental Oil Company was organized in December, 1884, at Council Bluffs, Iowa. * * * In the organization of the Continental Oil Company, there was never any consideration paid by the incorporators themselves, or by the shareholders in that company, with regard to these notes, or any indebtedness of Rickards to the Continental Oil & Transportation Company. The object of the formation of the Continental Oil Company was to do a general oil business, and particularly to avoid competition with the Standard Oil Company. It was to protect Mr. Rickards' interest here, as well as anything else; because the Standard would have advanced into his country, and made his business unprofitable, if he had not purchased his goods from them. There was no connection between the organization of the Continental Oil & Transportation Company and the Continental Oil Company, except a sale to the Continental Oil Company of the old company's plant and stock. It kept all its other property, except this plant and stock, in Colorado, New Mexico, Utah, and Wyoming, leaving out Montana, in which it had nothing to sell. Barton never had any interest in the Continental Oil Company." The witness then detailed the stockholders of the new and old companies. But, as we regard the case, it is not important to set forth all that he said in relation thereto.

The defendant gave the history of the purchase by him, as hereinbefore given, saying that he had conducted the business until he was driven out. He continued: "There was no positive agreement between me and the Continental Oil & Transportation Company that I was to purchase from them exclusively. I bought all the goods I could from them,

and from the new company, as long as I could have my trade supplied. When the Continental Oil Company established itself in Butte, it commenced a retail business, solicited trade from my customers, and offered them oil at much below the market price. * * * This continued until I was compelled to sell to them. Prior to this time my business was very prosperous. I was making money. * * * After the Continental Oil Company established themselves here, my business was very unprofitable. The Continental Oil Company have continued in business here ever since." Witness identified letters from Blake and Barton. "In 1884, Mr. Blake was in Butte, and said to me, 'Mr. Patterson tells me that you say you will refuse to pay those notes.' I simply replied, 'Mr. Patterson put those words into my mouth.' Patterson came out as an officer of the Continental Oil Company. He came to my office, and said they were about to establish a business here. I showed Patterson the bill of sale, and, after reading it, he passed it back to me, saying I was a fool to pay a dollar of these notes I gave to Mr. Blake by virtue of this contract or bill of sale. I replied, 'I never will.'" When cross-examined, the witness testified that he bought oil from the Continental Oil Company after they established a business in Butte, and that he sold out to the Continental Oil Company the buildings and plant that the Continental Oil & Transportation Company had sold to him, for which these notes were given in consideration. "I was obliged to sell to them. I got from the new company more than I had paid for it to the old company, but there was a great deal of property added to it."

The correspondence referred to in the testimony of the witnesses was certain letters written by Isaac E. Blake, recognizing that perhaps under the old agreement between the Continental Oil & Transportation Company and the defendant, Rickards, the Continental Oil Company were not to compete with the defendant, but justifying their competition upon the ground that the new company was not the old, and that the defendant had purchased oil from other parties. Two or three of the letters were signed by E. R. Barton as manager of the Continental Oil Company. They were addressed to the defendant, and told him that the Continental Oil Company would establish a regular agency at Helena, in which case the Standard Oil Company would withdraw entirely from Montana, and informed the defendant that the Continental Oil & Transportation Company and the Standard Oil Company were consolidated under the name of the Continental Oil Company. One of the letters, dated February 10, 1885, written by Isaac E. Blake to the defendant, stated that the writer had a general impression in regard to the understanding between defendant and the Continental Oil & Transportation Company that they did not intend to sell any goods in Montana, except to de-

fendant, and assuring defendant that the Continental Oil & Transportation Company would do all in their power to help defendant to succeed.

The principal ground upon which appellant asks for a reversal of the case is insufficiency of the evidence to support the verdict of the jury. But after a close examination of the record we are constrained to hold that, if the testimony of the witness Blake was credible, there is ample evidence to prove that there was a consideration for the transfer of the note sued on from Blake to the plaintiff church. The exchange of the notes, and the history of the facts which led up to the transaction whereby Blake gave to the church the note of Rickards, which was due before his own note was, is plausible, probable, and uncontradicted. Moreover, it was, in the eye of the law, a proper transaction. The paper was a negotiable note, indorsed to the plaintiff before maturity for a valuable consideration, and the plaintiff church, under the evidence, never had the slightest intimation, at the time the note was transferred to it by Blake, or prior thereto, that there was any defense whatever to be made to its payment. It may be that appellant's necessary premise is well founded,—that Blake was a knave; but, assuming that he was, the last act that he would have done, it occurs to us, would have been to inform the victims of his knavery concerning the facts and circumstances which would at once have precluded them from being victimized by him. But we think it is altogether incredible that the secretary of a corporation, even though it be an ecclesiastical organization, should be so wholly gulleless as to deliberately accept an unsecured promissory note, with the full knowledge of the fact that the maker would refuse to pay it, and that its collection could only be enforced by legal proceedings, in exchange for one already held by the corporation, and well secured by collateral. The only rational explanation for the exchange is in harmony with Blake's testimony, namely, that the church wanted money, and that they were induced to act in the matter by the more tempting rate of interest which appellant's note bore, and by the fact that it matured before Blake's paper did, and might be more speedily collected. The pecuniary value of the note in suit, and the responsibility of Mr. Rickards, the maker, were never carefully investigated or questioned. Mr. Blake assured the secretary of the church that Mr. Rickards was a man of honorable character, which of course carried with it, when sold to an innocent purchaser, without further explanation, an implied assurance that the note would be paid when it matured, provided, of course, the maker was able to meet it. This statement concerning the maker doubtless carried great weight with it, when it is remembered that it was made to the church by one of its prominent members, whose veracity there was no reason to suspect, and whose

munificence was most distinguished by his liberal gift. Moreover, they were led to believe by Mr. Blake that he considered the appellant's note good, and that, if their financial exigencies required a speedy relief, it was best for them to accept the Rickards note, which would be paid earlier than his own. It is evident, and the presumption is, that the secretary of the church corporation and Blake acted intelligently with one another, even though the church may have been too trustful in Blake; and our views concerning the whole transaction but conform to the just and fair deductions from the testimony. We regard the circumstance that the church did not inquire of appellant concerning this note as a bit of evidence strongly tending to show their reliance upon the assurance of their friend Blake, and their entire innocence in the acquisition of appellant's obligation. And no matter how similar may have been the traits of character which Blake developed to the traditional Mephistopheles, to whom appellant's counsel has compared him, the all-important fact stands out in bold relief that this plaintiff is not shown to be, directly or indirectly, a party to any misconduct or collusion or fraud of any kind whatsoever. Their legal attitude is, therefore, simply that of any bona fide holder of commercial paper who acquired the same before maturity, and in the usual course of business, without notice of anything which impeaches its validity. Thus they are brought within the elementary rules of law which enable them to recover as against the maker of the note, even though as between him and the original payee equities existed which could have been availed of. *Railroad Co. v. National Bank*, 102 U. S. 14.

The jury saw and heard Blake testify. They had the great advantage of observing his presence; his manner upon the witness stand; his honesty or dishonesty of countenance, his method of speech,—whether he hesitated or was glib of tongue, or nervous or collected; and finally they could impartially and calmly say, after deliberating upon his testimony, whether or not it was truthful or untruthful. With no interest in the result of the trial, and with due regard for the responsibility of their duties as the exclusive judges of the credibility of the witnesses, they have decided that Blake told the truth. The learned judge of the district court also had the advantage of seeing and hearing Blake upon the trial, and after due deliberation he concurred with the jury in believing that the plaintiff had made out its case, and was in good faith the holder and owner of the note in suit. When we consider these matters, this court, by the authority of an unbroken line of precedents, which have guided its decisions pertaining to the weight to be given to verdicts for upwards of a quarter of a century, and which are contained in nearly every volume of reports that has been published, cannot now disturb the verdict of the jury and the judgment of the lower court.

The attempt to prove that the Continental Oil & Transportation Company and the Continental Oil Company were one and the same thing was a failure. It is true that the witness Blake was interested in both, but it clearly appeared that he was the only stockholder in the Continental Oil & Transportation Company who participated in or owned stock in the new company. The old company seems to have been swallowed up by the Standard Oil Company, or its shareholders. The new company was organized on a different basis from the old, had a different name, and was owned by different parties. It had a perfect right to enter into business anywhere it pleased, and could not at law be precluded from doing so by virtue of any arrangement entered into between the appellant and another different corporation, made some 18 months before. The evidence fails to show that Blake was guided by a sinister motive in promoting the new corporation into existence. But, whatever motive he had, it becomes quite immaterial in the face of the fact that he did not control the stock in the new organization, and could not, even had he desired to do so, have used it for the purpose of defeating the collection of the note involved in this suit, unless by sanction or authority of the trustees of the new corporation, who were in no way interested in the Continental Oil & Transportation Company, the payee of the note, or in the note itself, or in this suit.

Other errors are assigned, but, as what we have said disposes of the case, they need not be considered at length. Taking the instructions as a whole, we think they fairly state the law pertinent to the case. Nor do we think there was any mistake in excluding certain letters written by Barton to appellant. The two corporations being clearly legally distinct, any letter of the Continental Oil Company was immaterial and irrelevant to the issues of the pleadings. The judgment must be affirmed.

PEMBERTON, C. J., concurs.

(16 Mont. 87)

WHEELER et al. v. JONES et al.

(Supreme Court of Montana. April 22, 1895.)

REPLEVIN—JUDGMENT.

Where in replevin on a verdict, "We, the jury, find for defendant," a judgment for defendant is rendered for a return of the property, plaintiff cannot complain that the verdict was not in the alternative.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by Hayden W. Wheeler and others against W. A. Jones and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Donovan & Lyter, for appellants. Leslie & Downing, for respondents.

PEMBERTON, C. J. This is an action of replevin. Plaintiffs in their complaint state that they are the owners, and entitled to the possession, of a large amount of jewelry, which they allege defendants to be in the wrongful possession of. All the material allegations of the complaint are denied by the answer. It appears from the record that the sheriff was only able to find in the possession of the defendants a portion of the jewelry claimed by plaintiffs. The articles he did find and take possession of he turned over to the plaintiffs, the defendants failing to give the necessary undertaking to hold possession thereof pending the suit. The case was tried to a jury. The verdict of the jury is as follows: "We, the jury, find for the defendants." This verdict was rendered on the 22d day of March, 1893, at the March term of the district court. On the 23d day of March, 1893, the clerk entered judgment on said verdict in favor of defendants for costs. On the 4th day of April thereafter, and during the March term of the court, on motion of the defendants, without notice to plaintiffs, the court entered a judgment in the case, modifying said judgment entered by the clerk, in effect directing the return of the property which the sheriff had taken from the defendants and delivered to the plaintiffs. On the same day plaintiffs filed a motion to vacate and set aside said amended or modified judgment. This motion, it seems, was permitted to go over, without action thereon by the court, to the July term of the court in said year. On the 19th day of July of said year, and during the regular July term of the court, said motion was heard, and by the court sustained, and said modified judgment was vacated, seemingly because it had been entered without notice. Thereafter notice of motion to modify the clerk's judgment was given, and on the 24th day of July, during said July term of the court, the same was heard, counsel for both parties being present, and by the court sustained, and the same amended judgment was entered which had been vacated by the court. To this action of the court the plaintiffs excepted, and appeal from the modified judgment so rendered. The appellants contend that the court had no authority, on the verdict rendered, to enter judgment for the return of the property taken by the sheriff from the defendants, and delivered to the plaintiffs. The contention of the appellants is that, as the verdict did not find for a return of the property, the court had no authority to render judgment for a return thereof. Under our statute (section 277, Code Civ. Proc.), a failure to find all the facts that should be found by a jury does not invalidate the verdict. *Miles v. Edsall*, 7 Mont. 185, 14 Pac. 701. In *Sumner v. Cook*, 12 Kan. 162, a case involving quite all the facts and circumstances disclosed by this record, and where the verdict was exactly like the one in this case, Mr. Justice Brewer, delivering the opinion of the court, says:

"Two questions are in this case. The action in the district court was one of replevin. The property had been delivered to the plaintiff. The verdict was for the defendants. The judgment entered was that defendants recover their costs. At the same term, on motion of defendants, the judgment was modified so as to include a return of the property. Upon the verdict the defendants were entitled to such judgment. *Kayser v. Bauer*, 5 Kan. 211. A failure of the jury to find the value did not invalidate the verdict or prevent a judgment for the return. *Marix v. Franke*, 9 Kan. 132. The court had the power upon motion to modify the judgment. Code, §§ 508, 569. The grounds for the modification are not disclosed in the motion nor the record, and we must therefore presume them sufficient. How the error in the judgment happened we are not informed, and must therefore presume it was from a mistake or omission of the clerk, which the court had power to correct by motion. Both parties appeared, and were heard by counsel on the motion. No advantage was therefore taken, and no error is apparent in the ruling." In *Anderson v. O'Laughlin*, 1 Mont. 81, where there was a general verdict for the defendant, in a case like the one at bar, the court say: "We see no error on the face of the record before us of which appellant has a right to complain. He is not injured by the form of the verdict. The respondent might complain that the jury failed to find, in their verdict, the value of the property; that he was entitled to a return thereof, and to assess his damages; but the appellant cannot. Upon a general verdict for defendant upon these issues, under our statute, as well as at common law, an order for return and judgment for costs followed as a matter of course." See, also, *Lavelle v. Lowry*, 5 Mont. 498, 6 Pac. 337; *Waldman v. Broder*, 10 Cal. 379; *Campbell v. Jones*, 38 Cal. 507; *Pico v. Pico*, 56 Cal. 453. That the verdict was irregular and incomplete, and that the judgment was not in the alternative for the return of the property, or the value thereof, were matters of which the defendants might complain; but we fail to see how the plaintiffs could be injured on account of said irregularities or defects. *Cobbey*, Repl. § 1108, and authorities cited. We think the judgment should be affirmed; and it is so ordered. Affirmed.

DE WITT and HUNT, JJ., concur.

(16 Mont. 65)

HELENA STEAM-HEATING & SUPPLY CO. v. WELLS et al.

(Supreme Court of Montana. April 15, 1895.)
LIEN FOR MATERIALS—TIME OF DELIVERY—RUNNING ACCOUNT—QUESTIONS FOR JURY.

1. In an action against a contractor and the owner of property to foreclose a mechanic's lien for material furnished the contractor under an agreement, the jury specially found that the

contractor was to notify plaintiff into which particular contract he put the material sold at a particular time; that the contractor had the right to furnish the material himself, or buy it from others than plaintiff; that each day's order made by the contractor on the plaintiff was due when the material was delivered, and was not a separate and independent contract from orders made upon every other day; that plaintiff furnished the material without a specific agreement as to the amount to be furnished, and was to furnish it whenever required; and that there was a running account under which the orders were filled. Held, that the materials were delivered under one contract, and the delivery dated from the day of the delivery of the last item.

2. The questions whether material furnished was furnished under separate contracts, and whether it was furnished under a running account, are questions for the jury.

3. A law providing that, in an action to enforce mechanics' or other liens, plaintiff shall, if successful, recover a reasonable attorney's fee and costs, is constitutional. *De Witt, J.*, dissenting.

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Action by the Helena Steam-Heating & Supply Company against Laura J. Wells and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action to foreclose a mechanic's lien. The issues were tried with a jury. Special findings of fact were submitted and made by the jury, and a general verdict for plaintiff returned. The findings of fact submitted to and returned by the jury are as follows: "(1) Was there a general arrangement between O'Brien and the plaintiff by which O'Brien was to notify the plaintiff into which particular contract he was to put the material sold at any particular time? Answer: Yes. William A. Chessman, Foreman. (2) Did O'Brien have the right, under the contract, to furnish the material himself, or buy it elsewhere than from the plaintiff? Answer: Yes; to buy wherever he pleased. Wm. A. Chessman, Foreman." "(5) Was each day's order made by O'Brien on the plaintiff due when the material ordered was delivered? Answer: Yes. Wm. A. Chessman, Foreman. (6) Was each day's order made by O'Brien upon the plaintiff a separate and independent contract from the orders made upon every other day? Answer: No. Wm. A. Chessman, Foreman. (7) Do you find that the plaintiff furnished the material without or with any specific agreement as to the amount to be furnished to O'Brien for the Wells plant? Answer: No specific agreement. Wm. A. Chessman, Foreman. (8) Do you find that there was an understanding from the commencement that the work should be done or the material furnished by plaintiff whenever required? Answer: Whenever required. Wm. A. Chessman, Foreman. (9) Do you find that there was a running account between O'Brien and the plaintiff under which the orders were filled, or do you find they were filled under separate, independent contracts governing each other. Answer: Filled under running account. Wm. A. Chessman, Foreman. (10)

Do you find that all the material charged went into the furnace plant? Answer: All but three valves. Wm. A. Chessman, Foreman." The court adopted the findings of fact by the jury, and rendered judgment in favor of the plaintiff for the amount of the verdict, and for \$100 as attorney's fee, and costs. The defendants appeal from the judgment.

McConnell, Clayberg & Gum and O. W. McConnell, for appellants. Walsh & Newman, for respondent.

PEMBERTON, C. J. (after stating the facts). The evidence upon which the findings were made is not before this court. There is no contention that the evidence did not warrant the findings. The appellants contend that, under the findings of the jury, the court erred in rendering judgment for the plaintiff in the sum of \$582.77, and for \$100 attorney's fee, with costs of suit. It is contended by appellants that only one item of the materials for which a lien is claimed, amounting to 24 cents, was sold and delivered by plaintiff within 45 days before the filing of the notice of lien, and that all the other materials in suit were sold and delivered under separate orders or contracts, and were all delivered more than 45 days before filing the lien, and that such several orders did not constitute one continuing contract. The appellants contend that the findings of the jury numbered 2, 5, 7, and 8 establish the claim that the materials were furnished under separate orders or contracts. We think finding No. 2, while it is to the effect that O'Brien might furnish the materials himself, or procure them elsewhere than of plaintiff, does not in any wise tend to show that what materials he did procure from plaintiff were not furnished under a continuing contract or understanding. Finding No. 5 is to the effect that each day's orders for material were due on delivery. We think that this merely means that there was no specific agreement for time. This does not preclude the presumption that time or credit was understood to be intended by the parties from the nature of the contract, and the custom of dealing between the parties. Finding No. 7 is to the effect that there was no specific agreement between O'Brien and plaintiff as to the amount of material to be furnished. This finding in no way removes or tends to remove the presumption that whatever was furnished, regardless of amount, should be considered as delivered under a continuing contract or agreement. Finding No. 8 is to the effect that there was an understanding from the commencement between plaintiff and O'Brien that the work should be done or the material furnished from time to time, as required by the nature and necessities of the job O'Brien was engaged in performing. This finding, instead of supporting the theory of appellants, we think, supports the idea that the understanding between plaintiff and O'Brien was that the materials

were to be furnished as needed, in the completion of O'Brien's job, and charged in one account, to be settled for when all the material necessary had been furnished. If this were the understanding, it would make the delivery of the materials one contract, regardless of the fact that they were delivered upon different days. Jones, Liens, § 1435.

Appellants contend that findings Nos. 6 and 9 were conclusions of law, and should not have been submitted to the jury. We do not think so. They were questions of fact, and were properly submitted. See Phil. Mech. Liens, § 326, and authorities cited; Jones, Liens, § 1449, and authorities cited; Turner v. Wentworth, 119 Mass. 459. Some of the authorities hold it to be error to refuse to submit the question to the jury whether the materials in such cases were delivered under an entire contract or under separate ones. Phil. Mech. Liens, § 326. We think the proper rule to be, and the one supported by ample authority, that when all the items in the account relate to one transaction, and is between the same parties, it constitutes a continuous account, regardless of different times of delivery, and dates from the day of the last item. See Phil. Mech. Liens, §§ 225, 226; Lamb v. Hanneman, 40 Iowa, 41; Kearney v. Wurdeman, 33 Mo. App. 447; Jones, Liens, § 1435. When it is inferable from the evidence that the materials were furnished under one contract, a mechanic's lien is enforceable for all the items of the account. Fulton Iron Works v. North Cedar Creek Mining & Smelting Co., 80 Mo. 265. We are aware that the authorities hold that, where materials are delivered under separate and distinct contracts, the lien should be filed within the time prescribed by the statute after the delivery under each of such contracts. But when the question has been submitted to a jury, and they find that the materials were delivered under one entire contract, and not under separate ones, and the court adopts such finding, and renders judgment in accordance therewith, we must presume that such question was properly submitted, that there was sufficient evidence to support such finding, and that the judgment is supported thereby.

The appellants contend that judgment should not have been rendered in any event for \$100 as attorney's fee, because he says the law of the state which gives to the court power to enter judgment for attorney's fees, as costs, in cases like the one at bar, is unconstitutional. This question was ably presented to this court in Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280, upon the same authorities now cited by counsel in their briefs. The majority of the court, in an able and learned opinion by Mr. Chief Justice Blake, held the law in question to be constitutional. The authorities cited are not uniform or harmonious. There is a conflict between able authorities on the question. In addition to Wortman v. Kleinschmidt, supra, see Railroad Co. v. Ellis (Tex. Sup.) 18 S. W. 723. Without expressing

any opinion as to how the court would view the question were it a new one in this jurisdiction, we are of opinion that the question should be regarded as *stare decisis*. The judgment is affirmed.

DE WITT, J. (concurring except as to the matter of attorney's fees). I concur in the judgment pronounced in this case in all respects, except as to the allowance of attorney's fees. I regret that I am not able to discover any reason why I should depart from the views which I expressed upon that subject in *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280.

HUNT, J. Having presided at the trial of this case as judge of the district court, I take no part in the foregoing decision, except to concur in the conclusion of the Chief Justice, affirming the case of *Wortman v. Kleinschmidt* (Mont.) 30 Pac. 280, sustaining the constitutionality of the statute taxing a reasonable attorney's fee as costs to the defendant against whose property a lien is filed, where judgment is rendered for the plaintiff in foreclosure.

(26 Mont. 40)

STACKPOLE v. HALLAHAN.

(Supreme Court of Montana. April 15, 1895.)

ELECTIONS—CERTIFICATE OF NOMINATION—FILING AND SUFFICIENCY.

1. A person nominated by a political convention as a candidate for county treasurer declined to the central committee, and no certificate of his nomination was ever filed with the county clerk. The committee, being empowered to fill vacancies on the ticket, nominated another candidate. The certificate of the second nomination failed to show the name of the person for whom such candidate was substituted, the cause of the vacancy, or that he was nominated to fill a vacancy. *Held*, that as such defects were not objected to until after an election in which no fraud was charged, and no rights appeared to have been prejudiced thereby, the nomination would not be declared void for failure to comply strictly with the provisions of Act 1889, §§ 11, 12, which require that a candidate declining the nomination shall so notify the officer with whom his certificate is filed, in writing, and that the certificate of the nomination made to fill the vacancy shall state "the cause of the vacancy, * * * the name of the person for whom the new nominee is to be substituted, and the fact the committee was authorized to fill vacancies."

2. The fact that a certificate of a nomination made by the central committee, under proper authority to fill vacancies caused by the declination of the former nominee, did not state, as required by Act 1889, § 12, that the committee had power to fill such vacancies, was not sufficient to render the nomination void, objection being made to the certificate, for the first time, after the election.

3. A certificate of nomination, giving the name, address, and business of the nominee, substantially complies with the provision of Act 1889, requiring that such certificate shall give his name, address, and "business address."

4. The provisions of the Australian ballot law (Act 1889), prescribing the facts to be stated in the certificate of nomination, and the manner in which the nomination may be declin-

ed, and the resulting vacancy filled, should not be considered mandatory, when the question of a failure to comply with them strictly is raised after an election, the fairness of which is not questioned. *Price v. Lush* (Mont.) 24 Pac. 749, modified.

Appeal from district court, Deer Lodge county; Theodore Brantley, Judge.

Action by E. S. Stackpole against D. F. Hallahan, contesting the election of the defendant to the office of treasurer of Deer Lodge county. From a judgment declaring the election void as to such office, both plaintiff and defendant appeal. Reversed, and judgment entered declaring the defendant elected.

This is an election contest, a statutory proceeding brought by E. S. Stackpole, asking that it be determined that he, and not D. F. Hallahan, was elected treasurer of Deer Lodge county, at the general election in November, 1894. It was determined by the district court that neither Stackpole nor Hallahan was elected. Each party appeals.

For convenience in this statement, and in the opinion below, instead of speaking of the parties as appellant or respondent, or contestant or contestee, we will simply use their personal names. The case was tried to the court without a jury. Very ample findings of fact and conclusions of law were made by the court. There is no question here as to the evidence, and our consideration of the case is simply whether the judgment upon the findings was correct. The facts, as they appear in the findings, are as follows: At a convention of the Republican party of Deer Lodge county, held September 1, 1894, Stackpole was nominated for county treasurer. A certificate of his nomination was duly filed with the county clerk and recorder. No question is made as to his certificate. The People's party of Deer Lodge county regularly held their convention on the 23d day of June, 1894. That convention duly nominated J. R. Whitmire for county treasurer. No certificate of Whitmire's nomination was ever made by the officers of the convention, or filed with the county clerk. That convention named a county central committee. It also passed a resolution authorizing that committee to fill any and all vacancies on the ticket of the People's party for county officers that then existed, or that might thereafter occur from any cause. No certificate of Whitmire's nomination being filed, he declined to be a candidate for county treasurer, and notified the county committee of his declination of said nomination, and his refusal to be a candidate. The county committee thereupon duly met on September 5, 1894. The whole committee was present. They met for the purpose of nominating a candidate of their party for the office of county treasurer, to fill the vacancy caused by the declination of Whitmire. At that meeting D. F. Hallahan was nominated for the office of county treasurer, to fill the vacancy. The chairman and secretary of the

committee were duly instructed to file the proper certificate of his nomination. They thereupon made and filed with the county recorder the following certificate: "Deer Lodge, Mont., 10/3, '94. At a regular meeting of the county central committee of the People's party of Deer Lodge Co., held at Anaconda, Mont., Sept. 5th, 1894, the following nominations were made for county treasurer: D. F. Hallahan, of Anaconda, Mont., wholesale liquor dealer. For county surveyor, J. P. Mitchell, of Deer Lodge, Mont., surveyor and assayer. Chairman, Dr. A. H. Mitchell, physician, Deer Lodge, Mont. E. B. Hasford, bookkeeper, Anaconda, Mont. E. B. Hasford, Sec. A. H. Mitchell, Chairman." This was filed on October 3d, within the time required by law. The clerk and recorder of Deer Lodge county made up the official ballot for use at said election from the nominations on file in his office. On that ballot he placed the names of E. S. Stackpole, Republican; D. F. Hallahan, Populist; and James B. McMaster, Democrat,—as candidates for county treasurer; also all the candidates of the different parties for various offices. He caused the same to be published daily for more than 10 consecutive days immediately prior to the said election, in the Anaconda Standard, a daily newspaper of general circulation, published in the county. Stackpole had knowledge of this publication. Hallahan's name was printed on the official ballot used at that election, and his name was not written thereon by any elector. At that election Stackpole received 1,554 votes; Hallahan, 1,794; and McMaster, 1,181. All these ballots were duly and regularly counted and canvassed, and the returns duly made to the clerk and recorder within the time allowed by law. They were counted and tabulated by the canvassing board, which declared that Hallahan had received the highest number of votes for county treasurer, and declared him elected, and issued him a proper certificate. Hallahan qualified for taking said office by filing his oath and bond. The Republican party, People's party, and Democratic party are each political organizations existing in said county. The business of D. F. Hallahan is that of wholesale liquor dealer, and his residence and business address is Anaconda, Mont. The business of the chairman of the county committee of the People's party is that of physician. His name is A. H. Mitchell, and his business address and residence is Deer Lodge, Mont. The business of the secretary of the committee, E. B. Hasford, is that of bookkeeper, and his business address and residence is Anaconda, Mont. Contestant, E. S. Stackpole, resides at the town of Deer Lodge, which was his business address, and his business was, at the time said convention was held and certificate filed, that of justice of the peace. That the residence of the chairman of the said Republican convention was Anaconda, Mont; his business, merchant; his business address, Anaconda, Mont. That the residence of the secretary of said Republican

convention was Deer Lodge, Mont.; his business, hotel clerk; his business address, Deer Lodge, Mont.

Upon these findings the court filed the following conclusions of law: "(1) That the contestee, D. F. Hallahan, was not nominated for the office of treasurer of Deer Lodge county, Mont., to be voted on as a candidate at the general election held for county and other offices in the state of Montana, on November 6, 1894, by any convention of delegates representing a party or principle, nor by any committee duly authorized for that purpose by such a convention, nor by the electors of said county. (2) That the name of the said Hallahan was improperly printed upon the official ballot prepared for said election by the clerk and recorder of said Deer Lodge county. (3) That the said Hallahan was not elected to the said office of treasurer of Deer Lodge county at said election, and is therefore not entitled to hold said office. (4) That E. S. Stackpole, the contestant, did not receive the highest number of legal votes, and is therefore not entitled to be declared elected, nor to hold said office of treasurer for said county of Deer Lodge. (5) That no other candidate or person received any greater number of votes than the said E. S. Stackpole, and there is therefore no other person entitled to be declared elected or to hold said office. (6) That no one was elected to the office of treasurer of Deer Lodge county at the general election held for county and other officers in the state of Montana on November 6, 1894, and said election was void as to said office. Let judgment be entered accordingly, each party paying his own costs." Judgment was then entered that neither Stackpole nor Hallahan had been elected treasurer of Deer Lodge county. As noted above, each party appeals.

The portions of sections 11 and 12 of the act of March 13, 1889, commonly called the "Australian Ballot Law," which are applicable to this contention, are as follows:

"Sec. 11. Whenever any person nominated for public office, as in this act provided, shall, at least twenty days before election, * * * in a writing signed by him, notifying the officer with whom the certificate nominating him is by this act required to be filed, that he declines such nomination, such nomination shall be void. * * *

"Sec. 12. Should any person so nominated die before the printing of the tickets, or decline the nomination, as in this act provided, or should any certificate of nomination be or become insufficient or inoperative from any cause, the vacancy or vacancies thus occasioned may be filled in the manner required for original nominations. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee shall thereupon make and file with the proper officer a certificate set-

ting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made shall be executed in the manner prescribed for the original certificate of nomination, and shall have the same force and effect as an original certificate of nomination. When such certificate shall be filed with the secretary of the state, he shall, in certifying the nominations to the various county clerks, insert the name of the person who has thus been nominated to fill a vacancy in place of that of the original nominee. And in the event that he has already sent forth his certificate, he shall forthwith certify to the clerks of the proper counties, the name and description of the person so nominated to fill a vacancy, the office he is nominated for, the party or political principle he represents, and the name of the person for whom such nominee is substituted."

The People's party convention delegated to its county committee power to fill vacancies on the People's party county ticket. The county committee filled the vacancy caused by the declination of Whitmire by nominating Hallahan, and by filing a certificate of his nomination with the county clerk. That certificate was defective; and did not comply with the provisions of said sections 11 and 12, in the particulars as follows, which we will note serially: (1) Whitmire did not "decline the nomination as in this act provided." Section 12. To decline a nomination as in the act provided is to notify, in writing signed by the party declining, "the officer, with whom the certificate nominating him is by the act required to be filed, that he declines such nomination." Section 11. (2) Hallahan's certificate itself does not show that he was nominated to fill a vacancy. (3) The certificate does not set forth the cause of the vacancy. (4) The certificate does not give the name of the person for whom Hallahan was to be substituted. (5) The certificate does not set forth that the committee had authority to fill the vacancy. (6) The certificate does not set forth in direct language the business address of Hallahan. (7) The certificate does not set forth in direct language the business address of the chairman or the secretary of the People's party committee. In these seven items, in making and filing of Hallahan's certificate, it did not technically comply with the provisions of sections 11 and 12 of the Australian ballot law. For these reasons the district court held that Hallahan was not nominated, and, not being nominated, was not elected, treasurer of Deer Lodge county.

W. H. Trippett and Rodgers & Rodgers, for plaintiff. Word & Smith and T. O'Leary, for defendant.

DE WITT, J. (after stating the facts). We are of opinion that the learned judge of the district court was justified in holding, as he did, as to Hallahan's certificate in this case, on the authority of *Price v. Lush*, 10 Mont. 61, 24 Pac. 749. We are also of opinion that, while the judgment in *Price v. Lush* was perhaps correct, the doctrine of that case must be modified in some respects. *Price v. Lush* was one of the pioneer American decisions upon the Australian ballot law, and at the time of its rendition no American authority was at the command of this court. As to the decision of *Price v. Lush*, perhaps we may remark that we are willing, in the language of Mr. Justice Field in the case of *Barden v. Railroad Co.*, 154 U. S. 322, 14 Sup. Ct. 288, to "take the responsibility of any conflict with the views now expressed. It is more important that the court should be right upon later and more elaborate consideration of the case than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience." In what respect we shall modify the decision of *Price v. Lush* will appear as we treat the case before us. We shall proceed to examine the defects in Mr. Hallahan's certificate, as they are set forth and numbered in the statement preceding this opinion, and shall state our views as to what should be the result of these defects when they are brought to the consideration of the court at the time and under the facts and circumstances shown by a court's finding of facts in this case.

1. It is true that Whitmire did not decline his nomination in the manner provided by sections 11 and 12 of the Australian ballot law. That statute provides that a written declination shall be filed with the officer with whom the certificate of nomination of such person declining is required to be filed. The county clerk is that officer in this case. But Whitmire's certificate of nomination had never been filed. He refused the nomination before the time expired in which his certificate must be filed. The county clerk had no evidence filed with him showing that Whitmire had been nominated. He officially knew nothing about Whitmire's nomination. If a nominee declines a nomination, it certainly is an expedient provision of law that the officer holding the official record of the nomination shall have a formal written declaration of the declination of the candidate, that such officer may have substantial authority for leaving a nominee's name off of the ticket. But the county clerk needed no such authority in this case to leave Whitmire's name from the ticket. He never would have put his name on the ticket. He never had authority so to do. What is the substantial reason, then, of requiring the county clerk to have authority to leave Whitmire's name off of the ticket when he never had authority to put it on? It would be a ceremony wholly useless to any one, bene-

fitting no one, securing no one any rights, and the omission of it working no one any wrong. Without holding fully, in this respect, that the reason of the law ceasing the law ceases, for there might perhaps be circumstances when the question could be raised in some connections, which do not now occur to us, where we might not be prepared to hold that the law ceased, yet we do hold that under the findings of fact in this case, which we shall more fully discuss below, the omission of Whitmire to file a declination with the county clerk was not such a substantial disregard of the statute as to wholly nullify Hallahan's nomination, in consideration of the other facts of this case, and the time and place and manner in which the objection was made for the first time.

2. Our view of this defect No. 1 disposes of defect No. 2. (See statement of facts.) Hallahan's certificate did not show that he was nominated to fill a vacancy, but, as Whitmire's certificate had never been filed, the information to the county clerk that Hallahan's nomination was to fill a vacancy was not useful or important. When Hallahan's certificate came to the county clerk it worked no change in the records as they were before the clerk. No nomination having been filed with the county clerk, he had no substitution to make. Hallahan was not to be put in the place of any one already on the records of the clerk. By no possibility could any one be injured upon the records with the clerk. Again, was this such a substantial disregard of the statute as should nullify Hallahan's nomination, when the question is raised as it is in this case?

Defects 3 and 4 are that the certificate does not set forth the cause of the vacancy, and does not give the name of the person for whom Hallahan was to be substituted. These defects fall under the same view as we have expressed as to those numbered 1 and 2.

5. The fifth defect is that the certificate does not set forth that the committee had authority to fill the vacancy. This is true. The law requires that this fact should be set forth. The certificate did not give this fact. It was a fact, however, that the committee did have authority to fill a vacancy. See the facts as set forth in the statement of the case. Therefore, the committee having full power to fill the vacancy, is the fact that they did not state this in the certificate such a defect as shall nullify the election, under the circumstances before us in this case?

6 and 7. The certificate does not set forth in direct language the business address of Hallahan, or that of the chairman or secretary of the People's party committee. The certificate gives the name and the address and the business of both Hallahan and the chairman and secretary of the committee. The statute says that the certificate shall give the business address also. We are of opinion that, when the name and business

and address are given, it is an extremely technical objection to say that the business address is not, in effect, given. Such are the defects in the certificate of Hallahan's nomination. Technically, these defects are in disregard of the provisions of sections 11 and 12 of the ballot law. As we have shown, and as we think would be accepted by any one, none of these defects are extremely substantial matters, when first brought to the attention of a court, as in this case. But we wish here to guard our language carefully. We will state that it may be that there are times, circumstances, or places, or manner of raising the question where and when the defects described may, by a court, be considered, for some reasons, substantial. But in this inquiry we limit ourselves to the consideration of these defects as they are brought before the court at this time, in the manner and under the circumstances, and in connection with the facts as they appear by the findings of the court in this case. We believe that, from the point of view which we occupy, and which the district court occupied, as we shall demonstrate below, these defects in Hallahan's certificate are of the nature of the mint, the anise, and the cummin, and not of the weightier matters of the law. Gospel of Matthew, c. xxiii. 23.

It is now important to note that the defects in Hallahan's certificate were simply the absence of statements of certain facts, and not the absence of the existence of the facts. While it is not stated in the certificate to be the fact, still it is the fact, that Whitmire declined his nomination in the only manner practicable for him to make his declination. Also it is the fact that Hallahan was nominated to fill the vacancy. It is the fact that the cause of the vacancy was Whitmire's declination. It is the fact that Whitmire was the person for whom Hallahan was substituted. It is the fact that the committee had authority to fill the vacancy. It is the fact that the business address of Hallahan and the chairman and secretary of the People's party committee was the same as the address of these persons given in the certificate. It is the fact that Hallahan was duly nominated by the committee having such authority. He was qualified to hold the office. He received 1,794 of the votes cast, a plurality of 240 over any other candidate. The ballots cast for him were regular, and were cast by legal voters. He was the choice of the nominating authority of his party. He was the choice of the voters of his party. His nomination, or his certificate of nomination, was never attacked, until after an election, the honesty and fairness of which have never been questioned. Therefore we come to this proposition: Under all the facts in this case, does the Australian ballot law contemplate that an election shall be declared null by reason of the defects in the nominating certificate such as exist in this case? We think not. In holding this

view, we are constrained to depart, to some extent, from the doctrine announced in *Price v. Lush*, supra. In that case it was said: "The statement of contest points out many particulars wherein the foregoing requirements of the statute have not been complied with. Are these provisions directory or mandatory? When this question is decided, the appeal will be determined." 10 Mont. 68, 24 Pac. 749. In the conclusion of the opinion it was said: "The principle which has called into being this law, that prescribes the conditions for the nominations of candidates for office before the day of election, demands the enforcement of every provision." 10 Mont. 72, 24 Pac. 749. That case has generally been thought to hold that every provision of the ballot law must be strictly complied with, or the election of a candidate not so complying will be void. But it was not necessary to so hold in that case. The case was decided upon the pleadings. It was held that the statement of the contest was sufficient in law. That statement set forth a violation of almost every provision of the ballot law. All that this court necessarily held in that case was that a motion to quash the statement should not have been sustained. But we are satisfied that the decision went too far in holding absolutely (if it did so, as generally thought) that all the provisions of the ballot law are mandatory, to the extent of invalidating an election if some detail as to a nominating certificate is omitted. The law may be mandatory in this: that, as it requires certain things to be done, if the direct question arose as to their being done or left undone, in some proceeding to determine that question, a court might hold that they should be done. As, for instance, the issuing of some process forbidding the filing of the certificate which did not comply with the law. *Miller v. Pennoyer*, 23 Or. 364, 31 Pac. 830. But that is a different proposition from holding that, if such things are not done, the result must be disenfranchisement of a plurality or majority of the voters of the district. In this connection we cite as follows from the Oregon case, just above referred to: "But however this may be, and whatever may be the correct interpretation of section 49, we are all agreed that the mistake, if it was a mistake, in printing the name of Mr. Pierce on the 'official ballot,' in both the People's and Democratic groups of electors, did not deprive the voter who cast such a ballot of the elective franchise, or the candidate for whom it was cast, of the benefit of such vote. Under the law as it now exists, neither a voter nor candidate has any control or voice whatever in the arrangement and publication of the names or forms of the ballot, and the voter is either compelled to vote the 'official ballot,' as prepared by the county clerk, or not vote at all. In such case, in the absence of an affirmative declaration in the statute that a ballot containing the name of a candidate in more than one place is void, and

shall not be counted, we are unable to agree to the doctrine that an error of the county clerk in construing a doubtful provision of the law should disenfranchise a large number of voters, who are in no way responsible for the error or mistake; and such is the effect of the decisions under similar ballot laws. *Bowers v. Smith* (Mo. Sup.) 17 S. W. 761, 20 S. W. 101; *Allen v. Glynn* (Colo. Sup.) 29 Pac. 670; *Northcote v. Pulsford*, 44 Law J. C. P. 217. The law is 'mandatory,' in the sense that it demands and requires the county clerks, in the preparation of the 'official ballot,' to strictly comply with all its provisions, but not in the sense that a voter's right to exercise its elective franchises will be lost because of some technical mistake of the county clerk in printing the names of candidates upon the ballot. Such a construction of the law would not only render the election invalid on account of an honest mistake of a county clerk, but would open the door to the gravest fraud. It would place the power in the hands of a dishonest officer to disenfranchise the voters of his county, as well as cause the defeat of any particular candidate. To defeat the will of the people or a particular candidate, it would only be necessary to furnish the electors, or a part of them, with ballots slightly variant or differing from those prescribed by law. Unless the law is clearly mandatory, or in some way declares the consequences of a departure from its provisions, the court ought not to defeat the will of the people, when fairly expressed, because of some technical error or mistake in the form of the ballot; and in this case there is no claim or suggestion of fraud on the part of any one, or that the returns now in the possession of the secretary of state do not correctly represent the will of the people, as expressed at the polls."

As to the views which courts have taken of defects in certificates of nomination, and as to the spirit of the provisions of the Australian ballot law, we quote from the following decisions:

Simpson v. Osborn, 52 Kan. 328, 34 Pac. 747: "We are unable to see that very serious harm can come from the printing of the name of a candidate on the official ballot, even though the certificate of his nomination be informal. The people, on election day, will vote only for the candidates of their choice, and are not likely to be seriously misled by any fraudulent or unauthorized nomination. On the other hand, most deplorable consequences might ensue if contentions over the regularity of nomination papers are to be prolonged past the time when the officers charged with the duty of certifying to the nominations, and causing ballots to be printed, are required by law to act in preparing for the election."

State v. Allen (Neb.) 62 N. W. 35: "The grand design of the Australian ballot law was the purity of elections, and to protect the voter, and public at large, from the ef-

facts of fraud and intimidation; and the construction given the act should, if possible, be in harmony with its beneficent object. A cardinal rule for the construction of statutes is that, in case of ambiguity in an act, the courts will adopt that construction best adapted to promote the general object, and most conformable to reason and justice. See Sedg. St. Const. Law, 196. * * * We must not, however, be understood as holding the provision of the ballot law under consideration to be mandatory. Generally speaking, provisions which are not essential to a fair election will be held to be directory merely, unless the contrary clearly appears from the act itself. *State v. Russell*, 34 Neb. 116, 51 N. W. 465, and authorities cited."

State v. Saxon, 30 Fla. 668, 12 South. 218: "Statutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favor, and exceptions which exclude a ballot should be restricted, rather than extended, so as to admit the ballot if the spirit and intention of the law is not violated, although a liberal construction would violate it. The result, as shown by the ballots deposited by legal electors, must not be set aside, except for causes plainly within the purview of the statute." "The object intended to be effected was the independence of the voter, and this was sought to be secured by prescribing to a certain extent the form of the ballot, and excluding from it whatever was within the prohibition of the provision, and thereby securing the secrecy of the ballot; inviolable secrecy as to the person for whom an elector may vote being the material guaranty of the constitutional mandate that voting at popular elections shall be by ballot. *State v. Anderson*, 26 Fla. 240, 259, 8 South. 1. The nearer the lawful approach to a perfect uniformity of ballots, the more perfectly is the secrecy of the ballot, and consequently the independence of the voter, secured. The greater the uniformity, the less the possibility of distinguishing marks. It is, however, not to be lost sight of, that a ballot will never be vitiated by anything which is not clearly within the prohibiting words and meaning of the statute. The elector should not be deprived of his vote through mere inference, but only upon the clear expression of the law."

Boyd v. Mills, 53 Kan. 594, 37 Pac. 16: "The departure from the law in matters which the legislature has not declared of vital importance must be substantial in order to vitiate the ballots. This appears to be the general current of all the authorities. In *Bowers v. Smith*, 111 Mo. 61, 20 S. W. 101, it is said: 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declarations, the judiciary endeavor, as best they may, to discern whether the deviation from the pre-

scribed forms of law had or had not so vital an influence as to prevent a full and free expression of the popular will.'"

Returning again to *Price v. Lush*, we observe that the doctrine was there invoked that, by the adoption of a statute of a foreign country, the subject of which was new to this jurisdiction, we impliedly adopted the construction given to such statute by the courts of such foreign country, provided our own statute, as enacted, was silent as to the matter of construction. Eminent authority was cited in support of that doctrine, as remarked in *State v. Barber* (Wyo.) 32 Pac. 14. That this general doctrine should obtain we have no doubt. It has often been declared by this court. *Lindley v. Davis*, 6 Mont. 453, 13 Pac. 118; *Territory v. Stears*, 12 Mont. 330; *First Nat. Bank v. Bell S. & C. Min. Co.*, 8 Mont. 32, 19 Pac. 403.

But we think that in *Price v. Lush* the doctrine should have been taken with a modification, which escaped the attention of the court. The Australian ballot law was adopted from a monarchical government,—a limited monarchy, perhaps, but still of the nature of a monarchy. The law was brought from such a government to a republic. In the former the tendency is to limit and restrict the electoral franchise. In the latter the tendency is to extend the same. The particular form of ballot law known as the "Australian System" was new to our jurisdiction. But construction of election laws generally was not with us a new field of law; and, in the construction of election laws, the whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of the electors. As said by Chief Justice Groesbeck, in *State v. Barber* (Wyo.) 32 Pac. 28: "Although our statute is a very faithful copy of the Australian ballot law, I see no reason for adopting the construction of the British courts, which appears to be most rigid. I do not see why this law should be more strictly construed than any other statute, or why different rules of construction from those invariably followed by the courts should be adopted in construing the statute." See, also, cases above cited, and cases cited in the brief of counsel for Hallahan.

We are of opinion that an election law imported from a monarchy to a republic should therefore not be subjected strictly to the rule that the importation of a statute imports also its construction. In this respect, and for the reason suggested, we are of opinion that *Price v. Lush* extended the rule to an application not warranted by our history, our institutions, and the former decisions of American courts upon the construction of election laws. These views lead us to the opinion that the provisions of our Australian ballot law should not be construed as strictly mandatory, when the question of their observance or disobedience is raised under the facts and circum-

stances found in the case at bar. *Price v. Lush*, however, is distinguishable from the case at bar in this respect, as remarked above in this opinion, that that case was decided upon the pleadings, and nearly the whole ballot system appeared to have been disregarded. It did not in that case appear that facts omitted to be stated in the certificate were absolutely existent; but in the case before us the defects in the certificate of nomination were simply omissions to state facts not particularly substantial, when, indeed, the facts so omitted to be stated did exist, and were so found by the court on the trial. That was not the case in *Price v. Lush*.

As to whether the provisions, here under consideration, of the Australian Ballot Law, as to certifying a nomination, are to be considered directory or mandatory, we are of opinion that the correct view is this: That while courts may have held that such provisions are mandatory, when the question was directly raised in some proceeding demanding that such provision should be complied with, or in some proceeding asking that an officer be required to file a certificate which was defective, and he made such defect a defense for his refusal, yet they should not be held to be mandatory in a case like the one at bar, where the nomination has been duly made, a certificate filed, the name placed upon the ballot, the candidate voted for and elected by a plurality of all the legal votes cast, and the effect of giving a mandatory construction of the provision under consideration is absolutely to disenfranchise a plurality of the voters of the district, when no question is made that their will has not been fully, fairly, and honestly expressed at the polls. *State v. Barber* (Wyo.) 32 Pac. 28; *Lucas v. Ringsrud* (S. D.) 53 N. W. 426; *State v. Saxon* (Fla.) 12 South. 218.

In this connection section 13 of article 11 of the constitution is pertinent: "In all elections held by the people under this constitution, the person who shall receive the highest number of legal votes shall be declared elected." To hold such provisions of a law mandatory is not within the rules as to mandatory and directory construction of statutes. We said in *Bank v. Neill*, 13 Mont. 382, 34 Pac. 180: "As to whether language should be construed as mandatory or directory, the doctrine is well stated in *Wheeler v. City of Chicago*, 24 Ill. 105, as follows: 'The word "may" is construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. And so, on the other hand, the word "shall" may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it that construction. But, if any right to any one depends upon giving the word an imperative construction, the presumption is that the word was used

in reference to such right or benefit. But, where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely.' So in the case at bar, The moving party's right to his compensation given by statute for the trouble and expense of his motion depends upon giving the word 'shall' an imperative construction, and, as remarked in the Illinois case, 'the presumption is that the word was used in reference to such right or benefit.' See, also, *Blake v. Railroad Co.*, 39 N. H. 435; *Ex parte Jordan*, 94 U. S. 251; *Sedg. St. & Const. Law*, 316-325."

We note the following from Endlich on Interpretation of Statutes: "When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of noncompliance, the question often arises, what intention is to be attributed by inference to the legislature? Where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention." Section 431. "It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience (and that, where an act requires a thing to be done in a particular manner, that manner alone must be adopted). But the question is in the main governed by considerations of convenience and justice, and when nullification would involve general inconvenience (or great public mischief) or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature." Section 433. "On the other hand, the prescriptions of a statute (often) relate to the performance of a public duty; and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, without promoting the essential aims of the legislature. In such case, they are said not to be of the essence or the substance of the thing required, and, depending upon this quality of not being of the essence or substance of the thing required, compliance being rather a matter of convenience, and the direction being given with a view simply to proper, orderly, and prompt conduct of business, they seem to be understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, but it does not affect the validity of the act done in disregard of them. It has often been held, for instance, when an act ordered a thing to be done by a public body or public officers, and pointed out the specific time when it was to be done, that the act was directory only, and

might be complied with after the prescribed time. Such is, indeed, the general rule, unless the time specified is of the essence of the thing, or the statute shows that it was intended as a limitation of power, authority, or right." Section 436. "In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be gathered from the statute, construed in the light of other rules of interpretation." Section 437.

Under these views of directory and mandatory statutes, we cannot hold that the matters omitted from Hallahan's certificate were mandatory, when the question is raised as it is in this case. The statute does not declare that noncompliance with these matters shall nullify the election. *End. Interp. St. § 431; Boyd v. Mills (Kan.) 37 Pac. 18; Keller v. Toulme (Miss.) 7 South. 508; People v. Board of Canvassers (N. Y.) 29 N. E. 327.* The whole aim and object of the legislature are not defeated by such noncompliance. *End. Interp. St. § 431.* If the election is to be nullified, it would, as observed in *Endlich*, involve general inconvenience and great public mischief and injustice to innocent persons, without promoting the real aim and object of the legislature. *End. Interp. St. § 433.* We cannot believe that such was the intention of the act.

Referring again to the case of *Bank v. Neill*, quoted above, we have to observe in the case at bar that the right of no one depends upon giving these provisions of the statute a mandatory construction. No right is preserved by such construction, but, on the other hand, a right would be destroyed; that is, the right of the person having the highest number of legal votes cast to be declared elected. *Const. art. 9, § 13.* But, by giving these provisions a directory construction, this same right is preserved. Surely, such construction should prevail in this case. Such are our views as to this important matter. It was claimed in the argument that our decision in *State v. Benton*, 13 Mont. 306, 34 Pac. 301, looked in the direction of the views now expressed. If it did, we are satisfied that it looked in the right direction. We said in that case: "The decision in this case is placed solely upon the ground discussed hereinbefore, and all other questions are reserved." So, in this case at bar, we limit our remarks to the facts of the case, in this, namely, that when such defects in a nominating certificate as existed in the one which we have considered are brought before a court in a proceeding such as the one at bar, and with the facts as they are found here, we are of opinion that the said described requirements of the Australian ballot law, as to certifying nominations, must be held to be directory only. Any other construction of these provisions of the Australian ballot law would convert a great reform measure into a trap and a snare for the

innocent and the honest, and would subject the will of the people in elections to the accidents of inadvertence and the tricks of the disingenuous. While the statute would seek to cast out one evil spirit, it would take into the political house thus swept and garnished seven other more dangerous spirits, and the last condition of the state would be worse than the first. Gospel of Luke, c. xii. 24; 28. There need be no new trial in this case. The findings are all made, and are not attacked. They are sufficient upon which to enter judgment. *Woolman v. Garringer*, 2 Mont. 406; *Collier v. Ervin*, Id. 557; *Barkley v. Tieleke*, Id. 435. It is ordered that the judgment of the district court be reversed, and that the case be remanded, with instructions to dismiss the contest, and adjudge that D. F. Hallahan is the duly-elected treasurer of Deer Lodge county. *Remittitur forthwith.*

PEMBERTON, C. J., concurs.

HUNT, J. (concurring). I concur in the conclusion and the reasoning of the learned opinion of Justice DE WITT. But I regard the decision of the court as a reversal, rather than a modification, of the case of *Price v. Lush*, and, so regarding it, I willingly concur. I have never believed that the doctrine in the case of *Price v. Lush* could be sustained. In my judgment, it is contrary to the intent of the law itself, as well as the spirit of our government, and to the letter of the constitution of the state, providing that "in all elections held by the people under this constitution, the person or persons who shall receive the highest number of legal votes, shall be declared elected." Article 9, § 13. Whatever may be the proper construction to be put upon the provisions of the Australian ballot law, where the regularity of the nominating certificate is questioned before election, I think that after the election is over, and no questions of fraud or illegality of the returns, or other questions of that nature, are raised, the constitution is mandatory, and that the person who receives the highest number of votes must be declared to be elected.

(37 Or. 328)

FLECKENSTEIN et al. v. INMAN, POULSEN & CO.

(Supreme Court of Oregon. April 29, 1895.)
ASSIGNMENT OF CLAIM—OWNERSHIP BY ASSIGNOR
—APPROPRIATION OF LOGS—LIABILITY
OF APPROPRIATOR.

1. In an action for the price of logs sold to defendant by one M., who assigned the claim to plaintiffs, it was not error to refuse an instruction that plaintiffs could not recover if the logs did not belong to M. at the time of the assignment, there being evidence that at the time of such assignment M. was acting as agent for the owner, who subsequently ratified his act.

2. Where logs which had been placed in defendant's rafts contrary to orders were taken to its mill, and sawed into lumber, defendant's liability for the value thereof attached when it first took possession of the logs, and not when they were actually used at the mill.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Fleckenstein & Mayer against Inman, Poulsen & Co. to recover the value of saw logs. From a judgment for plaintiffs, defendant appeals. Affirmed.

Raleigh Scott, for appellant. Joseph Simon, for respondents.

BEAN, C. J. This is an action to recover for certain saw logs alleged to have been sold and delivered by Matti Makarainen to the defendant between November 29, 1892, and the 21st day of February, 1893. The complaint avers that between the dates mentioned Makarainen sold and delivered to the defendant, at its special instance and request, 610 saw logs, containing 369,769 feet, of the reasonable value and agreed price of \$4 per 1,000, and 535 saw logs, containing 637,494 feet, of the reasonable value and agreed price of \$5 per 1,000, amounting in the aggregate to the sum of \$4,666.54, no part of which has been paid; that on February 21, 1893, Makarainen, for value, duly sold and assigned his claim and demand against the defendant to the plaintiffs, who ever since have been, and now are, the owners and holders thereof. The answer of the defendant denies that Makarainen sold and delivered to it the saw logs mentioned in the complaint, or that it received any logs belonging to him, except as therein alleged; avers that it has no knowledge or information sufficient to form a belief as to whether Makarainen sold and assigned his claim or demand against it to the plaintiffs in February, 1893, or at any other time; and alleges that at the date mentioned Makarainen had no claim or demand against it for any sum of money, except as therein-after alleged. And as a further and separate defense alleges: "That prior to the 29th day of November, 1892, the said Matti Makarainen offered to sell saw logs to the defendant, but the defendant refused to purchase any saw logs whatever from said Matti Makarainen, and has ever since so refused; that, notwithstanding this refusal to purchase any saw logs from said Matti Makarainen, certain saw logs belonging to the said Makarainen were placed in defendant's rafts by the agents of the said Makarainen, without the knowledge or consent of the defendant, and contrary to its direct orders; that said logs of the said Makarainen were brought to the mill of the defendant, in the city of Portland, Oregon, in their said rafts, and were there converted into lumber; that all of the saw logs belonging to the said Matti Makarainen, and converted into lumber by the defendant, as above alleged, prior to the 21st day of February, 1893, contained 614,305 feet; that the reasonable value of said logs was the sum of three dollars per thousand feet, or in all the sum of \$1,842.91; that prior to the 21st day of February, 1893, the defendant had paid to the said Matti Makarainen, for

and on account of the said logs, the sum of \$1,820.74, leaving a balance due the said Makarainen on said 21st day of February, 1893, the sum of \$22.17, which said sum defendant herewith brings into this court, and tender the plaintiffs; that since the 21st day of February, 1893, saw logs belonging to the said Matti Makarainen, containing 275,516 feet, have been placed in the rafts of this defendant by the agents of the said Makarainen without defendant's knowledge or consent, and contrary to its direct orders, as hereinbefore alleged, and converted into lumber by the defendant; that the said 275,516 feet of saw logs were of the reasonable value of three dollars per thousand feet, amounting to \$826.53; that defendant has paid for boomage of said logs the sum of \$153.53, leaving a balance due for said logs in the sum of \$673." At the trial Makarainen testified in rebuttal that during the month of September, 1892, he sold, assigned, and transferred all his right, title, and interest in and to the logs which were afterwards received by the defendant to his brother, Maketa, for the sum of \$500; that he had no further interest therein after that date; and that when he made the assignment, in February, 1893, to the plaintiffs, he was acting under a power of attorney for his brother, who subsequently ratified his acts. He also testified that he sold and caused to be delivered to defendant the logs mentioned in the complaint; that he demanded payment therefor, and that all the dealings in relation to the sale and delivery of such logs were had by defendant with him. At the proper time the defendant requested the court to instruct the jury (1) that, if Makarainen "had sold out to his brother before the assignment, he had nothing to sell, and could not convey anything by an assignment to plaintiff"; and (2) that, "if there was no sale made, as claimed by Makarainen, to defendant, but that defendant simply used said logs, which were placed in its rafts contrary to its orders, then you should only find for the plaintiffs for the amount of logs used up to the date of the assignment, to wit, February 21, 1893." These instructions were refused by the court, and, the trial resulting in a verdict and judgment in favor of the plaintiffs, defendant appeals, assigning as error such refusal.

It will be observed from the foregoing statement that no issue was made or tendered by the pleadings as to the ownership of the logs in question, but, on the contrary, it was affirmatively alleged in the answer that they belonged to Makarainen, and that the defendant was indebted to him on the date of the assignment to the plaintiffs for the value of the logs received and converted into lumber by it prior to that date, less the amount paid thereon. The only issues in the case were as to the assignment of the account to plaintiffs, the quantity and value of the logs, and whether they were purchased by the defendant as alleged in the complaint, or re-

ceived by it in the manner and under the circumstances set out in the answer. No offer was made to amend, and under the pleadings as they stood the instruction requested by defendant, that, if Makarainen did not own the logs, he could not, by an assignment, vest any title in the plaintiffs to the claim or demand for the price thereof, was not only outside of the issues, but was in the face of the admission of his ownership in the answer, and for that reason was properly refused. It was also properly refused for another reason. The alleged sale by Makarainen to his brother was made prior to the sale of the logs to the defendant, if a sale was made, and before the receipt of them by defendant, if received as stated in the answer, and all the dealings with defendant were had by Makarainen, and in his own name. Defendant regarded him as the owner of the logs, made payments to him thereon, and, indeed, he was the only party known in the transaction as the owner, or claiming any interest therein, prior to his disclosures as a witness at the trial. And while it is true he testified that his brother was in fact the owner, he also testified that he was acting as agent in making the assignment to plaintiffs, and that his act in so doing was subsequently ratified and confirmed. The court could not, therefore, have properly instructed the jury that, if his brother owned the logs, plaintiffs obtained no title by the assignment to them, as it entirely ignored the testimony of Makarainen that he was authorized to make the assignment, and that it was subsequently ratified, which would have given it validity even if Makarainen did not own the logs himself. We therefore think the court was clearly right in refusing the instruction as requested.

In support of the other assignment of error it is contended that if the defendant did not purchase the logs of Makarainen, but they were put into its rafts without its consent, it would not be liable for their value until received and used at its mill in Portland, and plaintiffs can only recover in this action for the value of the logs so used and received prior to the date of the assignment to them in February, 1893. From the bill of exceptions it appears that defendant's evidence tended to show that its manager had some conversation with Makarainen in regard to the purchase of the logs, which were then in the boom of the Cowlitz Boom Company, at the mouth of the Cowlitz river, some miles below the city of Portland; but declined to make the purchase, because they were not of suitable lengths and sizes, and so informed Makarainen, and instructed the boom company not to place them in its rafts. In disregard of these instructions, however, the boom company placed the logs in the raft of the defendant, with other logs belonging to it, and they were subsequently brought to its mill in Portland, and sawed into lumber. A portion of the logs was received at the mill prior to the date of the assignment to plain-

tiffs and a portion thereafter, but the record is silent as to when they were placed in defendant's rafts by the boom company, and as to when it took possession and exercised acts of ownership and control over them. Assuming defendant's theory of the case to be correct, its liability for the value of the logs attached when they were appropriated or converted by it, and not when they were actually used at the mill, if such appropriation or conversion occurred prior to that time. As the record is silent on this question, we are bound, in view of the rule that error must affirmatively appear, to assume that the instruction was refused by the trial court because there was evidence tending to show a conversion of all the logs before they were received at the mill, and prior to the assignment. Finding no error in the record, the judgment is affirmed.

(27 Or. 150)

VAN AUKEN et al. v. DAMMEIER et al.
(Supreme Court of Oregon. April 29, 1895.)

APPEAL—BOND—JURISDICTION IN EQUITY.

1. Where the sureties on the appellant's bond are excepted to, the appellant may, at any time before the expiration of the time for justification, abandon the appeal, and take a new one.

2. Equity has no jurisdiction, to avoid multiplicity of suits, of a suit to recover the several amounts due on a contract whereby defendants, in consideration of the assignment of the plaintiffs' several interests in an option on a mine, were to refund to each plaintiff the amount already advanced by him to develop the mine.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Suit by H. Van Auken and others against G. H. Dammeler and another. From a judgment for plaintiffs, defendants appeal. Reversed.

E. B. Watson, for appellants. J. H. Hall, for respondents.

BEAN, C. J. This is a suit in equity, in which 12 persons join as plaintiffs, against Dammeler and Coulter, to recover on an alleged contract by which the defendants agreed to assume and pay to each plaintiff the amount of money advanced by him for the purpose of developing and prospecting a certain mine, under the following circumstances, as alleged in the complaint: On the 14th of October, 1889, one J. H. Fisk, who had an option to purchase the Great Blue Gravel Mine, in the state of Washington, divided such option into 20 shares, of \$1,000 each, and sold to the plaintiffs Paquet and Smith, jointly, 1 share; to plaintiffs Buchtel and Mall, 1 share; to plaintiff H. Van Auken, 1 share; to plaintiffs M. M. Hunter, T. De Boest, and Charles Clark, jointly, 1 share; to plaintiff E. House, one-half of 1 share; to plaintiff W. H. Robertson, 2 shares; to plaintiff J. Surman, 1 share; and also to J. H. Dammeler, 1 share, and to Samuel Coulter, 1

share. At the time of this contract the respective shareholders mutually agreed among themselves, and with Fisk, that they would immediately pay 10 per cent. of the purchase price of each share for the purpose of developing the mine, with a view of ascertaining if the same was a good, paying mine of gold and silver, and if it should prove satisfactory they would pay the remainder thereof as follows: \$400 when notified to do so, and \$500 within 90 days thereafter. In pursuance of this agreement, the respective parties paid Fisk 10 per cent. of the contract price of each share held by them, and the sums of money so contributed were used by Fisk in developing the mine. Subsequently, and before the \$400 payment became due, defendants Dammeyer and Coulter, being desirous of purchasing the mine, proposed to plaintiffs that, if they would assign to them their several interests in the option to purchase, they would refund and pay the amount of money already advanced,—that is, to Paquet and Smith, the sum of \$100; to Buchtel and Mall, \$100; to Van Auken, \$100; to W. B. Welch, \$100; to Hunter, De Boest, and Clark, jointly, \$100; to E. House, \$50; and to W. H. Robertson, \$150. This proposition was accepted, and plaintiffs transferred to defendants their several interests in the mine; and defendants subsequently purchased and became the owners thereof, but have failed, neglected, and refused to pay plaintiffs the several sums as aforesaid, or any portion thereof. The complaint then asks for judgment against the defendants, in favor of the individual plaintiffs, for the several amounts advanced and paid by them. To this complaint the defendants demurred for want of jurisdiction, and because it does not state facts sufficient to constitute a cause of suit; and upon the demurrer being overruled they answered, denying the allegations of the complaint, and alleging affirmatively that plaintiffs, and each of them, have a plain, speedy, and adequate remedy by action at law to recover the amounts alleged and claimed in the complaint to be due from the defendants herein, and that the several causes of action set out in the complaint are not within the jurisdiction of a court of equity. After the evidence had been taken the defendants again raised the same question by a motion to dismiss on the ground that the complaint states facts showing a cause of action at law only, and that a court of equity has no jurisdiction over the same, nor right to try the questions involved. This motion was overruled, and a trial had, resulting in a judgment in favor of the plaintiffs separately for the respective amounts advanced by them to Fisk, from which the defendants appeal.

The plaintiffs move to dismiss the appeal for the reason that on August 7, 1894, defendants served a notice of appeal, and on the 14th day of the same month filed an undertaking with one Coulter as surety. Within the time allowed by law, the plaintiffs excepted

to the sufficiency of the surety; and the defendants, instead of producing him for justification, abandoned the attempted appeal, and served a new notice and gave a new undertaking before the time for an appeal had expired. These facts bring the case squarely within *Holladay v. Elliott*, 7 Or. 483, in which it was held that an appellant may abandon an attempted appeal when he deems his notice imperfect, or when it is inconvenient or impossible for the surety to justify in case of an exception to his sufficiency, and may give a new notice and undertaking at any time within the period limited by law for taking appeals. An appeal is not perfected until the time in which to except to the sufficiency of the surety has expired, or from the justification thereof, if excepted to, and until perfected it may be abandoned, and a new appeal taken. It follows that the motion to dismiss the appeal must be overruled.

On the merits the contention for the defendants is that, from the facts set out in the complaint, it appears that plaintiffs have a plain, speedy, and adequate remedy in an ordinary action at law, and consequently a court of equity has no jurisdiction of this controversy, while plaintiffs seek to sustain the jurisdiction on the familiar doctrine that a court of equity will exercise jurisdiction to prevent a multiplicity of suits. But we do not think the doctrine applicable to this case. The rights of the plaintiffs, as against the defendants, are purely legal, and wholly separate and distinct. There is no community of interest among them either in the subject-matter of the suit, or in the relief sought. Each plaintiff is demanding a separate judgment against the defendants for the amount of his individual claim, the granting or refusal of which does not depend upon the rights of his coplaintiffs any further than it grows out of the same transaction, and perhaps involves the same questions of law, and similar facts. A court of law is fully able to grant adequate and speedy relief, and it seems to us the controversy should be determined in that forum. It is sometimes admissible—where a number of persons have separate and individual claims or rights of action against the same person, arising out of the same event or transaction, and which involve and depend upon the same questions of law and similar matters of fact—for a court of equity to exercise jurisdiction in order to prevent a multiplicity of suits, and thus give in one proceeding more substantial relief than could be obtained in numerous actions at law prosecuted by each individual separately. But such jurisdiction is only exercised where the legal remedies are inadequate, and cannot meet the ends of justice as effectively as those afforded by a court of equity; and a bill for that purpose, as said by Morton, C. J., “will not be entertained unless it appears that this is a practical necessity for the interposition of the court to prevent vexatious litigation.” *Fellows v. Spaulding*, 141 Mass. 93, 6 N. E. 548. Where the

rights of the several plaintiffs are purely legal, and in themselves perfectly distinct, so that each party's case depends upon its own peculiar circumstances, and the relief demanded is a separate money judgment in favor of each plaintiff and against the defendant, there is no "practical necessity" for the interposition of a court of equity, and we can find no authority for holding that it will assume jurisdiction simply because the parties are numerous. A defendant is entitled to the constitutional right of trial by jury, of which he cannot be deprived because numerous parties are asserting claims against him, even though such claims may be founded upon the same questions of law and fact. The circumstances under which a court of equity will exercise jurisdiction in order to prevent a multiplicity of suits are fully discussed and considered by Mr. Pomeroy in his work on Equity Jurisprudence; but no principle is announced by him, or sustained by any of the authorities referred to, upon which, in our opinion, this proceeding can be sustained. 1 Pom. Eq. Jur. § 243 et seq. It follows that the decree of the court below must be reversed, the complaint dismissed, and the parties remanded to their remedy at law.

(27 Or. 148)

CAREY v. FARMERS' & MERCHANTS' INS. CO.

(Supreme Court of Oregon. April 29, 1895.)

INSURANCE—PROOFS OF LOSS—TIME OF MAKING.

Under a fire insurance policy providing that in case of loss the assured shall give immediate notice, and render a particular account thereof to the company, reasonable diligence is required in making proof of loss; and, where such proof was made over four months after a fire, and there was nothing in the pleadings to show that it could have been made sooner, the question of reasonable time was for the jury.

Appeal from circuit court, Linn county; George H. Burnett, Judge.

Action by David Carey against the Farmers' & Merchants' Insurance Company to recover on an insurance policy for loss by fire. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

W. R. Willis, for appellant. J. K. Weatherford, for respondent.

MOORE, J. This is an action to recover \$2,600, the amount alleged to be due on an insurance policy, on account of loss by fire. A demurrer to the complaint having been sustained, and the plaintiff refusing to further plead, judgment of dismissal was rendered, from which the plaintiff appeals.

It is contended for defendant that proof of the loss should have been made within 60 days after it occurred, and so alleged in the complaint, and that the want of such allegation entitled it to the judgment rendered; while the plaintiff insists that the policy of insurance did not require the proof to be made within that time, and that the defend-

ant waived such proof. The plaintiff alleges: The incorporation of the defendant company, and its engagement in the general insurance business. His ownership of a dwelling house, barn, woodshed, smokehouse, and household furniture, which, on July 5, 1893, the defendant, in consideration of the payment of the premium, insured against loss by fire in the sum of \$2,600 for the term of three years, and executed to him a policy therefor, a copy of which is set out in the complaint containing, *inter alia*, the following provision: "In case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building insured, or containing the property insured; other insurance, if any; and copies of the written portion of all policies; the whole cash value and ownership of the property; and the amount of loss or damage." That on October 14, 1893, said property was, without plaintiff's fault or negligence, totally destroyed by fire, in consequence of which he had sustained a loss of more than \$2,600. That he gave immediate notice of said loss to the defendant, which, on October 26, 1893, by its secretary, in response thereto, wrote to him as follows: "Yours of the 16th inst. received by us to-day. We will take action in the matter in a short time. The distance is so great, and the means of traveling difficult, that it may be some days before getting there." That on December 10th, no person having appeared to adjust said matter, the plaintiff, by telegraph, asked if the defendant "would send some one to adjust said loss," and the next day received by wire from said secretary an answer which stated, "Will be down next week." That no agent of the defendant appeared. That it was intended that none should adjust said loss. That said letter and message were written and sent with the intention of causing the plaintiff to delay the making or filing of any proof of loss, and that he was misled thereby, in consequence of which he did not file any proof thereof until February 24, 1894. That the defendant accepted and retained the said proofs until two days thereafter, when it returned them, for the alleged reason that they had not been filed within 60 days after the said loss. That the defendant made no other objection thereto, or demanded any other or further proofs; and that by its conduct aforesaid the defendant has waived all right to object to the proofs furnished, and is and should be estopped thereby. That, the defendant not having paid any part of said loss, the plaintiff prayed judgment therefor.

It will be observed that the terms of the policy are that, "in case of loss, the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire." This

provision must be construed to mean that the proof of loss should be made within a reasonable time in view of all the attending circumstances. Such terms in a contract are not to receive a literal construction, and the question whether the proof had been made "immediately" is one of fact for the jury. 2 Wood, Ins. (2d Ed.) 952. The term "immediately," as used in the policy, required the exercise of reasonable diligence by the plaintiff, which would be measured by his ability to make the necessary proof within a given time. If he could, by the exercise of such diligence, have made the proof prior to February 24, 1894, and this fact had been admitted by the pleadings, the court could, as a matter of law, have said that the proof of loss had not been made "immediately," (2 Wood, Ins. 930); but no such admission appears, and hence the question of reasonable time within which such proof should have been made was one of fact for the jury. The cause was argued in this court by the counsel for the defendant upon the assumption that the policy required the proof to be made within 60 days after the loss, and it was presumably decided by the court below upon that theory; but the alleged copy of the policy set out in the complaint contains no such provision. In view of these considerations, it was error to sustain the demurrer, for which reason the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

WOLVERTON, J., having participated in the trial of this cause in the court below, took no part herein.

(27 Or. 104)

ASTORIA EXCHANGE CO. v. SHIVELY.

(Supreme Court of Oregon. April 29, 1895.)

TIDE-WATER LANDS—TITLE IN STATE—CONVEYANCE BY RIPARIAN OWNER.

Act Oct. 11, 1862, entitled "An act to provide a Code of Civil Procedure," § 845 (Hill's Ann. Laws, § 855), which specifies, among other rules for construing the descriptive part of a conveyance of real property when the construction is doubtful, and there are no other sufficient circumstances to determine it, in subdivision 5, that, when tide water is the boundary, the rights of the grantor to low-water mark are included in the conveyance, and also the right of the state between high and low water mark, did not operate as a grant by the state of tide lands belonging to it to the proprietors of the adjacent bank.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

On motion for rehearing. Overruled.

For former opinion, see 39 Pac. 398.

WOLVERTON, J. By appellant's motion for rehearing we are asked to construe that portion of section 855, Hill's Ann. Laws Or., being section 845 of an act entitled "An act to provide a Code of Civil Procedure," passed by the legislative assembly of the state of

Oregon, and approved October 11, 1862, which reads as follows: "The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it: * * * Subd. 5. When tide-water is the boundary, the rights of the grantor to low-water mark are included in the conveyance, and also the right of this state between high and low water mark." It was claimed on the hearing, for this statute, that it is declaratory of the common law relating to tide lands, and that it operated to confirm the ownership of the soil whereon the tide ebbs and flows to low-water mark in the proprietor of the adjacent bank. The case of *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154, settles the question as to what was the status of tide lands under the law when the state was admitted into the Union. Lord, J., at page 427, 22 Or., and page 160, 30 Pac., says: "When the state of Oregon was admitted into the Union, the tide lands became its property, and subject to its jurisdiction and disposal; that, in the absence of legislation or usage, the common-law rule would govern the rights of the upland proprietor, and by that law the title to them is in the state; that the state has the right to dispose of them in such manner as she might deem proper, as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses, state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the state to determine for itself. It can say to what extent it will preserve its rights of ownership in them, or confer them on others." The statute above cited was the first passed since the state's admission having any reference whatever to tide lands; hence the law as it affected or determined the status of such lands stood the same at the passage of the act as when the state was admitted. It was therefore not the law of Oregon, upon the date of said enactment, "that, so far as the tide ebbs and flows, the ownership of the soil to low-water mark was in the proprietor of the adjacent bank." And as it was not claimed for this act that it operated as a grant of the tide lands to the bank owner, we presumed that *Bowlby v. Shively* was decisive of the point, and we still adhere to that opinion. But now, upon the petition for rehearing, it is urged that the act of October 11, 1862, operated as a grant by the state of Oregon to the proprietors of the adjacent bank. This is an important advance upon the doctrine as formerly stated and maintained. There exist three good and sufficient reasons why this statute should not now be construed as a grant:

1. It is apparent from the law itself that the legislature did not intend it to operate as a grant. It is found in an act entitled "An act to provide a Code of Civil Procedure,"

and comes under the title of "Evidence in Particular Cases," and purports to lay down rules "for construing the descriptive part of a conveyance of real property when the construction is doubtful, and there are no other sufficient circumstances to determine it." No words of grant are used or employed, and nothing appears upon the face of the statute to signify such an intent by the legislature. The object was, as the statute indicates, to provide rules for construing the descriptive part of conveyances. When tide water is made the boundary, the statute provides that "the rights of the grantor to low-water mark are included in the conveyance." If a grantor, being a bank owner, has any rights to the soil beneath the ebb and flow of the tide, such as he has would pass under a deed making tide water the boundary, because the courts would, under the statute, construe his grant as running to low-water mark; if he is without any such rights, however, then none can pass, as he could not convey more than he has. So, if the right was in the state, it was surely not intended by the legislature that a conveyance by a private individual, making tide water the boundary, would pass such right or title out of the state to the grantee. The latter clause of subdivision 5, to wit, "and also the right of the state between high and low water mark," can therefore have no bearing in the construction of the description of private conveyances, and just why it was added is not now apparent, unless it was to govern where the state makes a conveyance making tide water the boundary. One thing is certain: the clause does not operate as a grant, and was never so intended.

2. The legislature has treated all tide lands as belonging to the state, and subject to its disposition and control, but in subordination, however, to the rights of navigation and commerce. On October 17, 1862, at the same session of the legislature that the act to provide a Code of Civil Procedure was passed, another act was passed, authorizing "the owners of land lying upon a navigable stream or other like water to build wharves into such stream or other water beyond the line of low-water mark," which is alluded to by counsel; but this act seems to have no particular bearing upon the question at issue. But by the act of 1872 (Sess. Laws 1872, p. 129), and subsequent acts amendatory thereof, the legislature has, by direct enactment, provided for the sale and disposal by the state of all tide lands within her boundary, thereby assuming and exercising proprietary control over them. Since that time the legislature has, by the act of October 24, 1875, directly granted to the Willamette Valley & Coast Railroad Company all the tide and marsh lands in Benton county, and the state has by deed conveyed a large amount of her tide lands to a great number of private individuals who, together with their grantees, are now holding by virtue of the title thus deraigned. So we find that by legislative intentment all tide lands

belong to the state, and the policy has been, and is now, to convey them to purchasers subject to the paramount rights of navigation and commerce, thus placing upon said act of 1862 a legislative construction in harmony with what section 855, subd. 5, purports to be, — simply a rule of evidence by which to determine the descriptive parts of conveyances where the construction is doubtful, and therefore not a grant.

3. The courts of the state have treated the several acts of the legislature concerning tide lands as compatible with the state's ownership thereof, and have repeatedly upheld, sustained, and confirmed the grants and deeds of the state to such lands, until now it has become settled law that the state was primarily the owner of these lands, and had good right to convey and dispose of them. See *Hinman v. Warren*, 6 Or. 411; *Parker v. Taylor*, 7 Or. 446; *Parker v. Rogers*, 8 Or. 183; and *Bowliby v. Shively*, supra. True, in all the reported cases no reference is made to section 855 of the Code of Civil Procedure, and no attempt has ever been made to construe it. This fact in itself is a strong argument that no one ever considered said subdivision 5 as constituting a grant, when, if so considered, it was of such vital and vast importance to tide land occupants. It has now come to this: that the several acts of the legislature referred to, the legislative construction placed upon them compatible with the theory of the state's ownership, and the adjudications of this court touching them, have all tended to and have now indubitably established a fixed rule of property concerning these lands, which to overthrow would unsettle large vested interests, and destroy many valuable titles. Courts are always careful of vested rights, and will never disturb them unless there are good and ample reasons for so doing. For these and other reasons which might be assigned the motion for a rehearing is overruled.

(27 Or. 272)

**WILLAMETTE STEAM MILLS, LUMBERING & MANUFACTURING
CO. v. McLEOD et al.**

(Supreme Court of Oregon. April 29, 1895.)

MECHANIC'S LIEN—SUFFICIENCY OF NOTICE.

1. A notice for a mechanic's lien, reciting that "the ground on which the building was erected being at the time the property of H., who caused the said building to be erected by the said McL., her contractor and agent," to whom the material was furnished, sufficiently shows the contractual relation existing between them.

2. Where land is conveyed during the construction of a building thereon, the owner at the time a mechanic's lien is filed is the one properly named therein as the owner, and not the owner at the time the building was commenced.

Bean, C. J., dissenting.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by the Willamette Steam Mills, Lumbering & Manufacturing Company against N.

E. McLeod and others to enforce a mechanic's lien. From a decree for plaintiff, defendant Lydia Henry appeals. Affirmed.

E. C. Bronaugh, for appellant. Joseph Simon and G. G. Gammons, for respondent.

PER CURIAM. This is a suit brought by the Willamette Steam Mills, Lumbering & Manufacturing Company against N. E. McLeod, Lydia Henry, F. E. Beach, and C. A. Plummer to foreclose a mechanic's lien upon lot No. 1 in block No. 1 of Henry's addition to Portland, Or. Upon the issues being made up by answers and cross bills and replies thereto, the cause was tried by the court, which found the facts substantially as follows: That about January 10, 1893, one Charles K. Henry, being the owner of said lot, entered into a contract with the defendant McLeod by the terms of which the latter, in consideration of \$3,239, agreed to furnish the material, and erect thereon a dwelling house. That, on March 16th of that year, Charles K. Henry conveyed to the defendant Lydia Henry the said lot and the dwelling house so contracted for, then in process of construction, and which the defendant McLeod thereafter completed. That the defendant Lydia Henry received the said conveyance with knowledge that said house was being constructed by McLeod under his contract with Charles K. Henry. That she consented to the continuance of the work, and contracted with McLeod as the contractor in charge of the building until the completion thereof, and was fully aware of, and had notice of, from the beginning, and supervised, the furnishing of materials and labor for such construction by the plaintiff and other lien claimants; and that she never posted any notice that she would not be responsible for the cost of said building or any part thereof; and that a large portion of said materials was furnished and used in the building after the said conveyance to her. That the plaintiff, having furnished to the defendant McLeod lumber and material of the value of \$602.71, to be used, and which were used, in the construction of said building, filed its lien to secure the payment thereof. That the defendant Beach, having furnished to one Henry Schroeder material of the value of \$83.84, to be used, and which was used, in painting a part of said house under a contract between said Schroeder and McLeod, filed his lien to secure the payment thereof. That Fleming & Clark, having entered into a contract with McLeod, furnished material and performed labor of the value of \$35 in painting a part of said house, and, having filed their notice of lien, assigned their demand and lien to the defendant Beach. That Whittier, Fuller & Co., having furnished to the defendant McLeod material and performed labor of the value of \$275, to be used, and which were used, in the construction of said house, and having filed their lien to secure the payment

thereof, assigned it and their demand to the defendant Plummer. Upon such findings, the court decreed a foreclosure of said liens, and a sale of the property charged therewith, to satisfy the amounts found due the respective parties, from which decree the defendant Lydia Henry appeals.

The plaintiff's notice of lien states: "That the Willamette Steam Mills, Lumbering & Manufacturing Company, a corporation, of the city of Portland, in the county of Multnomah, Oregon, has, by virtue of a contract heretofore made with N. E. McLeod, of Multnomah, Oregon, sold and delivered to said N. E. McLeod lumber and building material to be used, and which were used, in the erection and completion of a certain building upon the land hereinafter described; the ground upon which said building was erected being at the time the property of Lydia Henry, who caused the said building to be erected by the said N. E. McLeod, her contractor and agent." The counsel for the appellant contends that this notice fails to state the contractual relations existing between the plaintiff and the defendant Lydia Henry. The statement that she was the owner of the property, and caused said building to be erected by McLeod, to whom the plaintiff furnished the materials, shows a contractual relation between the parties, sufficient to authorize McLeod to bind the property by his contracts for material furnished or labor performed in the construction of said building. The evidence, however, shows that the contract was entered into between the defendant McLeod and Charles K. Henry, who was at the time of its execution, and until March 16, 1893, the owner of the property. It also appears that McLeod commenced to work on the building about January 10th, and, while putting up the frame, the defendant Lydia Henry ordered a change in the plans by requiring double sliding doors in one of the partitions, which McLeod made after consulting with Charles K. Henry, who told him that the house was for Lydia Henry, and ordered him to make such changes as she desired; that she frequently visited the building, suggested changes therein, and supervised its construction. Charles K. Henry, as a witness for Lydia Henry, testified that, when the contract was entered into, he intended to have the building constructed for himself; that Lydia Henry had no interest in the property until it was conveyed to her; that it was understood between him and said Lydia that he was to pay for the building, and that he had paid the whole contract price, except \$839. From this evidence it is apparent that Charles K. Henry would in an action at law be personally liable on the contract for the full value of the materials furnished and labor performed in the construction of said building, while the property benefited by the improvement would in equity be also liable therefor to the extent of its value.

The testimony of McLeod shows that Lydia

Henry was the equitable owner of the property at the time the contract was entered into, and that the house was being constructed for her by Charles K. Henry, as her agent. This testimony is corroborated by other facts and circumstances, which leads us to believe it to be true. It is contended that Charles K. Henry, being the legal owner of said property when the construction of said building was commenced, was the proper person to be named in the notice as the owner thereof, and that the statement that Lydia Henry was the owner renders the lien void. It is the building which should be charged with the lien, and the notice of such lien should state the name of the owner at the time the lien is filed, either directly or by necessary inference. Any other interpretation of the statute would require the lien claimant to state the name of all the owners of the property from the time the building was commenced until the lien was filed, in cases where the premises had been conveyed during the construction of the building. *Collins v. Snook* (Wash.) 38 Pac. 161; *Edwards v. Derrickson*, 28 N. J. Law, 39; *Robins v. Bunn*, 34 N. J. Law, 322; *Amidon v. Benjamin*, 128 Mass. 534; *Kezartee v. Marks*, 15 Or. 529, 16 Pac. 407; *Gordon v. Deal*, 23 Or. 154, 31 Pac. 287. The statement that Lydia Henry caused the building to be erected upon land owned by her is equivalent to saying that she was the owner of the building. *Curtis v. Sestanovich* (Or.) 37 Pac. 67.

The lien notice of Fleming & Clark, assigned to the defendant Beach, is nearly identical in its statements with that of the plaintiff, except that it avers that Lydia Henry is the owner of the lot and house, and hence it needs no consideration. The lien of Whittier, Fuller & Co., assigned to the defendant Plummer, states: "That said N. E. McLeod was the agent of Charles Henry, and the said Charles Henry is the reputed owner of said building and of the land upon which it stands, and caused said materials and labor to be used and performed." And the lien of the defendant Beach states: "That during said time Charles Henry was, and still is, the owner and reputed owner of said lot and of said house, and caused the said house to be constructed." The only question involved in the consideration of these liens is the statement of the ownership of the property sought to be charged therewith at the time they were filed. The statute (Hill's Code, § 3673) requires the statement of the name of the owner or reputed owner if known, and these notices, having complied with its requirements, must be held valid; and the decree will therefore be affirmed.

BEAN, C. J. (dissenting). I concur in the result, but not in that portion of the opinion which assumes that a claim of lien must upon its face show the contractual relation between the owner of the building and the party to

whom the materials were furnished or for whom the labor was performed. It is true there is a suggestion to that effect in *Rankin v. Malarkey*, 23 Or. 593, 32 Pac. 620, and 34 Pac. 816, and *Curtis v. Sestanovich* (Or.) 37 Pac. 67, but the question was not directly involved or necessary to a decision of either of these cases, and hence I did not formally dissent at the time. In my opinion, the claimant observes the necessary legal requirements when he files in the proper office "a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with said lien sufficient for identification"; and to exact of him anything more is imposing a burden not authorized by law. When the statement contains all the facts required by statute to be contained therein, the question as to whether the lien attaches for materials furnished or labor performed for some person whom the statute makes the agent of the owner, as provided in section 3669, or whether it attaches by virtue of section 3672, is a matter of pleadings and proof. The statutes of California and New Mexico are similar to ours in this respect, and I think the view expressed by the courts of those states in *Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860, and *Post v. Miles* (N. M.) 34 Pac. 596, is the better construction of the statute.

(22 Nev. 336)

STATE v. WONG FUN. (No. 1,425.)

(Supreme Court of Nevada. May 1, 1895.)

HOMICIDE—INSTRUCTIONS AS TO DEGREE—REVIEW.

1. A murder not perpetrated by means of poison, lying in wait, or torture, nor in the perpetration of, or attempt to perpetrate, arson, rape, robbery, or burglary, can only become murder in the first degree by being willful, deliberate, and premeditated. An instruction which ignores these conditions, and informs the jury that if they find that the defendant unlawfully, and with malice aforethought, killed the deceased, their verdict must be murder in the first degree, is erroneous.

2. The words "willful, deliberate, and premeditated," as used in the statute defining murder in the first degree, are not synonymous with the term "malice aforethought."

3. Where there is evidence to support the verdict of the jury, the supreme court cannot reverse the judgment upon the ground of insufficiency of the evidence.

(Syllabus by Bigelow, C. J.)

Appeal from district court, White Pine county; G. F. Tolbot, Judge.

Wong Fun, indicted as George Fong, having been convicted of murder, appeals. Reversed.

Henry Rives and Frank X. Murphy, for appellant. R. M. Beatty, Atty. Gen., for the State.

BIGELOW, C. J. The defendant was convicted of murder in the first degree, and appeals. The charging part of the indictment reads as follows: "The said George Fong, on the 4th day of October, A. D. 1894, or thereabouts, without authority of law, and with malice aforethought, killed one Hing Lee, a human being, by shooting him with a pistol, at said county, state of Nevada." Under our statute dividing murder into two degrees, and the one providing a form of indictment, this indictment is sufficient to support a verdict of murder in the first degree, although it does not charge that the killing was done with premeditation and deliberation. *State v. Millain*, 3 Nev. 409, 439; *State v. Thompson*, 12 Nev. 140; *State v. Hing*, 16 Nev. 307.

In the second instruction, marked "State's Instruction," the court instructed the jury as follows: "The court instructs you that if, from all the evidence, you are satisfied, beyond a reasonable doubt, that the defendant, Wong Fun, on the 4th day of October, A. D. 1894, at the county of White Pine, state of Nevada, without authority of law, and with malice aforethought, killed Hing Lee by shooting him with a pistol, as alleged in the indictment, your verdict must be, 'Guilty of murder in the first degree.'" And again, in "State's Instruction No. 1," the jury were instructed that if they were "satisfied, beyond reasonable doubt, that he did kill the deceased at the time and place and in the manner charged in the indictment, without legal justification, your verdict must be, 'Guilty of murder in the first degree.'" These instructions are clearly erroneous. They define murder in the second degree, and then inform the jury that, if they find those conditions to exist, they must convict the defendant of the first degree. Section 17 of the act concerning crimes and punishments (Gen. St. § 4581) provides that: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree." As it is not claimed that the murder in this case was perpetrated by means of poison, or lying in wait, or torture, nor that it was done in the perpetration of, or attempt to perpetrate, any of the other offenses mentioned, it could only become murder of the first degree by having been willful, deliberate, and premeditated. Without these constituents, the crime would only be murder of the second degree, and it is the failure to notice these most important conditions in the definition of murder of the first degree that makes the instructions erroneous. *State v. Millain*, 3 Nev. 409, 445; *State v. Anderson*, 4 Nev. 265, 276; *People v. Valencia*, 43 Cal. 552; *People v. Iams*, 57

Cal. 115, 117; *People v. Guance*, 57 Cal. 154; *People v. Grigsby*, 62 Cal. 482. The reference to the indictment does not help the instructions any upon this point, because, as we have seen, the indictment does not allege that the killing was committed "willfully, deliberately, and premeditatedly"; conditions that, although not necessary to be stated in the indictment, must be found by the jury to exist, before they are justified in rendering a verdict of murder in the first degree.

It is argued by the attorney general that the term "malice aforethought," used in the instruction, is equivalent to the terms "willful, deliberate, and premeditated," but we cannot agree with that contention. Malice aforethought must exist in both degrees of murder, but if nothing more is shown it is murder of the second degree. *Whart. Hom. § 194*. The adjectives "willful, deliberate, and premeditated," as used in the statute, mean something over and above malice aforethought. *People v. Long*, 39 Cal. 694; *People v. Doyell*, 48 Cal. 85.

There was some evidence to support the verdict of murder in the first degree, and under these circumstances, whether it was such or not, and whether the defendant was insane at the time of the killing, were questions pre-eminently for the jury. With their conclusions this court cannot interfere. *State v. Raymond*, 11 Nev. 99; *State v. Orozler*, 12 Nev. 300; *State v. Mills*, Id. 403. The judgment is reversed, and cause remanded for a new trial.

BELKNAP and BONNIFIELD, JJ., concur.

(23 Nev. 333)

Ex parte HEWLETT. (No. 1,429.)

(Supreme Court of Nevada. April 26, 1895.)

STATUTES—AMENDMENT—CONSTRUCTION—FISHERIES.

1. Where the title states that the subject of an act is to amend one section of a former statute, the act cannot be extended to the amendment of other sections.

2. Where the sections of an act are so separate and independent that one section can be made to operate in accordance with the intention of the legislature without the aid of the others, and the invalid sections should not have constituted any inducement for the first, the courts will sustain that section although the other sections are unconstitutional.

3. St. Nev. 1895, 83, provides that trout shall not be caught from October of each year to June of each year. *Held*, that the intention of the legislature was to forbid the catching of trout from October of one year to June of the next year.

4. Where there is a conflict between the provisions of the same act, and there is nothing else to indicate which the legislature intended to be in force, the latest in position will control.

5. Where an act forbids the catching of trout from the rivers of a state, and also from the lakes, even if the provision as to the lakes is so self-contradictory that it cannot be enforced, this will not invalidate the provision against catching from the rivers.

(Syllabus by Bigelow, C. J.)

Original application by Fredrick Hewlett for writ of habeas corpus. Denied.

Torreyson & Summerfield, for petitioner. F. H. Norcross, Dist. Atty., and Robt. M. Beatty, Atty. Gen., for respondent.

BIGELOW, C. J. The application for the writ shows that the petitioner was convicted in the justice's court of Reno township, Washoe county, of having willfully and unlawfully caught, with a hook and line, on the 12th day of April, 1895, five river trout, in the waters of the Truckee river, under which conviction he is now imprisoned by the sheriff of said county. To the application the district attorney of Washoe county has appeared and filed a demurrer. The petitioner claims that there is no law forbidding the taking of trout on the 12th day of April. By St. Nev. 1893, p. 128, the legislature enacted an amendment to what is known as the "Fish Law," the act consisting of but two sections. Section 1 amends section 2 of the original act, and contains the provisions as to when it shall be unlawful to catch trout, but permits taking them after April 1st. Section 2 amends section 4 of the original act, and prohibits common carriers and others from shipping or transporting trout illegally caught. By St. Nev. 1895, 83, the legislature attempted to further amend the act of 1893. This amendment extends the close season to June 1st, and the plaintiff's conviction depends upon the validity of this amendment, as without it there is no law against taking trout after April 1st. It is claimed first that it is invalid because the title of the act does not express its subject. Stripped of its verbiage, the title states that it is to amend section 2 of the act of 1893. Section 1 provides for the amendment of section 2 of that act, as stated in the title, but from its subject-matter, which is substantially, except as to dates, the same as section 1 of the act of 1893, it appears that section 1 is the section they really wished to amend. However, as the title states that it is an act to amend section 2 of the former act, and the body of the act repeats that statement, we are of the opinion that it must be taken just as it reads, although it would seem that a mistake has been made. But the most serious point is that, after stating in the title that the act is an act to amend but one section of the act of 1893, it goes on to amend sections 4 and 8 of that act, although, as just stated, there are but two sections to the act, and consequently no section 4 or 8 to be amended. Under these circumstances, it would seem that the last two sections of the act of 1895 are unconstitutional, under the provisions of section 17 of article 4 of the constitution, which directs that "Each law enacted by the legislature shall embrace but one subject, * * * which shall be briefly expressed in the title." Having seen fit to restrict the title of the act to amending but one section of the former

act, the legislature cannot go on in the body of the act to amend other sections. *State v. Bankers' & M. Mut. Ben. Ass'n*, 23 Kan. 499; *Suth. St. Const.* § 87.

But the applicant for the writ was not convicted under either of these sections, but under section 1, and, admitting their invalidity, the question still remains whether the provisions of section 1 are not so separable and independent that they can be enforced, notwithstanding the unconstitutionality of the other sections. We are of the opinion that they are. It is the first section that provides when trout shall not be taken. The second section forbids the shipping or transportation of trout taken during the close season, and the third section forbids the taking of spawn without the permission of the state fish commissioner. The gist of the act is to preserve the fish of the state by establishing a season during which they shall not be caught. This is done in the first section, and the penalty for unlawfully catching them prescribed. If this section is enforced, there will be no fish to be shipped, and no means of taking spawn. The other sections are simply supplementary to the first. They contain provisions calculated to assist in carrying out the main purpose of the law, and to prevent trout being taken contrary to the directions of section 1; but without them there remains an act complete in itself, and capable of being executed in accordance with the apparent legislative intent. This being so, the courts are required to sustain that part of the law against which the constitutional objections do not exist. Being so entirely separate and independent, the provisions of sections 2 and 3 should not have constituted any inducement to the enactment of section 1. *State v. Board of Com'rs*, 21 Nev. 235, 29 Pac. 974; *Suth. St. Const.* § 169 et seq.

Section 1 provides that it shall not be lawful to catch trout "between the 1st day of October of each year and the 1st day of June of each year," and it is argued that the term "each year," as used therein, means the same year, and consequently that it is only between June and October that the catching of trout is forbidden. In view, however, of the order in which these dates are arranged, and the practical construction that has always been placed upon the law, we think the legislature intended the close season to run from October of one year to June of the succeeding year.

It is also said that the section is so insensible and self-contradictory as to when trout may be taken in the lakes of the state that it is impossible to determine the meaning of the legislature, and that, consequently, the whole section is a nullity. It must be admitted that in this, as in most other matters, the act is not a model of careful legislation, as it contains in its single section three different provisions concerning lake trout. But the principle that where there is a conflict in the same act the provision which is

latest in position repeals the others (Suth. St. Const. § 220; Bish. Writ. Law, § 65) would probably apply, and, at any rate, the nullity of the law as to lake trout would not affect the provisions as to river trout. As to them it is clear. The writ is refused.

BELKNAP, J., concurs.

(107 Cal. 84)

STINCHFIELD v. GILLIS et al. (No. 18, 315.)

(Supreme Court of California. April 5, 1895.)

SALE OF PORTION OF MINING CLAIM—DEED—PAROL EVIDENCE.

1. C., being the owner of a mining claim, took possession of an adjacent vein, and held the whole as one claim for many years, finally selling it to defendant under the name of the "C. Claim." Thereafter defendant conveyed to plaintiff a part of C. claim by metes and bounds, the part sold being designated as the "P. Claim," to distinguish it from that portion retained by defendant. *Held*, that the property was a single claim, and there being no reservation in the deed, and no evidence of mining customs introduced on the trial, defendant was estopped from denying plaintiff's title to all the gold found in any vein whose apex was within the surface lines of the ground conveyed; defendant's claim not being a "prior location," within Rev. St. U. S. § 2336, providing that all ore in the space of intersection of two veins shall belong to the prior location.

2. Where a deed designated certain monuments as the corners of the tract conveyed, in addition to giving the length of each side, the former description will prevail; and, in trespass, parol evidence is admissible to point out such monuments.

In bank. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by A. W. Stinchfield against James N. Gillis and others to recover the value of minerals alleged to have been taken from plaintiff's mining claim. From a judgment for plaintiff, defendants appeal. Affirmed.

F. W. Street and J. F. Rooney, for appellants. I. M. Kallloch and F. P. Otis, for respondent.

HARRISON, J. Upon the former appeal in this case (96 Cal. 33, 30 Pac. 839), it appeared that the Carrington mine was a single claim held by the defendant Gillis, of which he had sold a portion to the plaintiff, and it was held that, by virtue of his deed to the plaintiff, Gillis was estopped from questioning the right of his grantee to all of the gold found within the surface lines of the deed, irrespective of the depth below the surface at which it was found. After the case went down to the superior court for another trial the defendants amended their answers, presenting issues to the effect that the tract of ground which was sold to the plaintiff was known as the "Pine Tree Claim," and was distinct from that known as the "Carrington Claim," which was retained by Gillis, and had been located subsequent to the location of the Carrington claim; that upon these facts they were entitled to the

gold found at the place of intersection of the Rice vein and the West vein, although that place of intersection was within the surface lines of the grant to the plaintiff. Upon the issues thus presented, the court found that for nearly 14 years prior to the sale to the plaintiff the mining ground held by the defendant Gillis, including that sold to the plaintiff as well as that retained by himself, had been held and claimed by him as a single mining claim, and was known and designated as the "Carrington Claim," and that during this time no Pine Tree mine or claim had existed; that, prior to the sale and conveyance to the plaintiff, Gillis had pointed out to him the boundaries of the Carrington claim, and told him that the ground so sold and conveyed was a part of that claim; that, before the execution of the deed, Gillis and the plaintiff went together upon the ground, and marked off and agreed upon the portion of the claim to be sold to the plaintiff, and established visible monuments at each of the four corners, and agreed upon the dividing line between the portion to be sold to the plaintiff and the portion to be retained by the defendant, and established and agreed upon permanent monuments marking said dividing line; that the ground was conveyed according to these monuments, and in the conveyance to the plaintiff was designated as the "Pine Tree Mine," for the purpose of distinguishing it from the remaining part of the Carrington claim retained by Gillis. In 1854 the Carrington claim was located for 1,000 feet in length and 100 feet on each side of the vein, and in 1859 or 1860 T. E. Carrington, then being in possession of the Carrington claim, posted notices on the Pine Tree vein, adjacent thereto on the east, claiming 300 feet along said vein. Carrington remained in possession of this property until some time in 1870, when he moved away from the county, leaving the whole of the mining ground in charge of one Stoker, and instructed him to do the assessment work thereon. Stoker took possession of the entire ground in which the Carrington and Pine Tree veins lay, and held it for Carrington, as one claim, until June, 1872; and during this time the entire ground was held and known as the "Carrington Claim," and all the assessment work that was done upon the ground was done as and for the Carrington claim. In June, 1872, Carrington sold to the defendant Gillis his interest in the mining ground, the deed of conveyance including claims on all sides of the Pine Tree mine, but not mentioning any claim or mining ground by that name; and, upon the execution of this deed, Stoker turned over to Gillis the possession of all the ground that he had been holding for Carrington, and Gillis remained in possession thereof until his conveyance to the plaintiff, in 1886. Upon these facts the court rendered judgment in favor of the plaintiff. The defendants have appealed.

We are of the opinion that the additional

facts presented upon this appeal do not take the case out of the principles under which the decision of the former appeal was given. The mining ground held by Carrington, of which Gillis took possession under his deed of June, 1872, must be considered as a single claim, irrespective of the original locations of the different parts of the claim. Whatever distinction may have been at one time observed between the original location of the Carrington mine and that of the Pine Tree mine, it was disregarded by Carrington during a large portion of the time these claims were held by him; and after he left the county the entire mining ground, which included them both, was treated as one claim, not only while Stoker held them, but also during all the time that Gillis held them, until his conveyance to the plaintiff. That conveyance did not purport to be made in accordance with the lines or claim of any previous location, but was a conveyance of a tract of mining ground carved out of another tract, known as the "Carrington Claim," by metes and bounds agreed upon between the parties, and which they both treated as a part of the Carrington claim, but which, for the sake of convenience, was designated in the conveyance as the "Pine Tree Claim." Under these facts the conveyance from Gillis to the plaintiff must have the same effect as though the entire ground held by him previous to the conveyance was held by mere possession, or under a patent from the United States, or as if the two veins were a part of the same location. At the former appeal herein it was held that if the locator of a mining claim should convey a portion of his claim, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, in any vein whose apex was within the surface lines of his deed. So, if a locator should convey to A. the east half of his claim, and afterwards should convey the west half to B., each of his grantees would, in the same manner, be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance; and, on the same principle, if the proprietor of a tract of mining ground which has been derived through several locations should dispose of the same in parcels, irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds. In such cases section 2336 of the Revised Statutes of the United States has no application. That statute was not intended to limit or define the rights of a person in mere possession of a tract of mining ground, where there is more than one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The object of the statute was to supplement the provisions of section 2332, and to prescribe rules under which different locations by different proprietors should be held, and

to determine the rights of such proprietors in case of intersecting veins. At the date of the passage of that act, May 10, 1872, the Carrington claim was, and had for many years been, held as a single claim, without any adverse claim thereto, and it continued so to be held until the conveyance by Gillis to the plaintiff, in 1886. The position of the proprietor of a mining claim, who conveys a portion thereof, and retains the remainder, is analogous to the position of the United States after it has issued its patent for a location. As the United States, as well as a subsequent locator, holds the unpatented claim subject to the prior rights of the patentee, as prescribed by section 2336, so the grantor of a portion of his claim, in the absence of any reservation in his deed, or proof of mining customs, holds the ungranted portion subordinate to the rights of his grantee in the ground conveyed. The effect of the deed from Gillis to the plaintiff was to estop him and those claiming under him from questioning the title of the plaintiff to all the gold that might be found in the West vein, within the surface lines of his deed. The gold in controversy was found within the surface lines of this deed, and it was also found within the limits of the two walls forming the West vein, although the place at which it was found is also within the lines of the walls which form the Rice vein. This latter circumstance does not, however, relieve Gillis from the estoppel of his deed, for, as the deed contains no reservation, and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms, by holding that the entire West vein within the surface lines, even though intersected by another, passed to the plaintiff. In thus holding we concede that, when mining ground is conveyed by deed without express limitation, the grantee takes subject to the characteristics of mining property given to it by prevailing customs and laws, and not with the absolute dominion which flows from a conveyance in fee of ordinary land. The mining land thus granted is still subject to all mining laws and customs which are applicable, but the provision of section 2336 that, when two veins intersect, "priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection," cannot possibly be applied to the case where A. conveys part of his mining claim to B., for in such a case there is no "prior location." Therefore in such a case the ordinary rules which govern grants of land must, of necessity, apply, and if the intersection takes place on part of the claim conveyed the grantee takes all the mineral within the space of intersection. Whether the plaintiff would have been entitled to follow the West vein into the ground retained by Gillis, and to claim the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein, within the ground conveyed to the

plaintiff, are questions which are not involved in this appeal, and upon which we do not express any opinion. All that we hold is that inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff.

Certain rulings of the court upon the admission of evidence to show the boundaries of the lands described in the deed from Gillis to the plaintiff are assigned as error, but we are of the opinion that the rulings were correct. The description in the complaint follows that in the deed from Gillis to the plaintiff, and, in addition to giving the length of each side of the ground, designated certain monuments as the corners of the tract conveyed. If these monuments can be ascertained, they will prevail over the designated measurements, and the evidence offered was for the purpose of pointing out upon the surface of the earth the monuments which had been agreed upon in the sale, and which were named in the conveyance. For this purpose the court was authorized to receive parol evidence, in order to show the identity of the land so conveyed with that upon which the trespass had been committed. The judgment and order are affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.

GAROUTTE, J. (concurring). While I do not think the decision in this case upon the former appeal is at all conclusive as to the questions raised by the present appeal, still I concur in the judgment, upon the ground that the facts do not bring the case within the provisions of section 2336 of the Revised Statutes. And when that statute does not apply, and there is no other law or mining custom applicable to the facts, I think the grantee of the surface ground must be held to take all the mineral at the point of intersection. Again, it is not clear to me that the gold at the point of intersection can be said to be located in the West vein, any more than it was located in the Rice vein.

(107 Cal. 117)

HELMS et al. v. DUNNE, Justice of the Peace, et al. (No. 15,725.)¹

(Supreme Court of California. April 6, 1895.)

WRITS FROM JUSTICES' COURTS—ISSUANCE.

1. Under Code Civ. Proc. c. 5, art. 1, tit. 1, pt. 1, § 95, declaring that justices' courts shall be governed by the laws regulating proceedings before justices, "so far as such provisions were not altered or modified in this article," a summons, signed by the clerk of the justices' court, in accordance with section 91 of the same article, is valid, that provision modifying Code Civ. Proc. § 844, requiring process to be signed by the justice.

2. A summons from the justices' court, signed by W., "clerk of the said court," is valid, though "justices' clerk" is the proper designation.

3. Under Code Civ. Proc. c. 5, art. 1, tit. 1, pt. 1, § 91, providing that process shall be issued by the justices' clerk "upon the order of the presiding justice," the summons need not state that it was so issued, and, if such recital be made, a mistake therein as to the name of the presiding justice will not affect the jurisdiction of the court.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

A writ of review issued in an action by Fred Helms and another against F. H. Dunne, justice of the peace, and another, was dismissed, and plaintiffs appeal. Affirmed.

Geo. M. Hurlbut, for appellants. Aylett R. Cotton, for respondents.

GAROUTTE, J. This is an appeal from the judgment of the superior court for the city and county of San Francisco, entered in the above-entitled action, dismissing appellants' writ of review issued therein for the purpose of reviewing the proceedings of the justices' court in the city and county of San Francisco in a certain action then pending. It is claimed that the court failed to get jurisdiction of the person of the defendant in said action by reason of a fatally defective summons. That portion of the summons to which objection is made reads: "Given under my hand, this 31st day of May, 1893. By order of Charles A. Low, presiding justice of the peace for the city and county of San Francisco. E. W. Williams, Clerk of the Said Court."

1. It is contended that the summons should be signed by the justice of the peace, as provided by section 844 of the Code of Civil Procedure. We do not think that chapter 5, art. 1, tit. 1, pt. 1, of the Code of Civil Procedure is in any sense special legislation, and we have no doubt but that the sections of the Code found in that article are in full force and effect. Section 91 thereof provides that all process of every kind in actions, suits, or proceedings, "shall be issued by the said 'justices' clerk' upon the order of the presiding justice." Section 95 provides: "The justices' court and the justices of the peace of every such city and county shall be governed in their proceedings by the provisions of law regulating proceedings before justices of the peace, so far as such provisions were not altered or modified in this article." It is sufficient to say that said section 91 contains a modification of the rule declared in section 844 regarding the proper party to sign a summons in justices' courts in the city and county of San Francisco.

2. It is claimed that there is no such office as clerk of the justices' court, and that the summons is improperly signed and invalid for that reason. Section 86 of the Code of Civil Procedure provides that the board of supervisors shall appoint a "justices' clerk," and such undoubtedly is the technical name

¹ Rehearing denied.

of the office, but we think the variance between the two terms so slight and unimportant as to affect no question of jurisdiction. The better practice would be for the officer to sign all process as "justices' clerk."

3. It appears that at the time the summons was issued Charles A. Low was not presiding justice of the peace for the city and county of San Francisco, but J. E. Barry was such presiding justice. At the hearing of this proceeding in the trial court a written order for issuance of the summons under the hand of said Barry, as such presiding justice, was offered in evidence, and upon any question of jurisdiction we think the law fully satisfied. While the summons may, upon its face, recite that it was issued at the order of the presiding justice, we find no statutory requirement to that effect, and hence such recital is not conclusive as to the fact. Especially is this true of that portion of the recital which states the name of the presiding justice, and a mistake as to a recital of the name of the particular person, who was at the time presiding justice, presents in no way any jurisdictional question. Only those recitals in the summons which the law requires to be recited there are evidence of their truth. As to the recitals of matters of mere surplusage, they prove nothing. In the present case the order was made by the presiding justice, and that was the material and controlling fact. The judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(107 Cal. 123)

COHEN v. WALLACE. (No. 4.)

(Supreme Court of California. April 6, 1895.)

BILL OF EXCEPTIONS—FORM—SETTLEMENT—CONTENTS.

1. A trial judge is not justified in refusing to settle a bill of exceptions on the ground that it is a mere transcript of the reporter's notes, where it appears that the evidence in the proposed bill has been condensed to about one-fourth its original volume, and that a statement of some parts thereof by questions and answers is necessary in order for a proper understanding of the exceptions thereto.

2. Where the oral charge of the trial court, to which objection is taken, and the instructions asked for and refused, have been so authenticated as to become a part of the judgment roll, they need not appear in the bill of exceptions.

In bank.

Petition by Louis Cohen for a writ of mandate against William T. Wallace, judge of the superior court of San Francisco county, to compel the settlement of a bill of exceptions. Granted.

H. I. Kowalsky and T. J. Crowley, for petitioner. Wm. S. Barnes, Dist. Atty., for respondent.

VAN FLEET, J. Application for a writ of mandate to compel the settlement of a bill of exceptions. The petition sets forth

that petitioner Louis Cohen, was tried and convicted in the superior court of the city and county of San Francisco before respondent, the Honorable William T. Wallace, a judge of said court, of the crime of perjury; that judgment was entered on the verdict on January 18, 1895, and that thereafter, on January 28th, and within the time allowed by law, petitioner, upon notice to the district attorney, delivered to the clerk of the court for said judge a proposed bill of exceptions in said case for settlement; that on the 30th day of January, two days after the delivery of said proposed bill to the clerk, the respondent, as such judge, made an order refusing to settle said bill, and directing that it be stricken from the files of said court. The prayer is that respondent may be required by the mandate of this court to settle said bill. In response to the alternative writ issued upon said petition, the district attorney appeared in behalf of respondent, and filed an answer, wherein it is admitted that respondent has refused to settle the proposed bill, but stating that such refusal was because of the fact that the bill as proposed appeared to respondent to be substantially but a transcript of the reporter's notes of the trial in all its fullness of question and answer, argument of counsel, and remarks of the court in detail; that, for this reason, respondent deemed the bill objectionable; and that he was justified in refusing to settle it. The answer, contrary to the requirement of the statute, is unverified; but, inasmuch as no specific objection to its sufficiency is urged on this ground, we may regard the omission as waived, treat it as raising an issue, and proceed to dispose of the matter upon its merits.

We do not think the action of the respondent can be sustained. An examination and comparison of the proposed bill presented in this case, in connection with the transcript of the evidence taken at the trial, satisfies us that the learned judge of the trial court was misled in assuming that the bill as presented by petitioner was a mere transcript of the reporter's notes. It cannot properly be said to be such, either in fact or in form. The testimony taken at the trial comprises, exclusive of the examination of talesmen upon their voir dire, some 200 typewritten pages of the reporter's transcript. The examination of talesmen covers about 28 or 30 pages more, making a transcript in all of about 230 pages. The proposed bill consists of 101 pages of typewritten matter, but of this the statement of the evidence, including the objections and exceptions reserved thereon, covers but 55 pages; showing that the evidence is condensed in the bill to only about one-fourth of its original volume. It is true that the evidence is to a considerable extent stated in the bill by question and answer, but this would seem to be largely necessary in order to point the very numerous objections and

exceptions which appear to have been taken and reserved. For such purpose it is proper to so state it. It furthermore appears that some 15 pages of the statement of the evidence is taken up by the examination as a witness of the shorthand reporter with reference to testimony claimed to have been given by the defendant upon a former occasion. As to this portion of the evidence, it is necessary that it should appear by question and answer in detail. The same is essentially true as to the statement of the testimony given by the talesmen. It may be that there are instances in the bill where the evidence might with propriety be reduced to narrative form where it is not so stated; but, if so, this can be required upon the settlement of the bill, according as it may appear proper or necessary to the trial judge. While it is a rule, which should, so far as possible, be followed in making up a bill of exceptions in criminal as well as civil cases, to make as short and succinct a statement of the evidence as possible, either in narrative form, giving its substance, or by stating what the evidence tended to establish, yet there are frequent instances where neither of these methods would be wholly appropriate and adequate to express exactly what a witness has said. In such case it becomes necessary to state the evidence by question and answer, although not strictly required for the purpose of pointing an exception, but to lay before the court the exact statement of the witness. At best, written words are but a halting and imperfect substitute for words spoken in portraying the meaning or effect of language, and it will not do to say that in all cases and under all circumstances the evidence should never be stated by question and answer, except where it is desired to point an exception. No hard and fast rule should be laid down upon the subject, nor do we understand such to be the requirement of the statute. It must be left largely to the discretion and judgment of the trial judge, when settling the bill, to determine the proper method to be pursued in any given case. In this instance the manner in which the evidence is stated does not render the bill bad in form on that ground.

The rest of the bill, other than that portion devoted to the statement of the evidence, consists of other matters arising during the progress of the proceedings in the court below, to which objection and exception were taken; such, for instance, as a motion and the affidavits used thereon for a continuance, exceptions reserved to rulings made during the examination of talesmen, and to remarks of the district attorney in his opening statement, and argument to the jury, the charge of the court, and other matters. There are some things stated, perhaps, which might with propriety be left out of the bill; but the very purpose of the statute in requiring a settlement to be had is that such matter may be eliminated, and

it is no reason for refusing to settle the bill. It is not necessary, for instance, to incorporate in the bill of exceptions the instructions asked by defendant and refused by the court, where, as here, they are properly indorsed by the judge, as they become a part of the judgment roll, and should not be repeated in the bill of exceptions. The same may be true of the oral charge of the court. If it has been authenticated by the judge in such manner as to become part of the judgment roll, it has no place in the bill of exceptions; but, if it has not been so authenticated, it then becomes proper to preserve it in the bill. See *People v. January*, 77 Cal. 179, 19 Pac. 258; *People v. Gibson* (Cal.) 39 Pac. 864. Taking the proposed bill in its entirety, we find nothing constituting such a departure from the requirements of the statute as justified the respondent in refusing to settle it. The case falls strictly within the rule declared in *Sansome v. Myers*, 80 Cal. 483, 22 Pac. 212. In that case the judge of the trial court had refused to settle the bill, upon the ground that he deemed it inaccurate and in many respects untrue, and that it contained but a partial statement of the facts and proceedings leading up to and connected with and upon which the rulings of the court were had that were complained of. This court said: "We do not regard these as sufficient grounds for refusing to settle a statement. If anything was omitted from the statement, or any matter was incorrectly stated, it was the duty of the district attorney to propose such amendments as would correct the omissions or errors. His failure to do his duty in this respect did not justify the respondent in arbitrarily refusing to act in the matter. As was said in the former decision in this case, it was not the duty of the judge to prepare a statement, but it was his duty to see that one was properly prepared, and then sign it. If the attorney for the petitioner had omitted anything material, the judge should have directed and required him to insert it; or, if matter was incorrectly stated, he should have required him to correct it, if the district attorney had neglected his duty by failing to propose the necessary amendments, which he seems to have done. If the petitioner had refused or neglected to so correct the proposed statement as directed, the judge would, no doubt, have been justified in refusing to settle the same, but not otherwise. This, the findings show, was not done. The respondent refused, in the first instance, to settle the statement, not to sign it. This, we think, he had no right to do. To so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty."

The proposed bill in no sense comes within the objection stated in *People v. Getty*, 49 Cal. 581, relied upon by respondent as a warrant for his action in the premises. In

that case it appeared that the bill of exceptions found in the record consisted simply of the reporter's notes of the trial, without any attempt at condensation or the elimination of immaterial matter in any particular; and in passing upon the case this court said: "In no conceivable case can it be necessary or proper that a bill of exceptions should be made up in that manner. It was never intended that the reporter's notes should constitute a bill of exceptions. The evidence relating to the points presented should be stated, as far as possible, in narrative form, or by a statement of its substance, or what it tended to prove, and the questions should be stated only when it is necessary to present the point of an objection thereto." And it was said that the judge of the court below would be justified in refusing to settle a bill of exceptions presented in that form. What is there said was not strictly pertinent to that case, nor necessary to its determination, since no question as to the right to have settled the bill there criticised was involved in the appeal. But it is nevertheless true that the expression in that case as to the proper practice with reference to bills of exceptions presented in such form has in subsequent cases received the authoritative approval of this court. In *People v. Sprague*, 53 Cal. 422, involving directly the right of the defendant to the settlement of certain bills of exceptions proposed by him, which had been refused, the court say: "The judge was fully justified in refusing to settle and certify the bills of exceptions (so called) filed on the 16th and 18th of September. The first was a mere skeleton, containing no statement of evidence or rulings; the second was in the form pronounced 'reprehensible' in *People v. Getty*, 49 Cal. 584." While this last case seems to have been determined largely upon another point,—that of a failure of defendant to give notice to the adverse party of the presentation of his bills,—the point covered by the language quoted was involved, and what was said upon it cannot therefore be ignored. And in the case of *January v. Superior Court*, 73 Cal. 537, 15 Pac. 108 (a proceeding like the present, to compel by mandate the settlement of a bill), it is said: "The bill, as originally presented, was a transcript of the reporter's notes of the evidence and proceedings, and the court was justified in refusing to settle it." In *Sansome v. Myers*, 77 Cal. 553, 19 Pac. 577, where, in a proceeding to require the settlement of a bill of exceptions, the respondent answered that the reason for his refusal was that the proposed bill contained but a mere "defective skeleton" of the testimony and evidence, and the answer was demurred to as not stating sufficient ground for such refusal, the demurrer was overruled by this court, and it was held that the answer, if sustained by the facts, was good.

From these cases it may be fairly taken

as established that in instances where the proposed bill is either merely a copy of the reporter's transcript, without any effort to reduce to proper form for the purpose of presenting the questions involved, or where it is a mere skeleton, so bald of the essential requisites of the bill contemplated by the statute that it cannot in any true sense be regarded as such, it may be disregarded, and a settlement of it will not be required. This doctrine, however, is a harsh and rigid one, and, if inconsiderately applied, would be liable to great abuse, and frequently operate a virtual denial of justice to a defendant solely through the ignorance, incompetency, or indolence of counsel, for which he may be in no way responsible. For these reasons, we are not disposed to extend its application to cases not falling strictly within the class to which it has heretofore been held to apply. Even in such cases we are of the opinion that it would be better, as a general rule, if the judges of the trial court, disregarding as far as possible technical objections, should endeavor to settle the bill rather than refuse it. For this purpose, it is not necessary that the labor of making a proper bill of exceptions should be assumed by the judge. The party presenting the objectionable bill could be required by the judge to put it in proper shape, giving a reasonable time for such purpose. As suggested in *Sansome v. Myers*, 80 Cal. 486, 22 Pac. 212: "We must not be understood as intending to justify the too prevalent habit on the part of some attorneys of presenting an imperfect statement, thereby casting upon opposing counsel and the court the labor of piecing out and making complete a statement that should have been made perfect by the appealing party in the first instance. Such a course, whether it results from a design to gain an undue advantage or from indolence, should be severely condemned; and the party practicing it should be required by the judge to make and present a proper statement."

For these reasons, we are of opinion that the respondent should have proceeded to a settlement of the proposed bill, and that a peremptory writ should issue to that end. It is so ordered.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.

TEMPLE, J., not having heard the argument, did not participate in the foregoing decision.

(107 Cal. 141)

WOODSIDE et al. v. HEWEL. (No. 18,432.)
(Supreme Court of California. April 13, 1895.)

DISMISSAL OF APPEAL—NOTICE.

1. Code, Civ. Proc. § 954, provides that, if appellant "fails" to furnish the requisite papers, the court may dismiss the appeal. Rule 14 provides, that defects in the transcript may be

corrected on suggestion of either party; and rule 15 provides that any exception to the transcript which could be cured on suggestion of diminution must be taken before hearing. *Held*, appellee is not entitled to a dismissal for failure of appellant to include, under the Code, in the transcript, the notice of appeal, where such objection is cured by the filing of a certified copy before the motion to dismiss is heard.

2. The including of an additional notice of appeal from the judgment in the notice of appeal from the order denying a new trial has no effect either as an original appeal or to impair the appeal already pending.

Department 1. Appeal from superior court, Stanislaus county; W. O. Minor, Judge.

Action by one Woodside and others against one Hewel, executor. There was a judgment for plaintiffs, and defendant appeals.

Heard on motion by appellant to dismiss appeal. Denied.

D. M. Delmas, L. W. Fulkerth, and W. H. Hatton, for appellant. J. H. Budd and L. J. Maddux, for respondents.

HARRISON, J. Motion to dismiss an appeal. February 20, 1894, the defendant filed and served his notice of appeal from the judgment herein that had been entered against him December 22, 1893. August 25, 1894, the superior court made an order denying the defendant's motion for a new trial, and on August 27th he took an appeal from that order. November 20, 1894, the appellant filed in this court a transcript on appeal, containing the judgment roll, statement on motion for new trial, order denying the same, and notice of appeal therefrom, which notice contained also a notice of appeal from the judgment. The transcript did not contain a copy of the notice of appeal from the judgment that had been filed February 20, 1894. February 18, 1895, the respondents gave notice of the present motion to dismiss the first appeal from the judgment, upon the ground that no transcript on said appeal had been filed; and also to dismiss the second appeal from the judgment, upon the ground that by reason of the first appeal there was at that time no judgment pending in the superior court, from which an appeal could be taken. The appellant, in response thereto, has suggested a diminution of the record, and has filed a certified copy of the first notice of appeal and of the undertaking given thereon.

Rule 5 of this court provides that, if the transcript, though not filed within the time prescribed, be on file at the time the notice to dismiss the appeal for failure to file it within the prescribed time is given, that fact shall be a sufficient answer to the motion. The judgment roll contained in the transcript that was filed by the appellant presented all the matters to be reviewed on the appeal from the judgment, but the notice of appeal was omitted from the transcript. Section 950, Code Civ. Proc., provides that "on an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any

bill of exceptions or statement in the case upon which the appellant relies"; and section 954 provides that "if the appellant fails to furnish the requisite papers the appeal may be dismissed." Rule 14 of this court provides that, upon the suggestion by either party of any error or defect in the transcript, the same may be corrected by producing and filing a certified copy of the omitted record. By rule 15 it is provided that any objection to the right of the appellant to be heard, or any exception to the insufficiency of the transcript which might be cured on the suggestion of a diminution of the record, must be taken and notified to the appellant prior to the hearing; and that the objection to the hearing of the appeal shall not prevail unless the appellant shall fail to file such additional record after having been so notified. The provision of section 954, Code Civ. Proc., above quoted, is to be construed in connection with this rule, and not as giving to the respondent the absolute right to a dismissal of the appeal upon the mere showing that the transcript as filed is defective, but as authorizing a dismissal of the appeal if the appellant "fails" to furnish the requisite papers after the diminution of the record has been suggested, as provided by this rule. The including of an additional notice of appeal from the judgment in the notice of appeal from the order denying a new trial had no effect, either as an original appeal or to impair the one then pending. The motion is denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

(112 Cal. 180)

SIMSON v. FERGUSON. (No. 19,476.)¹
(Supreme Court of California. April 15, 1895.)
FORECLOSURE OF MORTGAGE—PRIORITIES—DECREE.

Where a mortgage of land and the crop growing thereon was not executed as a mortgage of a growing crop is required to be executed by Civ. Code, § 2956, and the crop was subsequently mortgaged in good faith, in proceedings to foreclose the first mortgage the court should direct a separate sale of the crop, and the application of the proceeds thereof on the second mortgage.

Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by one Simson against one Ferguson and another to foreclose a mortgage. From a judgment for plaintiff, defendant Ferguson appeals. Reversed.

G. A. Skinner, for appellant. E. B. Stanton, for respondent.

PER CURIAM. The defendant Shaw executed to the plaintiff three promissory notes, bearing date October 1, 1891, and, as security for their payment, a mortgage upon certain lands in Riverside. The mortgaged premises are described in the complaint as "lots numbered 231 and 232 of the lands of the Southern California Colony Association,"

¹ Rehearing granted.

but the copy of the mortgage annexed to the complaint has, in addition to the above description, the following clause: "Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof." The defendant Ferguson is the holder of a second mortgage upon the same property, executed by Shaw, and is also the holder of a chattel mortgage executed to him by Shaw, June 17, 1893, upon the crop of oranges then growing, or to be produced during the season of 1893 and 1894, upon the trees upon said lots 231 and 232. The present action was brought July 19, 1893, by the plaintiff, to foreclose the mortgage to him. Judgment was rendered against the defendant Shaw in favor of the plaintiff and of the defendant Ferguson for the amounts claimed by each respectively, and directing that the "mortgaged premises mentioned in the plaintiff's complaint, hereinafter described," be sold, and the proceeds applied in paying to the plaintiff the amount found due to him, and that out of any surplus that might then remain the defendant Ferguson should be paid the amount found due to him. The property directed in the judgment to be sold is described as "the aforesaid lots numbered 231 and 232 of the Southern California Colony Association," "together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof." Ferguson moved the court to amend the judgment by providing that the growing crop of oranges be sold separately, and their proceeds applied upon the judgment in his favor. This motion was denied, and Ferguson has appealed directly from the judgment. The respondent has not filed any brief in support of the judgment, nor did he appear at the argument of the cause, but the cause has been submitted upon the brief filed on behalf of the appellant, and upon an oral argument in his behalf.

Without determining whether, as between the plaintiff and Shaw, the mortgage, in 1891, of the land, together with the "rents, issues, and profits thereof," would create a lien in favor of the plaintiff upon all the crops of oranges that might thereafter grow upon the land during the life of the mortgage (see *Montgomery v. Merrill*, 65 Cal. 482, 4 Pac. 414; *Treat v. Dorman*, 100 Cal. 623, 35 Pac. 86), it is sufficient, for the purposes of this case, to say that, as against a subsequent mortgagee in good faith, a mortgage upon a growing crop must be executed with the formalities prescribed in Civ. Code, § 2956, otherwise it is void as against him. As the mortgage to the plaintiff was not thus executed, the lien of Ferguson upon the crop of oranges was superior to the claim of the plaintiff, and the court should have directed that they be sold separately, and the proceeds applied upon the amount of the judgment in his favor. The

judgment is reversed, and the court below is directed to modify the same, by directing a sale of the mortgaged property, in accordance with this opinion.

(107 Cal. 154)

PREWIT v. DYER. (No. 15,825.)

(Supreme Court of California. April 16, 1895.)

LIMITATIONS—SETTING ASIDE DECREE FOR FRAUD—DIVORCE.

1. Under Code Civ. Proc. § 338, subd. 4, providing that an action for relief on the ground of fraud must be brought within three years of the discovery of the fraud, the burden is on plaintiff in a suit to set aside a decree of divorce for fraud to prove that the discovery was within three years.

2. Plaintiff was married in 1877. In 1878 she separated from her husband by mutual agreement, and returned to her former home, in Pennsylvania, where she remained until 1886. While there she wrote to her husband with her address upon the envelope, and the letters were never returned. In 1882 the husband applied for a divorce, and in the affidavit for publication swore that, to the best of his information, "defendant resided" in New York. In his testimony the husband swore that he did not know where his wife resided; that the last he heard of her she was in Pennsylvania. After the divorce, the husband took up his residence and lived till his death, in 1893, at Santa Cruz, where he was well known, and had lived with his wife in 1877-78. The subject of his divorce was a matter of common knowledge there. During this time one or more of plaintiff's sisters lived at Santa Cruz, with whom she corresponded. In 1888 plaintiff visited Santa Cruz, and remained there about three months, having gone there to effect a reconciliation, but concluded, from public report, that there was no use attempting it. She lived, while there, near her husband, but held no intercourse with him, although she saw him in the street once or twice. There was no positive evidence that plaintiff was ever directly informed of the divorce, and she swore she had no knowledge of it till 1892. Held to justify a finding that she knew in 1888 of his divorce.

Department 2. Appeal from superior court, Monterey county; J. H. Logan, Judge.

Action by Martha C. Prewit against Sarah A. Dyer, executrix of the estate of James L. Prewit, to set aside the judgment and decree of divorce obtained by defendant's testate on the ground of fraud. Defendant pleaded the statute of limitations. The case was tried by the court without a jury. From a judgment against plaintiff upon the issue of fraud and for defendant upon her plea, and from an order denying a new trial, plaintiff appeals. Affirmed.

Robert Friedrich, George P. Burke, Archibald Yell, and Charles M. Cassin, for appellant. Joseph H. Skirm and William T. Jeter, for appellee.

HENSHAW, J. Appeals from the judgment and from the order denying plaintiff a new trial. Plaintiff, the divorced wife of James L. Prewit, commenced this action after his death, asking the court to set aside the judgment and decree of divorce obtained by Prewit, upon the ground that the same were procured by fraud. Judgment in

that case was rendered upon July 10, 1882. Plaintiff's action was commenced upon April 8, 1893, but she pleads that she was in ignorance of the divorce proceedings until December, 1892. Defendant, besides denying the material allegations of the complaint, pleads the statute of limitations. The court finds against plaintiff upon the issues of fraud, and for defendant upon her plea that plaintiff's cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure. If this finding is justified, it is determinative of plaintiff's right to maintain this action, and renders superfluous any examination and discussion of the evidence upon the charges of fraud. The finding of the bar of the statute is therefore first to be considered, and, herein, as to the facts: James L. Prewit and plaintiff intermarried in January, 1877, and thereafter lived at the Wilkins House in Santa Cruz, though the husband's ranch and home were in Monterey county. The wife separated from her husband in December, 1878. This separation she testifies was by mutual agreement, reduced to writing. She was to return to her former home, in Philadelphia, which she did after the lapse of a year, most of which she spent in Santa Cruz, the rest being passed in Sacramento. She remained in Philadelphia until 1886. While there she wrote some letters to her husband, with her address upon the envelopes. She never heard from her husband, but none of the letters were ever returned to her. Prewit's action was to obtain a divorce from his wife upon the ground of her desertion. It was verified and averred that the last known place of residence of his wife was the city of Philadelphia. In due course, service of summons was had by publication; and in the affidavit for such publication, made by Prewit three months after filing the complaint, he swears that, according to his best information, "defendant resides in the Fifth Avenue Hotel in the city of New York." At that time plaintiff had never been to that hotel, nor in New York. Upon June 26, 1882, Prewit, testifying in the matter of his divorce, swore that he did not know where his wife resided; that the last he heard of her she was living in Philadelphia. The divorce was obtained in the county of Monterey, but a short time after the date of it Prewit took up his residence in Santa Cruz, and there abode until his death, in January, 1893. Prewit was a man well known in Santa Cruz. He had lived there with his wife in 1877-78, and upon his return the fact that he had obtained a divorce from her was one of common knowledge, and the subject a matter of common conversation. Prewit himself discussed it openly. During this time one or more of the sisters of Mrs. Prewit were living in Santa Cruz. Alfred Fitch, son of one of these sisters, visited Mrs. Prewit in Chicago. This was in 1887. Fitch, at the time he saw

his aunt, knew of the divorce. Mrs. Prewit testified that they discussed family matters, but nothing was said of the divorce. She corresponded with her three sisters in Santa Cruz. In 1888 Mrs. Prewit came again to Santa Cruz, and went to the home of a sister. She remained there from July until October. She came, she says, thinking she might have a reconciliation with her husband. "I changed my views from public opinion. I heard from public report the way he was living, and I concluded there was no need of my attempting it, and I went back to New York." She had, she testifies, quite a large circle of acquaintances in Santa Cruz. Of that circle was Mrs. Wilkins, the principal witness for Mr. Prewit in his divorce suit. Mrs. Wilkins visited Mrs. Prewit several times during this period, and was at the time living near by, in Mr. Prewit's house, he making his home in her family. Mrs. Prewit saw her husband once or twice upon the street in his buggy. She knew he was suffering from cancer of the eye. In fact, he was then mortally afflicted, and afterwards died of the disease. She never sought out her husband, nor had any manner of communication with him. From "public opinion," she concluded that efforts towards a reconciliation would be futile. The fact of the divorce was seemingly known to the relatives of Mrs. Prewit in Santa Cruz. It was certainly known to some, and was "mentioned in the families." Many witnesses of Santa Cruz testified to their knowledge and to the general knowledge of the community of the divorce; but there is no positive evidence that Mrs. Prewit was ever directly informed of the divorce. She swears she had no knowledge of it until she was informed by a letter from a sister, in 1892.

In this state of the evidence, was the court justified in rejecting her testimony, and finding that she had knowledge in 1888, and that, therefore, her cause of action is barred? Under the circumstances, it became necessary for plaintiff to aver, as she did, her discovery of the alleged fraud within three years of the time of the commencement of her action for relief. The burden of proof to support the averment was upon her. Her evidence upon this point was an assertion of her ignorance. To meet this, it was proper for defendant to prove facts and circumstances tending to discredit this assertion by showing its unlikelihood or improbability. This she attempted to do by proof of the facts above set forth. Any fact may be proved from which the fact in issue is presumed or is logically inferable. Code Civ. Proc. § 1870, subd. 16. Such facts frequently form the basis of argument against a party's contention.

A judge, no more than a jury, has the right arbitrarily to reject evidence, but, as a jury may be instructed that it is not bound to decide in conformity with the declarations

of any number of witnesses which do not produce conviction, against a presumption or other evidence satisfying the mind, so should a judge be governed in his determinations by the same rule. Applying it to the facts of this case, a strong presumption is raised against the statement of Mrs. Prewit. She spent months in Santa Cruz, living but a short distance away from her husband, to become reconciled with whom she came to California; yet she held no intercourse with him. He was mortally afflicted; yet she did not offer to minister unto him. She lived in a community and among relatives who knew her husband had divorced her; yet no one told her of this all-important fact. She learned from a public rumor that it was useless to try to become reconciled with him; yet that same reckless gossip refrained from carrying to her ears news that she was a divorced wife. It is a natural presumption that what she did and did not do during these months was prompted by knowledge of the fact that she was no longer the wife of Prewit. To the mind of the trial judge, before whom the witnesses appeared, the presumption thus raised was more satisfactory than the declaration of plaintiff. It was his province to decide, and it cannot be said that his decision was error. The judgment and order are affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

(107 Cal. 151)

PEOPLE v. FRIGERIO. (No. 21,193.)¹

(Supreme Court of California. April 15, 1895.)

CRIMINAL PROSECUTION — WINNING AT PLAY BY FRAUD — SUFFICIENCY OF EVIDENCE — IMPROPER REMARKS OF COUNSEL — INSUFFICIENT OBJECTIONS.

1. A conviction under Pen. Code, § 332, directed against persons who obtain money fraudulently by the game of "three card monte, so called, or any other game, device, * * * or other means whatever," by the use of cards, is warranted by evidence that defendant and his accomplice pretended to play at a game of cards, wherein defendant, as an inducement to prosecutor to part with his money, was permitted to win repeatedly, and that the moment prosecutor's money was put up it was apparently lost by defendant to his accomplice.

2. The fact that the method used by defendant to swindle at cards was such as to render him guilty of larceny does not prevent him from being convicted of fraudulently obtaining money by tricks at cards.

3. Where the only objection to remarks of the prosecuting counsel in his arguments to the jury was couched in general terms, and apparently taken on the ground of misstatement of the evidence, defendant cannot for the first time on appeal object that the counsel erroneously called attention to defendant's personal appearance as a factor in evidence, though defendant had not testified as a witness.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Paolo Frigerio was convicted of a crime, and appeals. Affirmed.

¹ Rehearing denied.

J. Marion Brooks, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. Appellant and one Josefa Balletto were jointly charged, under section 332 of the Penal Code, with a felony committed by obtaining the sum of \$300 from one T. Marinovich, by trick and device, by the use of cards. Defendant was tried separately, and was convicted and sentenced to the state prison. He appeals from the judgment, and from an order denying him a new trial, and an order refusing to arrest the judgment. Several grounds of error are urged, but we do not regard any of them as possessing merit.

1. The information was in substantial compliance with the requirements of the Code, the offense being charged in the language of the statute, and the demurrer was not well taken. The orders of the court, therefore, overruling the demurrer, and denying the motion in arrest of judgment, were not erroneous.

2. It is contended that the evidence did not warrant a conviction. We deem it quite sufficient to make a case within the statute. The statute is directed against "every person who by the game of 'three-card monte,' so called, or any other game, device, * * * or other means whatever, by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money," etc. Without stating it in detail, the evidence discloses that the means employed in this instance was the old, familiar trick, by the defendant and his confederate, of pretending to play a game of cards, wherein the defendant, as an inducement to the prosecuting witness to part with his money, was permitted to repeatedly win; but the moment the money of the prosecutor was put up it was apparently lost by defendant to his confederate, who immediately disappeared with it. It is one of the most common of the many devices used in swindling by cards, and is strictly within the denunciation of the statute. The fact that the circumstances disclosed are such that the defendant might have been charged with and convicted of larceny does not make the offense any less one of the special class provided for in section 332, the circumstances being sufficient to bring the case within that section; nor does it render defendant less amenable to a prosecution under the latter section.

3. There was nothing in the language of the district attorney, used on the argument, to which exception was taken, not strictly pertinent to and warranted by the evidence, except that portion referring to the character and manner of the defendant. The defendant did not submit himself as a witness in the case, and it was therefore improper to comment upon or call attention to his personal appearance as a factor in the evidence.

But this particular feature of the argument was not made the subject of special objection. The objection was couched in general terms, and apparently taken upon the ground contended for in the brief,—that defendant regarded the argument as involving a general misstatement of the evidence. The court's attention was in no way directed to any particular feature complained of, and where, as here, the argument was in large part a proper comment upon the evidence, it was the duty of the defendant to direct the court's particular attention to anything transgressing the people's privilege. Had this been done, the court would, no doubt, have corrected the impropriety. Under such circumstances, the defendant will not be permitted to take in this court, for the first time, any more specific objection to the language complained of than that urged in the court below.

4. The court did not err in refusing the instruction requested by the defendant, as the instruction was in no way pertinent to the evidence in the case.

The judgment and orders appealed from are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

PEOPLE v. BALLETTTO. (No. 21,192.)¹
(Supreme Court of California. April 15, 1895.)

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Josefa Balletto was convicted of fraudulently obtaining money by a trick at cards, and appeals. Affirmed.

J. Marion Brooks, for appellant. Atty. Gen. Fitzgerald, for respondent.

PER CURIAM. This case arises upon the same transaction as the case of *People v. Frigerio* (this day decided) 40 Pac. 107. The only ground urged for a reversal is that the evidence does not sustain the verdict. The evidence is in all substantial particulars the same as that involved in the case of *People v. Frigerio*, supra, and, upon the authority of that case, the judgment and orders appealed from are affirmed.

(107 Cal. 130)

JANES v. BULLARD. (No. 15,806.)¹
(Supreme Court of California. April 6, 1895.)

JUDGMENT—AMENDMENT.

The error of the clerk in inserting in a decree the amount of the costs claimed by the plaintiff, before they had been ascertained or taxed, did not render it void, and was cured by the subsequent taxing by the court, and collection by the sheriff, of only the actual costs in the case.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by T. I. Janes against J. A. Bullard. Judgment for plaintiff, under which an order was issued for the sale of real estate. From an order refusing to set aside

¹ Rehearing denied.

such order of sale, defendant appeals. Affirmed.

Geo. D. Collins, for appellant. E. M. Morgan and G. W. Schell, for respondent.

VAN FLEET, J. This is an appeal from an order made after final judgment refusing to vacate and set aside an order of sale issued upon a decree of foreclosure, directing a sale of real property. In our judgment, the appeal is wholly without merit. Assuming, as contended by appellant, that the action of the clerk in inserting in the decree the amount of the costs as claimed by plaintiff, before the same had been taxed or ascertained, was erroneous, it was a mere clerical misprision, which did not affect the validity of the decree in other respects. Nor did it make invalid the order of sale issued thereon. The latter was, like the decree, erroneous, but not void, and the validity of the sale thereunder was not thereby affected. *Newmark v. Chapman*, 53 Cal. 557. Being merely erroneous, both the decree and order of sale were amendable in that regard; and the subsequent action of the court in taxing the costs was, in effect, such amendment, and a curing of the error. It was under the decree and order of sale as so modified that the property was sold, and only the amount of costs as taxed by the court was collected by the sheriff, so that appellant was in no way injuriously affected by the error complained of. The contention of appellant that the order of sale was prematurely issued, and therefore void, cannot be sustained. Code Civ. Proc. § 681; *Bank v. Raynor*, 61 Cal. 146. The order is affirmed, with \$50 damages.

We concur: GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.

(107 Cal. 120)

GIRAUDI v. ELECTRIC IMP. CO. OF SAN JOSE. (No. 15,254.)¹

(Supreme Court of California. April 6, 1895.)

ACTION AGAINST ELECTRIC LIGHT COMPANY—PERSONAL INJURIES—WIRES ON ROOF—CONTRIBUTORY NEGLIGENCE—ADMISSION OF EVIDENCE—HARMLESS ERROR.

1. Plaintiff was a dish washer in a restaurant, the wires to light which ran about sixty feet over the roof of the building at an average height of two feet. Plaintiff had seen the employees of defendant electric company placing the wires, and had been upon the roof in the daytime when the wires were in position. The night of the accident was stormy, and plaintiff, with his employer, went upon the roof, to secure the business signs of the latter. Plaintiff, not knowing or forgetting the location of the wires, came in contact with them. *Held*, that defendant was negligent in not raising the wires so high above the roof that those having occasion to go there would not come in contact with them.

2. The fact that plaintiff had been on the roof after the wires were placed did not show that he knew of their location, so as to render him negligent in coming in contact with them.

3. In such a case it would be a question for

² Rehearing denied.

the jury whether plaintiff was negligent in touching the wires, even though he had previously observed their location.

4. One injured by an electric wire cannot be presumed, in the absence of evidence, to have had knowledge that moisture destroyed the insulation of such a wire.

5. Plaintiff, over the objection that the question called the witness to state whether the defendant was negligent or not, was allowed to ask certain questions of an expert electrician as to what matters should be taken into consideration in locating wires such as those in question, and whether it was proper or prudent management to put them so low over a metallic roof. The answer gave the facts in full, and explained what methods would have been safe. *Held*, that as the information could have been obtained by questions proper in form, and negligence had been fully proved by other evidence, defendant was not injured by the form of the question.

6. Persons using electricity must exercise the utmost care to prevent injury, and must protect those possessing less than ordinary knowledge of its character.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Giovanni Giraudi against the Electric Improvement Company of San Jose for damages for personal injuries. From a judgment on a verdict for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Richards & Welch, for appellant. D. W. Harrington and Charles Clark, for respondent.

TEMPLE, J. This action is for damages for injuries received through an electric shock caused by the negligence of defendant. Plaintiff was employed as dish washer in an hotel and restaurant at San Jose, kept by one Lamolle. The house was lighted by incandescent lights, furnished by defendant. The wires passed over the house from the southeast corner, where they descended from the Hensley House to the apex of the roof. At the southeast corner it was 12 feet above the roof. At the ridge of the roof the wires were 18 inches high, and ran thence diagonally over the northern slope of the roof for 60 feet, at an average height of 2 feet, to a point on the north fire wall, where they descended on the outside of the wall to the transformer. Those wires were part of a circuit of 1,000 lights, and carried 1,000 volts, which was reduced at the transformer to 50. The wires were erected while plaintiff was employed at the Lamolle House. Plaintiff did not see the workmen place them over the roof, but saw where they came down the north wall. After the wires had been erected, plaintiff was on the roof for a few minutes, to assist in placing Lamolle's signs. One was at the southeast corner of the building, and one at the southwest corner. This was in the daytime, and was the only occasion on which plaintiff had been upon the roof before the accident. At that time the wires were dead, and plaintiff had no reason for taking note of them, and there is no evidence which tends to show that he did so. He got upon the roof then at the same point

as upon the night of the accident, about three feet west of the place from which the wires passed down from the roof to the transformer. He reached the roof by stepladders temporarily placed there for the purpose. When the wires were erected, Lamolle was told by the workmen of defendant that they were harmless, and he was not consulted as to their location, nor was he asked what use, if any, was made of the roof. The accident occurred in the night of February 23, 1891. It was dark, stormy, and there was a heavy fall of rain. The signs seemed to be endangered, and Lamolle went upon the roof to secure them, and requested plaintiff to accompany him. Lamolle reached the roof first, having, as he thinks, a lantern, though plaintiff testified that he did not. They desired to reach the southeast corner of the building, to do which they must necessarily go over the wires, or, passing to the west over the roof, pass under them at the southeast corner. Plaintiff, not knowing or forgetting the location of the wires, came at once in contact with them. The first contact was with his leg. By the shock he was thrown down, and, when Lamolle ran to him, he found him grasping one wire with his hand. He was badly burned, both in his hand and leg. Plaintiff had judgment, and this appeal is from the judgment, and from an order refusing a new trial.

The first question is, is there evidence which tends to show negligence on the part of defendant which contributed proximately to the injury? I think there is. Indeed, this point is not much insisted upon on this appeal. The question is, simply, was there any evidence which it can be reasonably contended showed such neglect? If the question is open to debate, it must be left to the jury, even though there is no conflict in the evidence. The jury thought such negligence shown by a preponderance of evidence, and I think they correctly found. Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there would not come in contact with them. Not to do so was sufficient proof of negligence to justify the verdict. If there was any excuse for not so locating the wires, it is on the claim that they were so covered that there was no danger in coming in contact with them. The accident itself proves that this was not sufficient, *res ipsa loquitur*. The point most insisted upon here is that plaintiff was guilty of contributory negligence; that he knew, or ought to have known, of the location of the wires, and should have taken care to avoid them. It is not a case where the doctrine of negligent ignorance can apply. Plaintiff owed defendant no duty, and no part of his employment required him to know, or gave him opportunity to know. Unless it can be held that he did in fact know,

there was no evidence which even tended to show negligence on his part. He testified that he had never seen the wires before the accident, and did not know of their location. This probably means that he had no recollection of seeing them. There was no testimony as to where he went on the roof when he was there to assist in placing the signs, except that one was over the fire wall at the southeast corner, and the other at the southwest corner. He might have passed from one to the other without going near the wires. At all events, he had no occasion to take note of them. He had no interest in the matter, and no reason to suppose he would ever be upon the roof again. It would be a hard measure to hold one responsible for knowing everything he might observe if he would only take notice, when he had no interest in taking heed.

Can we say then, as matter of law, and against his positive testimony, that he had notice and did know? Even had he observed the wires during his short visit to the roof, it would be a question for the jury to say whether it was the want of ordinary care for him not to have it in mind on that occasion. It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury. Illustrations of this proposition are found in the cases of brakemen who are injured by obstructions over or near the track of the road. They have been allowed to recover, although it is shown that they knew of the obstruction, on the ground that they cannot be expected to retain at all times a complete outline of the track, and because, in the hurry of their work, they would not be likely to keep these things in mind; that is, to forget, under the circumstances, did not prove absence of ordinary care. See *Dorsey v. Construction Co.*, 42 Wis. 583.

And, again, the wires over the roof were covered with insulating material, precisely as the wires in the house were. It is claimed that this was of the very best quality known, and that, if it had been perfect, it would ordinarily have rendered the wires harmless. If it was not in good condition, it was the fault of defendant, and plaintiff cannot be held to have had knowledge of its dilapidated condition. It is claimed that the fact that the wire was wet destroyed the insulation for the time. But we cannot presume that the effect of moisture is a fact generally known, and there was no evidence tending to show that plaintiff had such knowledge.

It is also suggested that plaintiff grasped the wire with such force that in its wet condition the insulation was destroyed. If so, this would not prove contributory negligence,

but there is no proof of this except that, when he was found, he had hold of the wire. His testimony is that he first felt the shock in his leg, and was by such shock thrown down upon the wire. His case must here be judged by the testimony most favorable to him.

2. Plaintiff was allowed, over the objection of the defendant, to ask certain questions of an expert electrician as to what matters should be taken into consideration in locating electric wires carrying such currents as these in question, and whether it was proper or prudent management to put them so low over a metallic roof. The objection was that it was the province of the jury to determine such matters, and not a proper subject for expert testimony. The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold that facts may be elicited from the witness from which the conclusion inevitably follows. To illustrate, in *Bemis v. Railroad Co.*, 58 Vt. 636, 3 Atl. 531, an expert was held not allowed to testify "that it was not prudent to use a certain holisting apparatus with less than three men, on a stone of two tons heft." Yet the court said there might have been shown "the number of men required, danger in its use by a less number, its safety and adequacy when properly used," and added that then the jurors could as well decide for themselves. Of course, the point had been as effectively decided by the expert as though the first question had been answered. The difference is largely one as to the form of the question; and, while I do not mean to say that it is immaterial, or that such an error may never be cause for reversal, I do not think it should be so held here. The answer of the witness gave the facts in full, and explained what methods would have been safe. All this information might have been obtained by proper questions; and then it was not very material here. The negligence of defendant was fully proven by other evidence. In fact, the defense chiefly relied upon the plea of contributory negligence. I think we may safely conclude that the defendant was not injured by the form of the question.

3. Appellant also claims error in refusing two instructions asked by him, and in giving one at the request of plaintiff.

Instruction 4, which was refused, is as follows: "With reference to the use of the agencies of nature, such as fire, steam, gas, or electricity, the court instructs you that persons employing such agencies, and introducing them into cities in the form of commodities for the public use, while held to a considerable degree of care in the service of these dangerous elements, are not required to use such extraordinary care as, while it would render the element absolutely harmless under all conditions, would also render its supply impracticable. The public, who receive the benefits of convenience and comfort from the supply of the commodity, are

presumed to know enough of the nature of the element to avoid the dangers which must arise out of its practical use. The duties of the person supplying the community [commodity?] and of the public using it are reciprocal. Each may depend upon the exercise by the other of such ordinary knowledge of the character of the community [commodity?] and such common prudence in its presence as the circumstances of the time and place require." I think this instruction was properly refused. The mere fact that some persons use a dangerous agency raises no presumption that the public know enough of its nature to avoid the danger which must arise from its use; and the public, aside from the consumers using the commodity, owe no duty to those introducing it; but, on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity to use the utmost care to prevent injury to any class of people composing the public which exists in any considerable numbers. They must protect those possessing less than ordinary knowledge of the character of the commodity. If ordinary knowledge means that of the person of average intelligence, the rule contended for would leave one-half the community partially unprotected. It is true, when the question is as to the negligence of the defendant, he is entitled to be judged in view of the knowledge generally—that is, almost universally—possessed by the community. The instruction asked had reference only to the alleged contributory negligence of plaintiff. As to that it has been said: "As there are different classes in society, with widely different degrees of intelligence, the plaintiff was not required to exercise more care than is usual under similar circumstances among careful and prudent persons of the class to which he belongs." *Shear. & R. Neg.* § 87. In *Mackay v. Railroad Co.*, 35 N. Y. 75, the court said: "You would never expect the same care and caution from the mass of ignorant laborers that is exercised by educated, grave philosophers. The mass of men would not expect it, and the law that requires it is absurd. He should be called upon for such care only as a man in his condition in life would ordinarily exert under the circumstances. Does not a juror know what that is as well as a judge? The ignorant and the unwary are entitled to the protection of the law, as well as the wise and educated. There is little justice in depriving a man of his life for not exercising more care than his capacity will allow him to exert." The same rule is applied to the case of children, lunatics, and the blind. Contributory negligence implies fault on the part of the person injured. Sometimes it is negligence to be ignorant. Such was not the case here.

The fifth instruction asked by defendant ought to have been entirely rejected. A portion was given. Of this the defendant cannot complain.

At the request of plaintiff, the court gave the

following instruction: "What constitutes reasonable care must be judged by the circumstances of this case, of which you are the judge. If he is ignorant of the danger that might result from contact with these wires, a less degree of care was demanded of him than would have been required if he had been informed of such danger." This is also complained of by appellant. As applied to the facts of this case, I think it correct.

The judgment and order are affirmed.

We concur: BEATTY, O. J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.; VAN FLEET, J.

(107 Cal. 107)

KNOWLES et al. v. MURPHY et al. (No. 15,424.)¹

(Supreme Court of California. April 6, 1895.)

ACTION AGAINST TENANT—DEFAULT IN RENT—RECOVERY OF POSSESSION—PLEADING—ESTOPPEL TO DENY LANDLORD'S TITLE—EVIDENCE.

1. Code Civ. Proc. § 1582, providing that "actions for the recovery of any property, real or personal, and all actions founded on contracts, may be maintained by executors in all cases in which they might have been maintained by their respective testators," authorizes the executor of a deceased landlord to sue the tenant in unlawful detainer.

2. In an action against a tenant to recover rent due or possession of the premises, a complaint alleging the terms of the lease, and tenant's failure to pay the rent which fell due prior to the date of demand, states a good cause of action, although it shows that the full amount claimed was not due at the time demand therefor was made.

3. When service of notice on a tenant to pay rent or surrender possession is distinctly alleged, the manner of such service need not be alleged.

4. When the complaint charged that defendant tenants "unlawfully hold over and continue in possession" of the leased premises, defendants' denial that they "continue to hold or occupy said premises, or any portion thereof, as tenants of" plaintiff's testator, was an admission that they were in possession of the premises, and a denial only of the tenancy.

5. One is bound by the terms of a lease made to him, which he has signed, but not acknowledged.

6. One who, in the absence of fraud or false representations, has executed to a creditor a deed to certain property, and retained possession under a lease from him,—the deed and lease providing that the premises should be reconveyed to the tenant upon his payment of the rent and the debt which the two instruments were given to secure,—is estopped to deny such landlord's title in an action brought to recover the rent.

7. In an action to recover from a tenant for rent of premises which he had conveyed to the landlord, and received back under a lease, the conditions of which permitted him to purchase the premises at a fixed price, it was not error to exclude evidence of the value of the premises, as being immaterial to the issue.

8. When a tenant's lease gave him the privilege of purchasing the leased premises at a fixed price, evidence of a tender made under such option was properly excluded in a suit against the tenant for rent.

9. When the defendant had admitted signing a lease, and the issue was whether such signing was voluntary, or had been induced by fraud, a charge reciting that the "execution" of the deed was admitted by the defendant was not misleading.

¹ Rehearing denied.

10. A statement in a charge that the plaintiffs, in order to establish their case, had "offered in evidence the lease, and the payment of rent thereunder," was not equivalent to a declaration by the court that the defendants had paid rent under the lease, that being one of the issues before the jury.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by J. N. Knowles, executor, and Emma Lolor, executrix, of the will of C. P. Lolor, deceased, against Bridget Murphy and Martin J. Murphy. Judgment for plaintiffs, and defendants appeal. Affirmed.

Sullivan & Sullivan, for appellants. Wilson & McCutchen, for respondents.

HARRISON, J. Defendants entered into a lease with C. P. Lolor, bearing date August 3, 1885, by the terms of which he hired and demised to them a certain lot of land in San Francisco, for the term of six months, at the monthly rent of \$31, payable in advance on the 3d day of each and every month during said term. The instrument contained a clause giving to the defendants the option of purchasing the demised premises at any time during the term, by paying the sum of \$3,700, and all the rent accruing under the lease. The defendants had been in possession of the land, claiming to be owners thereof, for several years prior to this time, and had mortgaged it to Lolor to secure an indebtedness to him of \$3,000. Lolor had commenced an action to foreclose the mortgage, and while that action was pending the defendants executed to Lolor a conveyance of the lands, and at the same time took from him the aforesaid lease. After its execution they paid all the rent which accrued, according to the terms of the lease, prior to April 3, 1891. Lolor died in December, 1890, and in March, 1891, the plaintiffs were appointed his executors. The defendants not having paid any rent after their appointment, the plaintiffs, on the 12th of February, 1892, served upon each of them a written demand for the payment of the rent, stating the amount then due, or that they deliver possession of the demised premises. This demand not being complied with, the present action was brought. Judgment was rendered in favor of the plaintiffs, and the defendants have appealed therefrom, and also from an order denying a new trial.

1. The plaintiffs were authorized to bring this action. "Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates." Code Civ. Proc. § 1582. In *Martel v. Meehan*, 63 Cal. 47, it was held that the provisions of this section do not apply to an action brought under the provisions of section 1161, Code Civ. Proc., against an executor of one who, in his lifetime, had been a tenant

of the plaintiff, for the reason that the section authorizes such action only when the tenant continues in possession, "in person or by subtenant," and that the executor is not such "person" or a subtenant, and that a judgment against an estate, in the nature of a penalty of three times the amount of the rent, should not be given unless expressly authorized by statute. These reasons do not exist in the case of an action by executors. The section expressly authorizes them to bring actions for the recovery of any property, in all cases in which the same might have been brought by their testator; and while they are engaged in the administration of the estate the executors are to be regarded as the "successor in estate of the landlord," for the purpose of giving the notice authorized by section 1161, and enforcing against a tenant who is guilty of an unlawful detainer the remedies authorized by that chapter.

2. The complaint sufficiently states a cause of action against the defendants. The terms of the lease were alleged, and also the period during which the defendants had been in default in the payment of the rent prior to the date of the demand. The rent was payable in advance, and the averment that the amount in default covered a period which extended beyond the date at which the demand was made, or beyond the date when the last installment accrued, was merely surplusage. It was alleged that the demand was made February 12, 1892, and within one year after the rent became due. It was not necessary to allege the manner in which the notice to pay rent or surrender possession was served. The fact of the service is distinctly alleged, and upon a general demurrer this allegation will be construed to include everything necessary to constitute a sufficient service.

3. The nonsuit was properly denied. Upon proof of the execution of the lease, and the default in the payment of the rent provided therein, with the admission in the answer that the defendants held possession of the demised premises, the plaintiffs were entitled to judgment. It was alleged in the complaint that "said defendants unlawfully hold over and continue in the possession of said premises," etc. The denial of the defendants that they "still continue to hold or occupy said premises, or any portion thereof, as tenants of C. P. Lolor," is an admission that they were in possession, but merely a denial of the tenancy. It was not necessary that the defendant Bridget Murphy should acknowledge the lease, in order to be bound by its terms.

4. The defendants alleged in their answer that the conveyance by them to Lolor on the same day that they executed the lease was merely by way of security for the payment of their indebtedness, and that the deed, although absolute in form, was only a mortgage, and was executed upon the agreement on the part of Lolor that upon payment of the sum of \$3,700, and interest at the rate of \$31 per month, he would re-

convey the premises to them; that they did not enter into possession of the premises under the lease; and that they were induced to sign the lease by reason of certain false and fraudulent representations by Lolor to the effect that the lease was intended only as additional security for a payment of said indebtedness. The court instructed the jury, very fully and explicitly, that, if they should find that the defendants were induced to accept the lease from Lolor through fraud or deception practiced upon them by Lolor, the lease did not create the relation of landlord and tenant, and that they must find for the defendants. The verdict in favor of the plaintiffs established that the lease was not entered into by the defendants by reason of any fraud or deception on the part of Lolor. It was immaterial, for the purposes of this action, whether the deed from the defendants to Lolor was absolute, or by way of mortgage. The question of title was not involved, and the defendants could not avoid the obligation assumed by them, by reason of the lease, by showing that Lolor did not have the title to the premises which he deeded to them. Upon their failure to sustain the averments of fraud and false representations, the presumption arose that the lease is to be construed and to have effect according to its terms. Even if it had been admitted that the deed and the lease were both executed merely as security for the payment of the indebtedness, the defendants would still be subject to the obligations consequent upon their entering into the lease, one of which is the right of the lessor to a judgment for possession, in case of their default in payment of the rent. Their contention that, inasmuch as they were in possession of the premises at the time they entered into the lease, they are not estopped from disputing the title of the lessor, is inapplicable to the present case. In *Tewksbury v. Magraff*, 33 Cal. 237, and in *Franklin v. Merida*, 35 Cal. 566, it was held that in an action of ejectment, where the tenant did not enter into possession under the lease, but was in possession at the time of the lease, he was not estopped from disputing the title of the landlord. This rule, however, was held in *Mason v. Wolff*, 40 Cal. 246, to be inapplicable in actions of unlawful detainer, for the reason that in these actions the question of title is not involved, and cannot be raised. See, also, *Felton v. Millard*, 81 Cal. 540, 21 Pac. 533, and 22 Pac. 750. The expression in *Davidson v. Ellmaker*, 84 Cal. 21, 23 Pac. 1026, to the effect that in such action the tenant is not estopped from disputing the title of the plaintiff, is to be construed in connection with the claim set up therein that the tenant was induced to accept the lease by reason of the fraud of the lessor, which, as was said in *Johnson v. Chely*, 43 Cal. 305, destroyed the relation of landlord and tenant, and removed the estoppel. In the present case, however,

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the very circumstances under which the lease was executed preclude the defendants from invoking the rule laid down in *Tewksbury v. Magraff*, and estop them from questioning the title of their lessor; for, if the deed and lease were executed as a security for their indebtedness, their lessor would have the right to avail himself of all the remedies afforded by law for making that security effective, and to enforce against them the surrender of the possession, which, by virtue of their lease, follows their default in the payment of the rent. Under the same principles, the value of the property at the time the lease was executed was immaterial, and the court did not err in excluding evidence of such value.

5. Evidence that the defendant Bridget Murphy had tendered to Lolor the amount of the indebtedness in November, 1885, was immaterial in this action. If the tender was made by virtue of the option clause in the lease, it did not release the defendants from their obligation to pay the rent, unless they should in some manner have sought the enforcement of this agreement on the part of Lolor. So long as they retained the possession of the premises, they could not escape their obligations to pay the rent. The subsequent payment of rent by them was to be regarded as an abandonment of their exercise of this option. If this offer of payment was intended for the purpose of extinguishing their indebtedness to Lolor, it did not have that effect, unless they kept the tender good. Civ. Code, § 1500.

6. The issues upon the execution of the lease, and whether there was any fraud practiced by Lolor upon the defendants, were very fully and fairly presented to the jury by the court. The expression in the charge that the "execution" of the lease was admitted could not have misled the jury. The signing of the lease was admitted by the defendants in their answer, and their signatures to the instrument when it was offered in evidence were not disputed. The issue before the jury was whether this signing was voluntary, or had been induced by fraud. While the execution of an instrument includes more, in legal contemplation, than merely signing, these terms are often used interchangeably. In another portion of the charge the jury were told that the plaintiffs, to sustain their case, had offered in evidence this lease signed by the defendants, and the payment of rent thereunder. The contention of the appellants that in this statement the court declared that the defendants had paid rent under the lease, whereas this was one of the issues before the jury, is not sustained by an examination of the charge itself. In this part of its charge the court was merely stating to the jury the course that had been taken at the trial, and not the effect of the testimony that had been offered. The defendants did not dispute the fact that they had paid

money to Lolor by reason of the agreement between them and that they had taken receipts from him, in which this money was stated to have been paid as rent. Their denial in the answer that the money was paid under a lease was coupled with their denial that they had executed a lease; but when the lease was produced in evidence, and it was shown that the defendants had paid rent to the lessor, this payment, in the absence of other testimony, would be presumed to have been made under the lease. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

PEOPLE v. GARCIA. (No. 21,154.)

(Supreme Court of California. April 17, 1895.)

CRIMINAL LAW—IMMATERIAL EVIDENCE.

The admission of hearsay evidence, in no way connecting the defendant with the offense charged, and in no way prejudicial to any of his rights, is harmless error.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Defendant, Garcia, was convicted of robbery, and appeals from an order denying his motion for a new trial. Affirmed.

Alex. Campbell, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. The defendant, Garcia, alias Herrera, was convicted of robbery, and now appeals from the judgment and order denying his motion for a new trial. There is no merit whatever in his appeal. It is claimed that the court committed an error in admitting hearsay evidence before the jury. A complete and conclusive answer to appellant's contention in this regard is found in the fact that the evidence admitted in no way connected the defendant with the offense charged, and was in no way prejudicial to any of his rights. The record discloses that the evidence is sufficient to support the verdict and the judgment. For the foregoing reasons, the judgment and order are affirmed.

(107 Cal. 163)

MCQUEEN v. MECHANICS' INSTITUTE. (No. 15,791.)

(Supreme Court of California. April 22, 1895.)

NEW TRIAL—CONFLICTING EVIDENCE—ERRONEOUS INSTRUCTIONS.

1. The fact that the jury, in an action to recover for injuries alleged to have been caused by the lack of sufficient light in the cellar in which plaintiff was working, were allowed to visit and examine such cellar, did not deprive the court of its jurisdiction to grant a new trial, where the jury rendered a verdict for plaintiff.

2. The giving of erroneous instructions is not grounds for setting aside an order granting a new trial.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Alfred W. McQueen against the Mechanics' Institute, a corporation. Judgment for plaintiff, and from an order granting a new trial he appeals. Affirmed.

Boone & Schlesinger, for appellant. E. J. McCutchen, for respondent.

PER CURIAM. This action was brought to recover damages for personal injuries received by plaintiff while in the employ of defendant. Plaintiff recovered a verdict, and the court granted a new trial. From this order plaintiff takes this appeal. Plaintiff's foot was crushed by the falling of a pile of boards which he and his fellow servants were storing in the cellar of the Mechanics' Pavilion. The boards were passed down through a hatchway, and put on a hand truck, and then taken to a place in the cellar, where plaintiff and a fellow laborer lifted them from the truck, and piled them. A pile which they had built up about five feet toppled over, and injured plaintiff. The work is not inherently dangerous, and no one was directing in what mode the planks should be piled, nor how high. Naturally, therefore, the presumption would be that the accident occurred through the carelessness of the workmen.

Plaintiff contends that the defendant was negligent, because there were cleats upon some of the boards, of which the workmen were not informed, which cleats caused the pile to be unsteady and liable to fall; also because the cellar was not sufficiently lighted. If the cellar was sufficiently lighted, plaintiff could have seen the cleats on the boards, and could also have seen if the pile was uneven or unsteady. The amount of light in the cellar was therefore a very material question. The trial court concluded that there was sufficient light in the cellar, and that the accident occurred through the negligence of plaintiff and his fellow servants, and it cannot be denied that there was evidence tending to support that view. But the jury was allowed to visit the cellar, and counsel contend that, therefore, they had evidence which is not and could not be in the statement on motion for a new trial. The purpose of allowing the jury to visit the premises was to enable them to understand the evidence introduced on the trial. Upon such evidence we must presume their verdict was based. The fact that the jury was allowed to visit the premises cannot deprive the court of its jurisdiction to grant a new trial. This it should do notwithstanding a conflict in the evidence, if fully convinced that the verdict was wrong.

The refusal of the court to grant a nonsuit is of no moment. Had there been no additional testimony, the court could change its ruling at any time during the trial. But

there was further testimony in defense and in rebuttal.

If, as suggested by appellant, some of the instructions were erroneous, that fact might constitute an additional reason for granting a new trial, but it is no reason for setting aside an order awarding a new trial. The order is affirmed.

BARNETT v. MULKINS et al. (No. 19,554.)
(Supreme Court of California. April 19, 1895.)

FORECLOSURE OF MORTGAGE—ATTORNEY'S FEES.

Where the mortgage secured the payment of principal and interest only, attorney's fees for which the note provided cannot be made a lien on the land. *Clemens v. Luce*, 35 Pac. 1032, 101 Cal. 432, followed.

Department 1. Appeal from superior court, San Diego county; George Peterbaugh, Judge.

Action by one Barnett against Mulkins and others to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Modified.

Wm. Darby, for appellants. V. E. Shaw, for respondent.

PER CURIAM. Upon the authority of *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032, this cause is remanded, and the superior court is directed to modify the judgment by striking therefrom the amount included therein for attorney's fees, so far as the same is made a lien upon the land described in the complaint; and, as so modified, the judgment will stand affirmed.

(107 Cal. 94)

PEOPLE ex rel. BOARDMAN v. TOWN OF LINDEN. (No. 18,335.)

(Supreme Court of California. April 5, 1895.)

MUNICIPAL CORPORATIONS—ORGANIZATION—PETITION—NOTICE OF ELECTION—BOUNDARIES.

1. Under Act 1889, p. 371, § 2, providing, on incorporation of municipalities, that the petition shall be presented to the board of supervisors after two weeks' notice, by publication, of the time when it will be presented, the petition is properly caused to be published by the petitioners before presentation to the board of supervisors.

2. Under Act 1889, p. 371, § 2, requiring, on incorporation of municipalities, the presentation to the board of supervisors of a petition signed by 50 qualified electors of the county, and resident within the territory to be incorporated, and providing that the affidavit of three qualified electors residing within the proposed limits shall be prima facie evidence of the requisite number of signatures, if the affidavit fails to show that the signatures of the petitioners are genuine, and there is no evidence introduced to prove their genuineness, the proceedings are fatally defective.

3. The board of supervisors, by adjourning the hearing of a petition for the incorporation of a municipality from day to day without fixing the hour for resuming the hearing, do not lose jurisdiction of the proceedings.

4. An order of the board of supervisors establishing the boundaries, and providing for the submission of the question of the incorporation, of certain territory, is not an ordinance, and therefore need not be published.

5. The board of supervisors, to whose discretion is committed the fixing of the manner of giving notice of an election for the incorporation of municipality, must themselves fix the manner or time of giving notice, and cannot delegate to the clerk such power.

6. An ambiguity in the order of the board of supervisors fixing the boundaries of a proposed municipality, consisting of a misdescription of a section corner, is not a fatal defect, where the courses and distances and other descriptions show the corner intended.

7. The filing of a certified copy of the order of the board of supervisors declaring a municipality duly incorporated is essential to the validity of the incorporation.

In bank. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Quo warranto on the relation of S. H. Boardman against the town of Linden. There was a judgment for defendant, and relator appeals. Reversed.

Atty. Gen. Hart and Jas. A. Louttit, for appellant. W. M. Gibson and Kile & Plummer, for respondent.

BEATTY, C. J. By virtue of certain proceedings under the general law providing for the organization, incorporation, and government of municipal corporations (St. 1883, p. 93), the defendant is assuming and claiming to be a municipal corporation of the sixth class, and this action was brought for the purpose of determining its right to hold and enjoy the franchise and to exercise the powers of such a corporation. The plaintiff claimed that, by reason of the failure of the board of supervisors to comply with the statute, no organization was ever effected. The defendant claimed that there had been a substantial and sufficient compliance with the law on the part of the board and of all parties concerned. A trial was had in the superior court, and judgment given in favor of the defendant, affirming the validity of its incorporation. Plaintiffs appeal from the judgment, and from an order overruling their motion for a new trial. In support of their appeal they specify various particulars in which, as they claim, the proceedings looking to the incorporation of the defendant fell short of the statutory requirements. There seems to be no difference between counsel as to the proposition that a substantial compliance with the statute is sufficient, but it is contended that positive and important provisions of the law have, in this instance, been violated or ignored. Most, if not all, of the questions to be decided depend for their solution upon the proper construction of section 2 of the act above cited, as amended in 1889 (St. 1889, p. 371).

1. It is therein provided, among other things, that a petition describing the territory to be incorporated, and signed by at least 50 qualified electors of the county, resident within the limits of said territory, shall be presented to the board of supervisors after two weeks' notice, by publication, of the time when it will be presented. Appellant

claims that such petition must be presented to the board, in the first place, before publication of notice, and must be thereafter published, with the notice, affidavit, etc., by order and under the official sanction of the board, for the requisite time, before it is presented to the board for its further action. We think, however, that a proper construction of the statute warrants the course pursued by the petitioners in this instance, who themselves caused the publication of the petition, affidavit, and notice of the time when the petition was presented to the board.

2. It is provided in the same section that "the affidavit of three qualified electors residing within the proposed limits, filed with the petition, shall be prima facie evidence of the requisite number of signatures" to the petition. The affidavit filed with this petition was radically defective. It merely showed that the names attached to the petition were names of qualified electors resident within the limits of the proposed corporation. It did not show that their signatures were genuine, and there never was any evidence of the genuineness of such signatures offered before the board, or on the trial of this action before the court. The board never found or declared that such petition had been in fact signed by 50 qualified petitioners, and there was no evidence to sustain such a finding by the court. In this respect we think there was a failure, in a substantial particular, to comply with the statute. It is of the very essence of the proceeding, and absolutely essential to the jurisdiction of the board to make the order declaring the establishment of the incorporation, that a proper petition, signed by the requisite number of qualified petitioners, should be laid before them. This, of course, involves proof of the genuineness of the signatures attached to the petition, no less than the citizenship and residence of the persons whose names are attached. And the statute prescribes what that proof shall consist of,—at least in part,—viz. an affidavit of three qualified petitioners, filed with the petition. This affidavit, it is true, is only made, by the statute, prima facie evidence of the requisite number of signatures. But we do not construe this to mean, as counsel for respondent contends, that it may be entirely dispensed with, and other evidence substituted. It only means that the affidavit, if uncontradicted, is sufficient proof. If it is contradicted, no doubt it may be supported by additional testimony, but that such an affidavit should accompany the petition we think clear. And even if we were to concede, which we do only for the argument, that the absence of a proper affidavit might be supplied by other competent evidence of the genuineness of the signatures of a sufficient number of qualified petitioners, the case shows that in this instance there was no other evidence, and there was no finding or declaration of the fact.

3. There was no loss of jurisdiction by the

board, if they had ever acquired jurisdiction, by the adjournments of the hearing from time to time, merely because, in the orders of adjournment, the hour of the day for resuming the hearing was not specified.

4. If the order of the board establishing boundaries, and providing for a submission of the question of incorporation to the people, had been otherwise valid, it was not invalidated by the failure to publish it as an ordinance. Such orders are not ordinances, governed, as to their enactment, by the provisions of the county government act, but are orders to be entered on the minutes of the board in accordance with the provisions of the statute regulating this particular proceeding.

5. The board of supervisors did not make any direction as to the manner or time of giving notice of the election in this case, but merely resolved that notice be given, leaving it to their clerk to determine what the notice should be. The clerk caused a notice to be posted for 15 days, in which was contained an ambiguous description of the boundaries of the proposed corporation. This was not a substantial compliance with the statute. The manner of giving notice, whether by publication in a newspaper, or by posting, and the length of time that the notice is to be published or posted, are matters committed to the discretion of the board, and cannot be delegated to the discretion of the clerk. In this case the proposed incorporation was of a territory eight miles long and six miles wide, embracing one small village and a wide extent of farming country. The notice of election was posted, under the direction of the clerk, in five places. This seems scarcely reasonable or sufficient, but whether or not it was sufficient to give actual notice to the voters, and to elicit a full vote, is immaterial. The board, and not their clerk, must determine what notice shall be given. As to the error in the description of boundaries, it was, to some extent, ambiguous, by reason of the call for the southwest corner of section 30, instead of the northwest corner, but the other calls show conclusively that the northwestern corner was meant. The beginning point in the description is the "southwest corner of township 2 north, range 8 east; running thence six miles to the southeast corner of township; thence north eight miles to north line of Douglas township; thence west six miles to southwest corner of section 30, township 3 north, range 8 east, being the northwest corner of Douglas township; thence south eight miles to the point of beginning." It was shown that the northwest corner of Douglas township was identical with the northwest corner of section 30; and the other calls, viz. a course west from the northeast corner to the northwest corner of the proposed incorporation, and a distance of eight miles from the northwest corner to the southwest corner, sufficiently demonstrated what corner of the section was meant.

6. No certified copy of the order of the board of supervisors declaring the defendant duly incorporated had been filed in the office when this action was commenced, or, so far as appears, when it was tried. The filing of such copy is, in our opinion, essential to the completion of the incorporation. Until it is filed there is no corporation. The last-mentioned defect in the proceedings is shown by the pleadings and findings, and is a ground for reversing the judgment on the appeal from the judgment. The other defects, viz. insufficiency of the affidavit as to signatures to petition, and failure of the board to exercise its discretion as to notice of the election, appear only from the statement on motion for new trial.

As the failure to file a certified copy of the order with the secretary of state may have been, or may still be, remedied, it is proper to remand the cause for further proceedings, with a view to which we have passed upon all the points likely to arise on another trial. The judgment and order appealed from are reversed, and the cause remanded.

We concur: McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

(107 Cal. 160)

BOOB et al. v. HALL. (No. 19,550.)

(Supreme Court of California. April 19, 1895.)

APPEAL.—NOTICE—FORECLOSURE OF CHATTEL MORTGAGE—ATTORNEY'S FEES.

1. It is not necessary, where one defendant appeals, to serve notice of appeal on other defendants, where by default they admit the averments of the complaint.

2. The complaint in foreclosure of a chattel mortgage described part of the property mortgaged as "ten shares of the L. W. Co., a corporation." Held, that the description was sufficient to identify the property intended to be mortgaged, as well as for purpose of sale under the judgment, where it appeared that no certificate of the stock had been issued.

3. In the absence of an agreement therefor, the court is not authorized to include counsel fees as part of the judgment in an action to foreclose a mortgage.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Paul Boob and others against Lavinia Hall and others to foreclose a mortgage. From a judgment decreeing foreclosure and sale, defendant Lavinia Hall appeals.

Goodcell & Leonard, for appellant. Geo. B. Cole, for respondents.

HARRISON, J. Action to foreclose a mortgage executed by the defendant Lavinia Hall. The other defendants were made parties to the action under the allegation that they have or claim some interest in the mortgaged premises, subject to the lien of the plaintiffs. The defendant Hall demurred to the complaint, and upon the overruling of her demurrer she failed to answer, and her

default was thereupon entered. The defendants Mansfield made no appearance, and their default therefore was entered. Judgment was rendered in favor of the plaintiffs, directing a sale of the mortgaged property, foreclosing all the defendants of any right therein, and providing that, if the proceeds of the sale of the mortgaged property was insufficient to pay the amount found due to the plaintiffs, judgment for the deficiency should be docketed against the defendant Lavinia Hall. The defendant Lavinia Hall alone has appealed.

1. The notice of appeal was served upon the plaintiffs alone, and the respondents have moved to dismiss the appeal for failure to serve the notice upon her codefendants. As the averment in the complaint that the interest of the other defendants in the mortgaged property is subject to the lien of the plaintiffs was admitted by their default, and as the judgment merely forecloses their interest in the property, it is evident that they could not be affected by a reversal of the judgment, or by a modification of any of the terms thereof which affect the appellant and the respondents.

2. The demurrer to the complaint was properly overruled. The complaint described the mortgaged property, other than the land, in the same terms in which it had been described in the mortgage, viz.: "Together with one share of water in the South Fork ditch of the Santa Ana river, and ten shares of the capital stock of the Lugonia Water Company, a corporation." The appellant ought not to object to an uncertainty in description which she has herself made. It does not appear that the corporation had issued to the appellant a certificate for the shares of its capital stock; and, if not, the description in the complaint, as well as in the mortgage, was sufficient to identify the property which the appellant intended to mortgage, as well as for the purpose of a sale under the judgment. Such a description in an instrument of sale would transfer any title the vendor might have to shares of the capital stock in a corporation for which no certificate had been issued.

3. In the judgment rendered by the court there was allowed to the plaintiffs the sum of \$400 for counsel fees in foreclosing the mortgage. The complaint contains no averment of any agreement on the part of the mortgagor to pay a counsel fee, nor does the copy of the mortgage annexed to the complaint contain any such stipulation. In the absence of an agreement therefor, the court was not authorized to include counsel fees as a part of the judgment. *Sichel v. Carrillo*, 42 Cal. 493; *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032. Neither the prayer in the complaint for its allowance nor the averment of the amount which would be reasonable can supply the necessity of a direct averment that an attorney's fee had been agreed to be paid by the mortgagor. The

motion to dismiss the appeal is denied, and the cause is remanded to the superior court, with directions to modify the judgment by excluding therefrom the amount included therein for attorney's fees, and, when so modified, the judgment will stand affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(1 Kan. A. 184)

In re PETRIE.

(Court of Appeals of Kansas, Southern Department, E. D. March 19, 1895.)

CONSTITUTIONAL LAW—COMMITTING WITNESSES—BAIL.

1. Section 61, c. 82, Gen. St. 1889, by which an examining magistrate is authorized to commit to prison a witness who refuses to enter into a recognizance with or without sureties for his appearance as a witness, is not unconstitutional, as being in violation of the fifth article of the amendment to the constitution of the United States.

2. Section 61, c. 82, Gen. St. 1889, only subjects witnesses in criminal cases to the same general rules which govern every other citizen of the state, and is such an execution of the power of the state as the settled maxims of the law sanction and require for the protection of society and good government; and the requirement of this statute is simply to secure the presence of persons who are material witnesses for the public in the trial of those charged with offenses against the laws of the state. The same burden is imposed upon every citizen of the state alike who may happen to possess the information which is necessary to protect society against criminals, and to vindicate the majesty of the law.

3. When a person voluntarily makes complaint before a justice of the peace or other examining magistrate, and causes the party to be arrested on charge of a felony, and the party waives his right to an examination, and is admitted to bail or committed to jail to answer the charge contained in the complaint, it is the duty of the justice or examining magistrate to require all the material witnesses for the state to enter into recognizance for their appearance at the next term of the court to which the party is required to answer, and it is not necessary that he hear evidence as to the complaining witness. Being a material witness for the state, he may require him to enter into recognizance, and, if he has reason to believe that he will not perform the conditions of his recognizance, may require him to enter into recognizance, with sureties, and, if he refuses to enter into such recognizance, may commit him to jail until he comply with such order.

(Syllabus by the Court.)

Original application by L. A. Petrie for a writ of habeas corpus. Denied.

L. A. Petrie petitioned for a writ of habeas corpus as follows: "Now comes your petitioner, L. A. Petrie, and avers that he is a resident of Miami county, Kansas, and has been such resident for 39 years last past. That your petitioner is now illegally restrained of his liberty and imprisoned by T. J. Allen, sheriff of Bourbon county, Kansas, in the common jail of said county. That your petitioner has been so restrained of his liberty since the 31st day of January, 1895; that the illegality of said imprisonment is in this, to

wit: That your petitioner was required by B. C. Garrison, J. P., to enter into recognizance, with approved securities, in the sum of \$3,000, to appear as a witness at the next term of the district court for Bourbon county, Kansas, in a case there pending, wherein the state of Kansas is plaintiff and Mart Tooney is defendant. That your petitioner has not refused to give said recognizance, but has used his best endeavors to secure sureties that are satisfactory to said justice of the peace. That said justice has no cause to believe that your petitioner would not appear in obedience to the commands of said court, and in satisfaction of his own personal recognizance, your petitioner. Your petitioner further represents and avers that he will attend the next term of the district court of Bourbon county, Kansas, and that he will not depart the jurisdiction of said court without leave thereof. Your petitioner further represents that he has never had an opportunity to be heard upon the matters and things herein set out, and that he is being deprived of his liberty without due process of law: Wherefore your petitioner prays that a writ of habeas corpus issue from the court, and that the matters and things herein contained be inquired of by the court, and that upon said inquiry being had and determined, that your petitioner be discharged from confinement upon his own personal recognizance in such sum as the court may adjudge, and for such other and further relief as your petitioner ought to have." The petition was duly sworn to by the petitioner, and presented in open court, and the writ was granted by the court as prayed for.

The sheriff made due return as follows:

"(1) I am the regularly elected, qualified, and acting sheriff of Bourbon county, Kansas, and ex officio keeper of the county jail of said county. (2) B. C. Garrison, Esq., herein named, was at the dates hereinafter mentioned one of the regularly elected, qualified, and acting justices of the peace in and for the city of Fort Scott, said county and state. (3) I admit that I am imprisoning and restraining said L. A. Petrie and keeping him confined in the county jail of said county. (4) I also admit that on January 31, 1895, he was committed to the county jail by said justice, B. C. Garrison. (A copy of the writ of commitment is hereto attached, marked 'Exhibit A,' and made a part hereof.) (5) On said date, one Mart Tooney was examined before said justice on a charge of robbery, said L. A. Petrie being the complaining witness; and said Tooney was placed under bonds to appear for trial on said charge of robbery at the next term of the district court of said county and state, and, failing to give such bond, was also committed to the county jail, and is now in confinement in my charge. (6) The justice then deemed said L. A. Petrie a material witness in the action against Mart Tooney on the aforesaid charge; and said justice was then satisfied that there was a good cause to believe that said L. A. Petrie would not per-

form the condition of any recognizance given by him unless required to give security. (7) Because of the premises, said justice required said L. A. Petrie to furnish a recognizance, with approved security, in the sum of three hundred dollars, with which said order said Petrie failed to comply, and because of the fact he was committed as above set out. (8) And, because of the matters and things herebefore set out, I allege that the said L. A. Petrie is rightfully and lawfully being restrained of his liberty by me.

"Exhibit A.

"The State of Kansas, to J. R. Smith, Constable in and for the County Aforesaid, and to the Keeper of the Jail of the County Aforesaid—Greeting: Whereas, Mart Tooney, late of said county, has been arrested on the oath of L. A. Petrie, charged with the crime of robbery; and whereas, said L. A. Petrie has been required to enter recognizance in the sum of \$300 to appear and testify in that behalf at the 1st day of the April court, 1895, of Bourbon county district court, and has been examined by me, with which requisition he has failed to comply: Wherefore, you, the said constable, are hereby commanded to take the body of him, the said —, and deliver him to the keeper of the county jail of your county; and you, the said keeper of the said jail, are hereby commanded to receive the said L. A. Petrie into your custody in the jail of the county aforesaid, there to remain until he be discharged by due course of law."

Parties agree on the following facts: "(1) The statements in clause six of the sheriff's answer are true. (2) The justice's docket, as it relates to the commitment of said Petrie, is considered in evidence. (3) It is further agreed that the only questions involved herein are whether or not the statute under which the commitment was made is constitutional, and whether or not the provisions of the statute have been complied with."

The justice's docket that relates to the commitment of L. A. Petrie is as follows: "January 31, 1895, personally appeared L. A. Petrie, and filed complaint, under oath, charging that on or about January 30, 1895, in the county of Bourbon, state of Kansas, one Mart Tooney did, willfully, unlawfully, and feloniously take from the person of affiant, and against affiant's will, and by violence of the person of affiant, certain money of affiant, to wit, one five dollar treasury note, and one two dollar treasury note, currency of the United States, said money being the property of affiant, contrary to the form of statutes in such cases made and provided, and against the peace and dignity of the state of Kansas. January 31, 1895, warrant delivered to J. R. Smith, constable. Warrant filed January 31, 1895, indorsed, 'Received this writ January 31, 1895. Served the same by arresting the within-named defendant, and producing his body into court. J. R. Smith, Constable.' January 31, 1895, the defendant being present

in person, the county attorney, C. E. Corey, appeared for the state, and thereupon the defendant waived a preliminary examination, and was bound over to the district court of Bourbon county, Kansas. Bond fixed at \$300. Not given. A commitment delivered to J. R. Smith, constable. Commitment filed January 31, 1895, indorsed: 'Received this writ January 31, 1895. Executed the same by committing the within-named Mart Tooney to the jail of Bourbon county, Kansas, and by delivering a certified copy of this order to the jailer thereof. J. R. Smith, Constable.' The complaining witness, L. A. Petrie, was required to give bond in the sum of \$300 to appear and testify in behalf of the state at the 1st day of the April term, 1895, of the Bourbon county, Kansas, district court. Bond not given, and thereupon a commitment was issued for said L. A. Petrie, and delivered to J. R. Smith, constable. Commitment filed January 31, 1895, indorsed: 'Received this writ January 31, 1895. Executed the same January 31, 1895, by committing the within-named L. A. Petrie to the jail of Bourbon county, Kansas, and delivered a certified copy of this order to the jailer thereof.'

N. W. Wells, for petitioner. C. E. Corey, for respondent T. J. Allen, sheriff.

JOHNSON, P. J. (after stating the facts). There are only two questions in this case presented by the agreed facts for the consideration of the court. The first reason urged by the counsel for the release of the petitioner is that section 61, c. 82, of the General Statutes of 1899 is unconstitutional. The claim is that this section violates his rights under that portion of the fifth article of the amendment to the constitution of the United States which reads as follows: "Nor be deprived of life, liberty, or property, without due process of law." The contention is that under this statute the petitioner is deprived of his liberty without due process of law. The statute under which the petitioner is imprisoned is found in the fifth article of the Code of Criminal Procedure, for the arrest and examination of offenders, which provides, upon complaint made to any magistrate authorized to examine into criminal offenses, that he shall examine, on oath, the complainant and any other witness produced by him, and shall reduce the complaint to writing, and, if it shall appear that an offense has been committed, shall issue a warrant naming the offense charged to have been committed and the county in which it was committed, and requiring the officer to whom it is directed forthwith to take the person accused, and bring him before some court or magistrate of the county, to be dealt with according to law, also give the form of the warrant, and prescribe the manner of the examination of the party accused of an offense, and if, on the examination, it shall appear that an offense has been committed, and there is probable

cause to believe the prisoner guilty, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken, and the prisoner discharged, but, if no sufficient bail be offered or the offense be not bailable by the magistrate, the prisoner shall be committed for trial. When the prisoner is admitted to bail or committed by the magistrate, he shall also bind by recognizance such witness against the prisoner as he shall deem material to appear and testify at the next term of the court, having cognizance of the offense, and in which the prisoner shall be held to answer. Section 58 provides: "If the magistrate shall be satisfied that there is good cause to believe that any such witness will not perform the conditions of his recognizance unless other securities be given, such magistrate may order the witness to enter into a recognizance with such sureties as may be deemed necessary to secure his appearance at court." The magistrate shall in like manner, at the defendant's request, cause the material witness for the defendant to enter into a recognizance for appearing and testifying in the court having cognizance of the offense. All witnesses required to recognize, either with or without sureties, shall, if they refuse, be committed to prison by the magistrate, there to remain until they comply with such order or be otherwise discharged according to law. Counsel for petitioner claims that, under these several provisions of the statute, he is deprived of his liberty without due process of law. This brings us to the consideration of the constitutionality of these sections, and to determine what is meant by due process of law.

Justice Valentine, in delivering the opinion of the court in the case of *Gilchrist v. Schmidling*, 12 Kan. 271, says: "The able disquisitions found in many decisions and elementary works upon 'due process of law,' 'due course of law,' 'law of the land,' etc., can have but little application in Kansas, for our constitutional provision upon that subject differs from that of almost every other state in the Union. It reads as follows: 'All persons for injury suffered in person, reputation, or property shall have remedy by due course of law, and justice administered without delay.' Const. Bill of Rights, § 18. We suppose that it is settled beyond all controversy that 'due process of law,' etc., for transferring property from one person to another, before any injury has been suffered by the owner of the property, does not necessarily mean a judicial proceeding or a judicial determination. The distraining of cattle damage feasant, the taking up of strays, the sale of property, real or personal, for taxes, the exercise of the power of eminent domain, the passage of remedial and retrospective statutes, legalizing what had previously been defectively executed or performed, and thereby changing title to property (*Weister v. Hade*, 52 Pa. St. 479-481; *Cooley*, Const. Lim. 371), or the exercise of many police powers by the police officers of

a city, is as much due process of law as any judicial determination can be; and yet they are not, as a rule, judicial proceedings. Nor does 'due process of law' mean a 'legal proceeding according to the course of the common law, nor must there be a personal notice to the party whose property is in question.'" Judge Cooley, in his work on Constitutional Limitation (page 353), in giving the definition to "due process of law," says: "What, then, is meant by 'due process of law' and the 'law of the land' in the several constitutional provisions which we have referred to, as they are applied to the protection of rights in property, and in what cases can legislative action be annulled, as not being the 'law of the land,' or judicial or ministerial action set aside as not being due process of law in the constitutional sense. These definitions and these terms to be found in the reported cases are so varied that some difficulty arises in fixing upon one which shall be accurate and complete in itself, and at the same time applicable in all cases. The diversity of definition is not surprising when we consider the diversity of cases in which it has been attempted, and reflect that the definition which is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another." No definition is more often quoted than that of Mr. Webster in the Dartmouth College Case, 4 Wheat. 519: "By the law of the land is most clearly intended the general law, which hears before it condemns. It proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pose under the form of an enactment is not the law of the land." These definitions are correctly used when applied to judicial proceedings which usually terminate in a judgment whereby the property of one citizen is transferred to some other individual, or where the individual is deprived of his personal liberty as a punishment for some crime, but are not applicable to matters in which the public requires the property for some legitimate purpose for the state, or where the public requires the service of the citizen. Where private rights and interests must yield to the demands of the public, and for the good of society,—there are many cases in which the individual citizen must yield his personal liberty for the preservation of the public peace, the protection of society, and defense of the government against rebellion or insurrection,—all citizens must respond to the call of the sheriff or other police officers for the apprehension of felons, to pursue fugitives from justice, and must obey the summons of the proper officers to appear as jurors or witnesses. Temporary deprivation of liberty must often take place through the action of ministerial or executive officers or functionaries. For instance, a notary public, in taking depositions,

may commit a refractory witness. Any court may attach one who fails to obey a subpoena, or imprison one in contempt of court. Justice Miller, in delivering the opinion of the court in the case of *Davidson v. New Orleans*, 96 U. S. 102, says: "A most exhaustive judicial inquiry into the meaning of the words 'due process of law' as found in the fifth amendment, resulted in the unanimous decision of this court that they do not necessarily imply a regular proceeding in a court of justice, or 'after the manner of such courts.'" In *re Ebenhack*, 17 Kan. 620. This was a proceeding in habeas corpus for the discharge of the petitioner, who was imprisoned in the jail of Greenwood county, Kan., for failure to pay costs taxed against him in a case where he was the complaining witness in a prosecution before a justice of the peace for a misdemeanor, and on trial the defendant was acquitted, and the prosecutor adjudged to pay the costs, or give bond for the same, and stand committed until they were paid or bond given, and, on his refusal to comply with the order of the justice, was committed to jail. It was claimed that section 18, c. 81, of the General Statutes was unconstitutional, and that his imprisonment was without due process of law. Brewer, J., delivering the opinion of the court, says: "We do not consider the objections well taken. By coming into court and filing his complaint, he submits himself to the jurisdiction of the justice, and, at the same time that the question of the guilt of the person by his affidavit charged with crime is being tried, his own conduct in the premises is inquired into. True, he is not upon the record as a party plaintiff or defendant; but the prosecution is instituted at his instance, and he appears upon the record as the complaining party." In the case of *Welmer v. Bunbury*, 30 Mich. 210, in which the constitutionality of certain revenue laws of Michigan were under consideration, Cooley, J., in delivering the opinion of the court, says: "Due process of law is not necessarily judicial process. Much of the process by means of which the government is carried on, and the order of society maintained, is purely executive or administrative, which is as much due process of law as is judicial process."

After a thorough examination of the decisions of the various courts of this country, we are of the opinion that section 61, c. 82, Gen. St. 1889, is not unconstitutional; that it only subjects witnesses for the state in criminal cases to the same general rules which govern every other citizen of the state, as the settled maxims of the law sanction and require for the protection of society and good government; and the requirements of this statute are simply to secure the presence of persons who are material witnesses for the public in the trial of those charged with offenses against the laws of the state. The same burden is imposed upon every citizen of the state alike who may happen to possess the

information which is necessary to protect society against the criminal and vindicate the majesty of the law.

Having decided that the sections of the statute under which the petitioner is confined are constitutional, we next proceed to consider the second reason urged for his release. Were the forms of the statute complied with? It is agreed and shown by the record that the petitioner made complaint before B. C. Garrison, a justice of the peace of Ft. Scott, Bourbon county, Kan., charging one Mart Tooney with the crime of robbery in that county; that the complaint was reduced to writing, signed and sworn to by the petitioner; that a warrant was duly issued thereon by the justice of the peace, and Mart Tooney arrested, and brought before him for examination; that he waived examination, and the justice thereupon required him to enter into a recognizance in the sum of \$300, with sureties, for his appearance at the next term of the district court of Bourbon county, Kan., to answer the charge contained in said complaint; that said Mart Tooney failed to give such recognizance, and was committed to the jail of said county to answer said charge at the next term of the court. Thereupon the magistrate required the petitioner to enter into a recognizance in the sum of \$300 to appear at the next term of the district court of Bourbon county, as a witness of the state in said case; and, the magistrate being satisfied that the petitioner would not perform the conditions of said recognizance unless security be given, the magistrate ordered that he enter into recognizance, with sureties, in the sum of \$300, for his appearance at the next term of the district court of said county, and said witness neglecting and refusing to recognize with sureties, as required by said magistrate, was thereupon committed to jail until he complied with such order. The contention of counsel is that, because the person charged with the crime waived his right to an examination, there was no evidence showing that petitioner was a material witness for the state, and there could be no judicial determination on the part of the examining magistrate that would authorize him to find that he was a material witness for the state. We think that when the complainant voluntarily went before the magistrate, and made complaint, and it was by the magistrate reduced to writing, and subscribed and sworn to by the complainant, these facts furnished the very strongest evidence that he was a material witness for the state, and, if his complaint as sworn to was true, a very material witness; and the magistrate could have no stronger evidence of that fact if an examination should have been had. The record and agreed facts show that the petitioner is confined in jail under a statute that is constitutional, and the forms of the statute have been duly observed in the matter.

It is the order of this court that the petitioner be remanded to the jailer of said coun-

ty until such time as he comply with the order of the court and enter into recognizance, as required by the examining magistrate, or be otherwise discharged by due course of law. All judges concurring.

(11 Wash. 649)

LE MAY et al. v. BAXTER et al.

(Supreme Court of Washington. April 20, 1895.)

BILL OF DISCOVERY—WHAT CONSTITUTES—FILING OF INTERROGATORIES—REVIEW ON APPEAL—PARTIAL APPEAL.

1. An objection that there was a misjoinder of parties, not made in the trial court, will not be considered on appeal.

2. A complaint in an action for legal and equitable relief, with which are filed interrogatories under Code Proc. § 1661, which provides for a discovery of facts by the plaintiff by means of such interrogatories, is not a technical bill of discovery.

3. A defendant who has appealed from only that part of a judgment which requires him to appear and answer interrogatories filed by the plaintiff cannot, on such appeal, object that the complaint with which such interrogatories were filed is insufficient.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by William H. Le May and another against Sutcliffe Baxter and John Goodfellow and their wives. Judgment for plaintiffs, and defendants appeal. Affirmed.

Metcalf & Jurey, for appellants Baxter and wife. Strudwick & Peters, for appellants Goodfellow and wife. J. T. Ronald and S. H. Piles, for respondents.

ANDERS, J. On July 14, 1893, the plaintiffs (respondents here) recovered a judgment in the superior court of King county against Sutcliffe Baxter and John Goodfellow, partners doing business under the firm name and style of S. Baxter & Co., for the sum of \$7,746.06, which judgment was neither appealed from, nor paid in whole or in part. A writ of execution was issued, and return made thereon that the sheriff was unable to discover any property of said firm, or of the individual members thereof, subject to execution. Thereafter these judgment creditors instituted this action on the aforesaid judgment against the said judgment defendants and their respective wives, for the purpose of obtaining a judgment and decree that the debt evidenced by said judgment was not only the joint debt of said firm, but the several debt of the individual members thereof, and also the community debt of each of them and their respective wives, and to discover certain assets and property mentioned, but not specifically described, in the complaint, for want of sufficient knowledge, and alleged to be held, owned, or controlled by said firm, or by the individual members thereof, or by the communities consisting of said individuals and their wives, but not subject to execution, and to

subject the same, when discovered, to the lien of their judgment. Separate demurrers were interposed to the complaint by defendants on the grounds (1) that there is a defect of parties defendant; and (2) that the complaint does not state facts sufficient to constitute a cause of action. These demurrers were overruled, and exception taken, but neither of the defendants filed an answer. At the time of filing the complaint the appellants, pursuant to section 1661 of the Code of Procedure, filed interrogatories in the cause, to be answered on oath by the respective parties. These interrogatories were not answered within the time required, or at all, whereupon the court entered judgment in favor of plaintiffs, as prayed for, and ordered the defendants, and each of them, to appear before the court at a time specified, and then and there answer concerning their property, interests, rights, and effects, and make a full, true, and complete disclosure thereof. "From so much of said judgment as requires the defendants to appear and answer the interrogatories of the plaintiffs, and to disclose their assets to plaintiffs," the defendants appeal to this court.

It is claimed by the defendants that the court erred in overruling their demurrers. The first ground of demurrer, that there is a defect of parties defendant, is not urged in this court, and will not, therefore, be considered; and the objection that there is a misjoinder of parties was not made in the court below, and was therefore waived. But appellants insist that the complaint states no cause of action, because (1) no community interest exists between the individual members of a copartnership and their respective wives; and (2) because the court had no jurisdiction to entertain a bill of discovery. The learned counsel for the defendants, in the argument in their brief, say that "the office and nature of bills of discovery, properly so called, is to ascertain facts through interrogatories, when an action at law is pending, and it becomes necessary for one or the other party, in order to establish such facts so as to maintain his legal rights. No decree adjudging the rights of either party was made." And we believe that their view of the nature and office of such a bill is correct. We also agree with them in the assertion that bills of discovery, in aid of legal actions, are practically obsolete in this country, for the reason that judicial procedure is so regulated by statute that there is no longer any necessity for filing a separate bill to obtain a discovery of facts or documents material to the support or defense of an action at law. Our statute (Code, Proc. § 1660 et seq.) provides for the discovery of facts by the plaintiff in an action by means of interrogatories addressed to the defendant; and hence it is argued that that method of obtaining a discovery is exclusive, and no other can be recognized or employed. While we concede that a technical bill of discovery, as defined by appellants' counsel,

would not be proper under our procedure, it does not follow that defendants may not, by means of the pleadings, be compelled to make a discovery of facts in an action brought for proper relief. Indeed, that they may be compelled to do so is maintained by high authority. Mr. Pomeroy, after having stated, in effect, that statutes like ours have superseded and practically put an end to the suit for a discovery, as a branch of the auxiliary jurisdiction of equity, uses this language: "This abridgment of the technical discovery, it should be carefully remembered, does not extend to the discovery or compelling defendants to make admissions or disclosures by means of the pleadings in suits brought for relief." 1 Pom. Eq. Jur. (2d Ed.) p. 234, § 193. This action is for legal and equitable relief, and also for a discovery, and hence the above-cited authority would seem to be in point. The complaint in this case is not, therefore, a bill of discovery. And besides the plaintiffs fully complied with the statute when they filed the interrogatories which the defendants failed to answer, and which they now say they ought not to be compelled to answer, because the complaint is bad. If they had appealed from the whole judgment, there would be force in the contention that the complaint is insufficient; but having appealed only from the order which the court made at the time of the rendering of judgment, but which it might have made and enforced at any previous stage of the proceedings, they are not now in a position to challenge the sufficiency of the complaint. To concede that the judgment, or even a portion thereof, is valid, and at the same time insist that the complaint on which it is founded is insufficient, is to assume inconsistent positions.

There can be no question on this appeal but that the plaintiffs were entitled to all the relief granted, except the order for a disclosure of defendants' assets; and we would not, therefore, be disposed to reverse the judgment, even if we were convinced that the complaint is obnoxious to the objection urged against it. But plaintiffs insist that if this complaint is not a bill of discovery, but is in the nature of a creditor's bill, then the method of procedure pointed out in the statutes (Laws 1893, p. 435) concerning proceedings supplemental to execution should have been followed. As to this contention, it may be said that this order is substantially the same order that would be made if an affidavit were filed in accordance with the act above mentioned; and, as we have hereinbefore said, it is an order which the court had a right to make in this action, and there was therefore no necessity for filing an affidavit after judgment, in order to authorize the court to make it. Whether any further proceedings may or may not be necessary on the part of plaintiffs, we are not now called upon to determine. The judgment is affirmed.

HOYT, C. J., and SCOTT and DUNBAR, JJ., concur.

(11 Wash. 536)

SHANNON et al. v. GRINDSTAFF et ux.
(Supreme Court of Washington. April 1, 1895.)
UNLAWFUL DETAINER—NOTICE—LEASE—LIABILITY OF SUBLESSEE.

1. Under Code Civ. Proc. § 529, providing that persons having a valid interest in land, and a right of possession, may sue therefor, a complaint alleging that the claimants are "owners of the premises" is sufficient without denigrating their title.

2. In an action to recover possession of premises, where the evidence showed that the relation of landlord and tenant never existed between the parties, a motion for nonsuit on the ground that notice to vacate the premises was not given is properly denied.

3. Where a lease contained a covenant prohibiting the lessee from subleasing the premises, and reserving the lessor's right to sell, a sublessee will be charged with notice of the terms of his lessor's lease.

4. Where a lease reserved to the lessor the right to sell the premises on reasonable compensation for the unexpired term of the lease, and the premises were sold, and settlement made with the lessee, a subtenant cannot defeat the purchaser's right to possession by the assertion of a contract existing between himself and the lessee.

5. A lessor may evict the subtenant of his lessee, although a part only of the premises has been sublet, if a forfeiture has been incurred by the lessee.

6. A lease of a part only of leased premises is a sublease, and not an assignment of lease.

7. A written notice to quit, served on one in possession, who refuses to surrender possession unless paid a certain sum, although not signed, is sufficient.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by James Shannon and others against I. J. Grindstaff and wife to recover possession of certain real estate in Skagit county. In December, 1891, one Judah Wells, being the owner of the E. ½ of the N. W. ¼ of section 21, township 34 N., of range 3 E. W. M., in Skagit county, Wash., made a three-years lease of said land to Bonner and Graham. Graham afterwards assigned his interest in said lease to Bonner. On January 2, 1893, Bonner subleased three acres of said land for three years to one Reese, who assigned his sublease to appellant I. J. Grindstaff. In 1893, Wells sold the land to respondents James Shannon and R. C. Shannon. Bonner surrendered up the premises some time in December, 1893. In January, 1894, respondents brought action to oust appellants from the three-acre tract. The jury were directed to bring in a verdict for plaintiffs, upon which judgment was entered. From an order denying defendants' motion for a new trial, they appeal. Affirmed.

Frank Quinby, for appellants. M. P. Hurd, for respondents.

GORDON, J. Upon the verdict of a jury, judgment was entered below in favor of the respondents for the recovery from appellants of possession of certain real estate (being about three acres) situated in Skagit county, and for costs. Thereafter, a mo-

tion for new trial having been overruled, the cause was brought to this court on appeal. By stipulation of counsel, the only questions submitted for our determination are: First, the refusal of the court to grant the appellants' motion for nonsuit; and, second, an instruction to the jury that appellants were not entitled to notice from respondents to quit and surrender possession of the premises in dispute prior to the commencement of this action. Notwithstanding this stipulation, counsel for appellants, in his brief, urges that the complaint is insufficient to state a cause of action under the provisions of section 529 of the Code of Civil Procedure. In their complaint respondents allege that they are the owners, etc., of the premises, and we think this sufficient, without deraigning their title. There was nothing in the evidence at all tending to show that the relation of landlord and tenant ever existed between the respondents or their grantors and the appellants, or that appellants ever had been recognized as tenants. Such being the state of the evidence, the motion for nonsuit was properly denied. Nor do we think that the court committed error in giving the instruction complained of. Appellants claim by virtue of an agreement for a sublease made with one Bonner, who was the tenant of respondents' grantors under a written lease, duly recorded, which contained the following stipulation: "Said second party covenants and agrees not to let or underlet the whole or any part of said premises without the written consent of the said party of the first part, and the first party reserves the right to sell the said premises upon making reasonable compensation for the unexpired term of said lease." There was no proof tending in any way to show, nor do appellants claim, that any written authority was ever given to Bonner to sublet any portion of the premises to any person. They knew that Bonner, their lessor, was a tenant, and the law charged them with notice of the terms of their lessor's lease. *Foster v. Reid*, 78 Iowa, 205, 42 N. W. 649. Hence they are conclusively presumed to have known that Bonner had no right or authority to sublet any portion of the premises to them without the written consent of the owner of the premises, and also that said owner reserved the right to make a sale of said premises, and thereby terminate the lease. It was a fact undisputed upon the trial that, upon respondents purchasing the premises, respondents' grantor settled with said Bonner, and made full "compensation for the unexpired term of said lease"; and said Bonner, pursuant to demand and notice, removed from said premises, and surrendered the same to the respondents. It seems clear that Bonner could not confer upon appellants any greater rights than he himself possessed, and, waiving the stipulation against subletting without written consent, etc., appellants

have no standing here, for the reason that their lessor could have none. A contingency had arisen which was contemplated by the terms of the lease, and which operated to terminate it, and entitled the landlord to possession. Between respondents or their grantors and the appellants there was neither privity of estate nor privity of contract. Appellants could not have been sued by respondents or their grantors upon Bonner's contract to pay rent, and it follows that the relation of landlord and tenant never existed between them. If, therefore, respondents, at the time of the commencement of this action, were entitled, under the terms of their grantors' lease to Bonner, to the possession of these premises, then appellants, as subtenants of Bonner, cannot defeat their right to possession by the assertion of any contract existing between themselves and Bonner. The rule is well settled that, if a lessee underlets the premises for a shorter term than that for which they are to him granted, or if he underlets a part only of the premises, the original lessor cannot sustain an action for rent against the sublessee. *Fulton v. Stuart*, 2 Ohio, 215; *Davis v. Morris*, 36 N. Y. 539. The land, however, is not discharged, by such subletting, from the claims of the original lessor, who may, notwithstanding the underlease, proceed to evict, if a forfeiture shall have been incurred by his lessee. 1 *Tayl. Landl. & Ten.* (8th Ed.) § 109. Nor can the appellants claim as assignees of Bonner. There is a marked difference between an assignment of lease and a sublease. By an assignment the lessor parts with his whole interest in the estate, whereas by a sublease he grants an interest less than his own, reserving to himself a reversion. *Tayl. Landl. & Ten.* § 426. But, were we to assume that appellants were entitled to notice, we think that their own admissions upon the trial show that such notice was given. They admit that prior to the commencement of the action one of the respondents served upon I. J. Grindstaff, the husband, a written demand for the possession and surrender of the premises in dispute. This service was made at the house of the appellants upon said premises, and the notice so served is as follows: "Edward Grindstaff and Wife: You and each of you are hereby notified and required to quit, vacate, and surrender the premises now occupied by you within five days from this 10th day of January, 1894, otherwise proceedings will be taken against you as the law directs to recover possession of the following described property, and each and every part thereof, to wit, the east half of the northeast quarter of section twenty-one (21), range three (3) east, Skagit county, Washington; and in this fall not. ———, Owner of Said Property." It also appears from the record that at that time they refused to surrender or deliver up the premises unless respondents should pay them \$75 for so doing. Appellants insist that the notice was insufficient, because it was not sign-

ed by any person; that it was not served upon appellant Georgie E. Grindstaff, the wife of appellant I. J. Grindstaff; and that it insufficiently describes the premises. We think that it was sufficient, under the circumstances attending its service. It follows that, were we to hold that appellants were entitled to notice, the notice which appellants admit was served was sufficient, and the instruction complained of was at most harmless error. The respondents, upon either view of the question, were entitled to a recovery. The judgment appealed from is affirmed.

HOYT, C. J., and ANDERS and SCOTT, J.J., concur.

(11 Wash. 619)

AMERICAN BUILDING & LOAN ASS'N v. FARMERS' INS. CO.

(Supreme Court of Washington. April 16, 1895.)
ACTION ON POLICY — LIMITATIONS — EFFECT ON MORTGAGEE.

1. The requirement of a policy of fire insurance, to which is attached the "mortgage clause," that suit shall be brought within 12 months after loss, is binding upon the mortgagee.

2. In an action on a contract, the court cannot adjust rights thereunder which are not asserted.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by the American Building & Loan Association against the Farmers' Insurance Company. From the judgment rendered, both parties appeal. Reversed.

John P. Fay and C. H. Gest, for plaintiff.
Struve, Allen, Hughes & McMicken, for defendant.

GORDON, J. On the 7th day of April, 1891, the above-named Farmers' Insurance Company, in consideration of the premium thereon duly paid, issued its policy of insurance in the sum of \$1,000 upon the two-story frame lodging house of one Mrs. M. McWilliams, said property being situated in the city of Seattle. At the time when said insurance was effected, there was a mortgage upon the said property held by the above-named American Building & Loan Association, and at the time of issuing said policy there was indorsed upon and annexed to it the following: "Mortgage clause: (To be attached only to policies covering in whole or in part on real property.) Loss, if any, payable to the American Building and Loan Association of Minneapolis, Minnesota, mortgagee or trustee, as hereinafter provided. It being hereby understood and agreed that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; provided, that in case the mortgagor or owner neglects or re-

fuses to pay any premium due under this policy, then, on demand, the mortgagee or trustee shall pay the same; provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy; and provided, further, that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagee or trustee on reasonable demand, and after demand made by this company, upon and refusal by the mortgagor or owner to pay according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy as stipulated in the printed conditions in said policy; and also to cancel this agreement on giving ten days' notice of their intention to the trustee or mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed that, in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein. It is also agreed that whenever this company shall pay the mortgagee or trustee any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor exists, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payments shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said company may, at its option, pay said mortgagee or trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by such parties for the payment thereof. To be attached to policy No. 1,961 of the Farmers' Insurance Co. Apl. 7th, 1891. S. S. Waldo, Secy., per Botsford." The premises were destroyed by fire on the 7th day of August, 1891, and in October, 1892: this action was brought by said building and loan association to recover the amount of said insurance. In its complaint it alleged that the amount due upon the loan secured by said mortgage and other securities which it held at the time when said fire occurred was \$1,623.40. The insurance company filed its answer, and, among other things, in its affirmative defense, pleaded "that in said policy of insurance it was expressly provided that no suit or action on said policy for the

recovery of any claim should be sustainable in any court of law or equity, * * * unless commenced within twelve months after the fire." A demurrer was interposed to this affirmative defense, which demurrer was by the lower court sustained, and exception duly reserved. Thereafter, the cause proceeding to trial, a verdict was returned in favor of the building and loan association for the full sum of \$1,000. A motion for a new trial having been made and overruled, judgment was entered upon the verdict. In entering judgment, the court, upon its own motion, incorporated therein a finding "that the amount of said verdict was in excess of the debt secured" by the mortgage held by the building association upon said premises, and directed that the defendant should, upon payment to plaintiff of the amount of the judgment, be subrogated to all rights of the plaintiff in and to securities held by it for the debt owing to it by the said Mrs. McWilliams. The building and loan association (plaintiff below), contending that any judgment other than one for the amount of the verdict was erroneous, appealed from that part which was so incorporated therein upon the court's own motion, and the insurance company (defendant below), by a cross appeal, brings to this court and assigns as error the ruling of the lower court which sustained a demurrer to its affirmative defense above noticed.

The conclusion to which we have come concerning the cross appeal disposes of this case. In *Insurance Co. v. Meesman*, 2 Wash. St. 459, 27 Pac. 77, this court held that a stipulation in a policy of insurance similar to that relied upon here is valid and binding, and learned counsel in this cause do not question the validity of such a provision, but insist that it is not binding upon the mortgagee. Their contention is that "there is absolutely no limitation of the time in which to bring the action in the mortgage or subrogation clause"; that the mortgage clause is a separate, distinct, and valid contract between the mortgagee and the insurance company; and that it must be construed and enforced without regard to the provisions of the policy, which they contend to be applicable only as between the insurer and the insured (mortgagor); or, stated in the language of their brief: "We cannot inject into it [the mortgage clause] some other provision not contained in it; for, if one of the clauses of the contract [policy] between the insurer and insured can become part of the mortgagee's contract, all can. If one must, all must." The case of *Hastings v. Insurance Co.*, 73 N. Y. 141, is cited and confidently relied upon by counsel for both parties in support of their respective contentions. We have therefore given that case an extended examination. In that case the defendant company issued its policy of insurance to S. upon her dwelling house. The policy contained a clause that in case of other insurance the insurer could only re-

cover upon the policy its proportionate share of any loss. The plaintiff held a mortgage upon the premises, and, subsequent to the issuing of the policy, the defendant made an indorsement thereon, and annexed thereto a mortgage clause, which in all respects was similar to the mortgage clause with which we have to deal in this case (excepting only that the provision contained in the mortgage clause in this case upon the subject of "other insurance" was not contained in the clause under consideration in the case from New York). S. had other insurance upon the building, of which plaintiffs and defendant were ignorant. In an action upon the policy it was held that the mortgage clause operated as an independent insurance of the mortgagees' interest; that it gave them the same benefit as if they had taken out a separate policy, free from the conditions imposed upon the owner, and making them responsible only for their own acts; and that thereafter the clause of the policy limiting defendant's liability in case of other insurance did not apply, as the mortgagees had procured no other insurance, and plaintiffs were entitled to recover the whole of the loss, without regard to the additional insurance procured by S. Counsel for the building and loan association, in their very able brief, quote the following from the opinion in that case, and insist that it is conclusive upon the question which we are now considering: "The rules laid down in the authorities cited have no application, however, to a case where a provision has been inserted in the policy which places the mortgagee upon another and a different footing from that of a mere assignee or appointee to receive the loss. The mortgage clause was agreed upon for this very purpose, and created an independent and a new contract, which removes the mortgagees beyond the control or the effect of any act or neglect of the owner of the property, and renders such mortgagees parties who have a distinct interest, separate from the owner, embraced in another and different contract. The tendency of the recent cases is to recognize these distinctions, and thus protect the rights of the mortgagee when named in the policy, and the interest of the owner and of the mortgagee are regarded as distinct subjects of insurance." We think, on the contrary, that it does not support their construction of the clause in question. That it does not appears to us to be conclusively shown by giving the case in question further consideration. The court also held in that case that the provision of the policy making the loss payable within 60 days after due notice and proof of loss entitled the plaintiff to interest after the expiration of 60 days from the time of furnishing such proof. Hence it appears that the court did in fact interpret and enforce provisions of the policy itself. The stipulation requiring proofs of loss to be furnished is nowhere

mentioned in the indorsement or mortgage clause in that case, nor is it in the case before us. And the court further in its opinion say: "The insurance had been to the owner, and the additional provisions, which were incorporated in the policy by the mortgage clause, created a distinct contract with the mortgagees. * * * The meaning of the word 'assured' has not been changed by the addition of the mortgage clause. * * * The just and reasonable interpretation of the provision * * * is that the legal force and effect of the policy shall not be weakened or impaired. When it provides that it 'shall not be invalidated,' it means that it shall continue valid for the full amount named, despite any act or neglect of the owner or mortgagor."

The plaintiff in this case, under the provisions of the mortgage clause, became entitled to maintain this action, and the effect of said clause was to relieve it from the consequences of any act or neglect of the owner of the property insured, viz. Mrs. McWilliams. But we think, also, that all of the provisions of the policy continued in force, excepting only such as are inconsistent with the provisions contained in the clause annexed; in other words, that the annexation of the mortgage clause operates merely as a modification of the policy by dispensing with certain requirements, duties, and obligations which, by the terms of the policy, were imposed upon the owner, and protects the mortgagee against his (the mortgagor's) acts either of omission or commission, but that general provisions of the policy intended for the security and protection of the company, and which do not relate personally to the mortgagor, such as the stipulation concerning the time in which an action shall be brought, are not abrogated or affected by it. The mortgage clause is not a complete contract in itself, nor does it profess to be. It is, of course, conclusive upon the parties in so far as it speaks, and controls any provisions of the policy to which it is attached which are inconsistent with it; but, as a complete or entire contract, it is indefinite and uncertain. Resort must still be had to the terms of the policy to ascertain many things which are the very life of the contract; among others, the amount of the insurance, the property insured, the term of the insurance, and very many matters concerning which the indorsement itself furnishes absolutely no information whatever. The suit is based, not upon the indorsement as a complete contract, but upon the policy of which it is simply a part. It is the policy which constitutes the basis of plaintiff's right to a recovery, and it plainly and unmistakably says that "no suit or action for the recovery of any claim by virtue of this policy shall be sustainable in any court, * * * unless such suit or action shall be commenced within twelve months next after the date

of the fire from which such loss shall occur." This condition is one which may be waived in many ways, but we have nothing to do with the question of waiver in this case. If facts or circumstances existed which would establish a waiver of this condition, it was the duty of the plaintiff to set them up by appropriate pleading.

We think the demurrer should have been overruled. As this conclusion necessitates a reversal of the judgment, we will not discuss the question presented by the appeal of the plaintiff, further than to say that we have examined the same, and are of the opinion that, under the pleadings, independent of the question which we have here considered, the court was not warranted in entering more than a general judgment upon the verdict. The judgment appealed from went beyond the issues, and attempted to adjust rights that were not asserted, and settle questions that were not submitted for a judicial determination. The judgment will be reversed, and the cause remanded, with instructions to overrule the demurrer to the defendant's second affirmative defense; costs to the Farmers' Insurance Company, appellant.

HOYT, C. J., and ANDERS and SCOTT, JJ., concur.

(11 Wash. 526)

RINEHART v. WATSON et al.

(Supreme Court of Washington. April 1, 1895.)

REVIEW ON APPEAL—DISCRETION OF COURT.

1. The granting of a new trial will not be disturbed on appeal unless it be shown that there was an abuse of discretion.

2. A request by respondent, that the case be remanded, with instructions to enter judgment in his favor, cannot be granted, he not having appealed.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by W. V. Rinehart against Harry Watson and others for use and occupation of premises. From a judgment for plaintiff on a motion for a new trial, and setting aside a nonsuit granted, defendants appeal. Affirmed.

The following statement of facts is gathered from the briefs of appellants and respondent: March 23d defendants W. answered plaintiff's complaint: (1) That title was in B.; (2) a prior action pending. March 30th, plaintiff moved to have B. made defendant. April 8th, another answer by defendants W. was filed, and court entered an order making B. defendant. May 1st, B.'s demurrer to the complaint was overruled. May 9th, B. served an answer on plaintiff's attorney, and plaintiff's attorney claims it was afterwards stipulated that W.'s answer should stand as B.'s answer. Defendants' attorney denies signing the stipulation. May 27th, a demurrer to that answer was overruled. Leave was given to renew the de-

murrer, and on June 13th a demurrer was sustained as to the first affirmative defense, and overruled as to the second. June 17th, another answer was served, purporting to be the answer of all defendants, but which now appears to have the names of "Alice and Harry Watson," two of defendants, interlined in ink, and to be their answer only. After nine days defendants joined in a motion for default against plaintiff for want of reply, which motion was overruled. The reply was filed, and the case set for trial. At the trial, defendant B. contended that there was no issue as to him, as he had never filed an answer which brought him into the controversy. It was found that there was only one answer of defendants W. in the files, and that was the answer interlined, and that neither the stipulation nor any answer of B. was on file. November 20th the case came on for trial. At the conclusion of plaintiff's testimony, defendant B. moved for judgment and nonsuit, which was granted. Thereupon defendants W. moved for judgment and nonsuit, which was granted, plaintiff having substantially confessed such motion. Thereafter plaintiff moved for a new trial, and to set aside such judgment of nonsuit, which was granted. December 20th, attorney for B. filed an answer disclaiming any interest in the case, and asking to be dismissed.

Ira Bronson, for appellants. Stratton, Lewis & Gilman and W. V. Rinehart, Jr., for respondent.

SCOTT, J. Upon the trial of this action the court granted a motion for a nonsuit, and thereafter, upon the plaintiff's motion, the judgment of nonsuit was set aside, and a new trial granted. This appeal is prosecuted from said order, appellants claiming that the court erred in vacating said judgment. The respondent contends that not only was the judgment of nonsuit properly set aside, but that the court should have gone further, and rendered judgment in his favor, and asks that the cause be remanded, with an instruction to that effect.

The granting of a new trial is a matter addressed largely to the discretion of the lower court, and, after an examination of the record, we find nothing to indicate that it was improperly exercised in this instance. The various contentions of the appellants and respondent upon this appeal are based upon the pleadings in said action, and certain defects or irregularities therein are practically conceded, but it is within the province of the lower court to permit an amendment, and as this may be done, and the cause tried on other and different pleadings, it would serve no purpose to pass upon the questions now presented thereon. We do not think the condition of the cause was such as to entitle the plaintiff to judgment, and, if otherwise, we could grant him

no relief, he not having appealed. The judgment granting a new trial is affirmed.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

(11 Wash. 562)

HILL v. FRINK et al.

(Supreme Court of Washington. April 8, 1895.)

PLEADING—CROSS COMPLAINTS.

In an action to foreclose a laborer's lien on a quantity of wheat, several of the defendants filed separate answers, claiming similar liens, which they sought to have foreclosed; and with each answer was incorporated a cross complaint against certain codefendants alleging that the latter had wrongfully converted the wheat to their own use, and asking damages therefor. *Held*, that the cross complaints were properly dismissed, as containing new matter having no connection with the cause of action set out in the original complaint.

Appeal from superior court, Lincoln county; Wallace Mount, Judge.

Action by Charles Hill against W. E. Frink and others to foreclose a laborer's lien. From a judgment dismissing certain cross complaints, a part of the defendants appeal. Affirmed.

Higgins & Martin, for appellants. N. T. Caton and Merrit & Salisbury, for respondents.

ANDERS, J. This was an action to foreclose a laborer's lien on a certain quantity of wheat owned by the defendant W. E. Frink. The defendants other than W. E. Frink and Gehres & Hertrich claimed similar liens on the same wheat, which they asked to have foreclosed. Each of them filed a separate answer, with which was incorporated a cross complaint, so called, against the defendants Gehres & Hertrich, who, it appears, held a chattel mortgage on the grain in controversy; alleging, in brief, that said codefendants unlawfully took possession of said wheat, and proceeded to foreclose their chattel mortgage, regardless of defendant's prior lien, and caused said wheat to be sold at public sale to parties unknown to defendant, and thereupon, without accounting to defendant, or payment to him for his work and labor performed in harvesting and threshing said wheat, converted the proceeds thereof to their own use, and praying the court to adjudge that he have a preferred and prior lien upon the moneys converted to their use by said Gehres & Hertrich, arising from the sale of said wheat, and that he have and recover from the said Gehres & Hertrich upon said lien, and for the conversion of said wheat, and for the proceeds thereof, the amount due for his said work, the cost of preparing, filing, and recording his lien, and \$25 as attorney's fees and costs. The court entered a decree, as prayed, in favor of these several defendants and against the defendant W. E. Frink, but dismissed the

cross complaint against Gehres & Hertrich, on the latter's motion. And the only point made on this appeal is that the granting of this motion was error.

It is insisted on behalf of the appellants that their respective answers and cross complaints stated facts constituting a valid cause of action against Gehres & Hertrich, and that it was the duty of the court to determine the issues thus tendered, and not to summarily turn them out of court, and thus compel them to seek redress in an independent action. On the other hand, these respondents claim that the cross complaints were properly dismissed, for the reason that they set up new matters in no way connected with or dependent upon the cause of action stated in the original complaint. We think the position of the respondents is well taken, as it is in accord with both law and reason. While it is true that the court may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves (Code Proc. § 407), and that one defendant may, by cross complaint, in a proper case, seek affirmative relief from a codefendant, it is also true that the cause of action stated in the cross complaint must arise out of or relate to the subject-matter of the original action. Bliss, Code Pl. (3d Ed.) § 390, and cases cited. Now, the object of this action was simply to foreclose a laborer's lien on property upon which it was alleged the appellants and the respondents Gehres & Hertrich had or claimed a lien. The validity and priority of these claims were proper questions for the court to determine. But whether Gehres & Hertrich converted the property to their own use, to the damage of appellants, and, if so, whether they were liable to respond in damages, by reason thereof, to appellants, were matters not embraced in the original complaint, and which therefore did not constitute a proper subject of cross complaint. The proper office of a cross complaint is admirably illustrated and defined by Mr. Justice Nelson in *Ayres v. Carver*, 17 How. 594, as follows: "The cross bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. It should not introduce new and distinct matters, not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross bill is auxiliary to the proceeding in the original suit, and a dependency upon it." Tested by the authorities, the judgment of the court below was right. Owing to the views already expressed as to the merits of this case, it is unnecessary to discuss or determine the points raised

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by respondents' motion to dismiss the appeal. The judgment is affirmed.

HOYT, C. J., and GORDON, J., concur.

(11 Wash. 577)

MORATH v. GORHAM et al.

(Supreme Court of Washington. April 11, 1895.)

COUNTIES—ALLOWANCE OF CLAIMS—APPEAL.

Under Laws 1893, p. 292, providing that any person may appeal from a decision of the county commissioners, and that the "party appealing" shall serve notice, etc., persons interested in a claim, who feel aggrieved by the decision of the commissioners, only can appeal and not taxpayers generally.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Appeal of Charles Morath from an order and decision of the commissioners of Snohomish county allowing the account of Gorham & Clemans. From a judgment dismissing the appeal, Morath appeals. Affirmed.

John W. Frame, for appellant. Bell & Austin, for respondents.

ANDERS, J. Gorham & Clemans, publishers of the Snohomish Tribune, presented a claim to the county commissioners of Snohomish county for publishing a delinquent tax list. Their account and claim were audited and allowed by the commissioners, whereupon one Charles Morath, a resident taxpayer of the county, conceiving himself aggrieved by the order and decision of the commissioners, appealed therefrom to the superior court of Snohomish county. His appeal was dismissed by the court, on motion of counsel for Gorham & Clemans, "on the ground and for the reason that the said Charles Morath was not a party interested in said matter before the board of county commissioners, and had no right, under the law, or as a matter of fact, to take said appeal"; and he thereupon appealed to this court.

It is not claimed or pretended by appellant that he was a party to the proceedings before the county commissioners, or interested therein, otherwise than as a citizen and taxpayer, but he contends that he had a right to appeal from the order of the board of county commissioners by virtue of the statute which provides that "any person may appeal from any decision or order of the board of county commissioners to the superior court of the proper county." Laws 1893, p. 292. The language of this portion of the statute, if literally construed, might afford some suggestion for appellant's contention; but when considered and construed in connection with the remaining portions of the section, and in the light of established principles of procedure, it becomes apparent that the position of appellant is utterly untenable. The argument of appellant is that he is a taxpayer of Snohomish county, and interested in the disbursement of the

public money, and as such has a right to prosecute his appeal; but the statute does not say that any taxpayer may appeal, and the courts have no right to interject such a provision into it. The legislatures of Montana and Idaho have provided that, under certain circumstances, any taxpayer may appeal from the order of the board of county commissioners allowing a claim against the county; but neither these statutes, nor the decisions based thereon, and cited by appellant, are applicable here. A literal construction of this part of our statute would compel us to hold that any man or woman in the county or state, or elsewhere, may appeal, in cases like this, regardless of his or her relation to the matter in controversy; and we do not think the legislature intended, for a moment, to confer such an unlimited and universal right of appeal. It is a generally understood proposition of law, and presumably within the knowledge of the legislature when they enacted this section, that no one but a party to an action or proceeding can prosecute an appeal from a judgment or decision therein. Haynes, *New Trials & App. c. 31*. And we must presume that, when the legislature said "any person may appeal," they meant any person who has properly presented a matter before the board for their determination, and who is dissatisfied with their decision. The same section provides that: "Such appeal shall be taken within twenty days after such decision or order, and the party appealing shall within said period serve notice on the county commissioners that the appeal is taken; which notice shall be in writing and shall be delivered to at least one of the county commissioners personally, or left with the clerk of the board. The party appealing shall, within ten days after the service of the notice of appeal, give a bond to the county, with one or more sureties to be approved by the clerk of the board, conditioned for the payment of all costs which shall be adjudged against him on such appeal in the superior court." This plainly contemplates but two parties,—the county, represented by the commissioners, and the appealing party. The appealing party must give the notice of appeal. But here the person appealing was not a party at all, in contemplation of law. He was a mere outsider, and a stranger to the proceedings. Of course, the commissioners could not appeal from their own order, and the other party was satisfied with their decision. The matter before the board was therefore settled, so far as the right to appeal was concerned. We can see nothing in the statute, as a whole, which would warrant the conclusion that a person not directly interested in a matter before a board of county commissioners may appeal from their order or decision in respect thereto. Under a statute of Arkansas providing that "appeals shall be granted from all orders or judgments of the county court, making allowances or refusing to make allowance to any individual or indi-

viduals, made in the county court," the supreme court of that state held, in *Chicot County v. Tighlman*, 26 Ark. 461, that the appeal therein contemplated only extended to such persons as had an interest in a claim against the county, and felt aggrieved by the allowance or rejection of their demand, and did not refer to citizens of the county not interested in the allowance of the claim. We think that decision is correct, and that it is in point here. The judgment is affirmed, with costs.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

(11 Wash. 591)

MASON et al. v. PURDY, County Treasurer.
(Supreme Court of Washington. April 13, 1895.)

TAXATION—COUNTY EXPENSES—CONSTRUCTION OF ACT.

1. Const. art. 7, § 8, providing that, whenever the expenses of any fiscal year shall exceed the income, the legislature may provide for a tax for the ensuing year sufficient to pay the deficiency, as well as the estimated expenses of the ensuing year, applies only to state taxes.

2. Since Const. art. 7, § 5, providing that every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied, merely requires that the purposes for which the money is to be raised shall be stated, and not the expenses for any particular time to which it shall be applied, Revenue Act 1893, § 63, authorizing the county to levy taxes to pay expenses already incurred, and those to be incurred, is constitutional.

3. Revenue Act 1893, § 63, providing that county taxes shall be based on a statement of the estimated expenses for the ensuing year, and no greater levy shall be made than will be equal to the estimated amount, with an excess of 15 per cent., does not limit the object for which taxes may be levied to the payment of the expenses of the ensuing year, so as to prevent their application in payment of indebtedness already incurred.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by J. R. Mason and others against E. W. Purdy, as county treasurer in and for Whatcom county, to enjoin the payment of certain county warrants. There was judgment for defendant, and plaintiffs appeal. Affirmed.

Dorr, Hadley & Hadley, for appellants.
Newman & Howard and Black & Leaming, for respondent.

HOYT, C. J. It is conceded by the appellants that the judgment rendered by the superior court in this cause must be affirmed if the funds arising from the annual tax levy made by the board of county commissioners in any given year can be applied to the payment of obligations other than those incurred during the fiscal year following such levy, but they contend that they cannot be so applied. The provisions of the constitution upon which they rely to establish this contention are contained in sections 5, 8, art. 7; and the provisions of the statute

which they claim to have been enacted in harmony with such constitutional provisions are contained in section 63 of the revenue law of 1893. The following is a copy of said sections of the constitution:

"Sec. 5. No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

"Sec. 8. Whenever the expenses of any fiscal year shall exceed the income, the legislature may provide for levying a tax for the ensuing fiscal year sufficient with other sources of income to pay the deficiency as well as the estimated expenses of the ensuing fiscal year."

And the part of said section 63 of the revenue act of 1893 relied upon is substantially as follows: The county taxes shall be levied by the county commissioners at the time of their meeting in October of each year. Such taxes shall be based upon an itemized statement of the estimated county expenses for the ensuing year, which statement shall be included in the published proceedings of the said board; and no greater levy of county tax shall be made upon the taxable property of any county than will be equal to the amount of such estimated expenses, with an excess of 15 per cent. of the same. And it is contended that thereby the legislature has provided the object for which county taxes shall be levied as required by section 6 of article 7 of the constitution, and that such object is the payment of the expenses for the ensuing fiscal year, and that the application of any funds derived from such levy to any other purpose than the payment of such expenses would be in violation of said section of the constitution. And section 8 of article 7 is relied upon to aid this contention, it being claimed that thereunder the legislature is given authority to provide by special levy for other obligations of the several counties.

If the section of the constitution last mentioned referred to taxation for county purposes, as claimed by appellants, it would greatly strengthen their contention as to the force to be given to the other section, and to the provisions of the statute above set out. But to us it seems clear that this section has no reference whatever to taxation for county purposes. This is so evident from the language used that the inference to be drawn therefrom can be little aided by argument. By other provisions of the constitution the legislature is prohibited from enacting special laws; hence, if it enacts upon the subject of county taxation it must do so by a statute applying to a class of counties, and, as the revenue of only a single county may have been insufficient to meet its expenses, the fact of a deficiency in a single county would require of the legislature the passage of a law which would authorize the levy of a tax in all of the counties of the state. Such legislation

would be so absurd that it could not have been contemplated by the framers of the constitution. Besides, there is no way provided by which the legislature could be informed as to the condition of the finances of the several counties. From these facts, and from the fact that the language is apt and accurate when applied to state expenses, revenue, and taxation, and entirely inapt and inaccurate when applied to those of counties, it must be held that it applies only to those of the state. It follows that that portion of the argument of the appellants founded upon the language of this section is without force. For the same reason, it might well be contended that that portion of the argument founded upon said section 5 was also without force. Its language is applicable and accurate when applied to taxation by the state, and, at least to a degree, inaccurate and inapplicable when applied to taxation by counties. The law by which counties are authorized to levy a tax is not, strictly speaking, a law imposing a tax; and the authority of the legislature to enact such a law is much better sustained by that part of section 9 of said article 7, which provides that, "for all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same," than it is by the language of said section 5. But it is not necessary to decide as to the application of this section, for the reason that in our opinion the object for which the tax shall be levied as therein provided is not the expenses of the county or state for any particular time, but has reference to the purpose for which the money is to be raised, as it relates to the business of the county or state. If it applies to counties, it was thereby made the duty of the legislature, in providing for a levy for their purposes, to specify the general objects for which the levy might be made; for instance, that a certain amount might be levied for general county purposes, a certain amount for school purposes, and a certain amount for roads and bridges. This is the more reasonable construction, and is the one which has been adopted by the legislature, as it has specially provided in all the acts relating to the levy of taxes by counties that there shall be separate amounts levied for each of the objects above stated. For these and other reasons, it is our opinion that the contention of the appellants that the object of the tax levied by the board of county commissioners within the meaning of this constitutional provision, was the payment of all the county expenses for the ensuing fiscal year, and not the payment of the different classes of county expenses, as therein provided for and segregated, cannot be sustained. It follows from what we have said that, under the constitution, the legislature was at liberty to

provide for the levy of taxes by the board of county commissioners for the payment of obligations already incurred by the county, as well as those thereafter to be incurred.

The only remaining question is to decide whether or not it has done so. This question can only be properly decided by taking into consideration the circumstances so existing in the several counties of the state as to be presumed to have been within the knowledge of the legislature at the time it enacted the law in question. The important circumstances which so existed were that in nearly or quite every county of the state its indebtedness was carried in the shape of warrants issued by order of its board of county commissioners upon its treasurer; that such indebtedness had been so carried from a time antedating the adoption of our constitution; that in all these counties it had been the universal custom of the county treasurer to apply money coming into his hands, without reference to any particular tax levy from which it was derived, to the payment of such warrants in the order in which they were issued, or presented for payment; and that this practice had been specially recognized by numerous acts of the legislature of the territory and state, and by a general course of dealing on the part of the executive department. That these customs existed had been decided by the courts, which not only recognized the practice, but in numerous cases held that it was rightful. In doing so, they held that the warrants were entitled to payment in the order of their issue, out of any moneys in the funds upon which they were drawn, and that they had practically the same force as judgments, so that proceedings in mandamus were the proper means by which to secure their payment. And these decisions have received the sanction of this court. See *Trust Co. v. Gelbach*, 8 Wash. 497, 36 Pac. 467; *Cloud v. Town of Sumas*, 9 Wash. 399, 37 Pac. 305; *Fire-Engine Co. v. Davis* (Wash.) 38 Pac. 154. It thus appears that it had been the universal custom among counties, recognized and upheld by every department of the government, to carry their indebtedness in the shape of these warrants, and to provide for their payment, in accordance with their date of issue, out of any moneys in the hands of the treasurer belonging to the fund upon which they were drawn, without reference to the tax levy from which such fund had been derived. This being so, it will not be presumed that the legislature intended such a radical change in the manner of carrying the indebtedness of the counties and providing for its payment as would be wrought by the construction contended for by the appellants, unless the language used is such that no other construction is possible. Is the language relied upon such that we are compelled to construe it in accordance with the contention of appellants? We think not. There is nothing therein which, in express terms, requires the

money to be derived from the tax levy to be applied to the payment of the expenses for the ensuing year. The most that can be claimed is that, by reason of the fact that such expenses are taken into consideration in determining the amount of the levy, it should be inferred that the funds derived from such levy are to be applied only to the payment of such expenses. If there had been no provisions in our constitution and laws by which the counties were authorized to incur and carry an indebtedness, there might be some reason for drawing this inference from the language used. But, when such language is construed in the light of the fact that counties have such right, no such inference can be drawn. The language used will be as well satisfied if it is held that it was the intention of the legislature that counties in debt should carry such indebtedness without decrease, excepting such as might be brought about by the collection of the 15 per cent. additional to the estimated expenses. Under the circumstances above referred to, it was and is the duty of the court to adopt this construction, rather than the one contended for by appellants, even if that contended for by them would not lead to absurd results. And, when the absurd results which would follow from the construction contended for are taken into consideration, their duty so to do, if otherwise doubtful, will be made clear. That absurd results would follow such construction is apparent from the most superficial examination of the circumstances referred to, and of the different provisions of the statutes. It is a matter of common knowledge that not more than 50 per cent. of the annual tax levy is promptly collected. From this fact it would follow that, if the construction contended for were adopted, one doing work for or furnishing supplies to a county during the first half of each fiscal year would be reasonably sure of prompt payment, while another, performing like labor or furnishing like supplies during the latter half of such year, might never receive any pay therefor, and if he ever did he could do so only after the payment of those who should do similar work or furnish like supplies in the first half of the succeeding fiscal year. There is another reason why the construction contended for cannot be adopted, and that is that the same legislature which enacted the provision under consideration enacted other provisions which distinctly recognized the practice, which had so long existed, of carrying county indebtedness in the shape of warrants, and paying them in the order of their issue or presentation, as above stated. It cannot be presumed that the legislature which directly recognized such a practice could have intended such a radical departure therefrom. The presumption to the contrary could be overcome only by language much more emphatic and unequivocal than that of the provision under consideration.

But it is claimed on the part of the appel-

lants that the general statutory provisions which require warrants to be paid in the order of their issue can be given force, even although the construction contended for by appellants is adopted. They say it should be held that, when the legislature provided that warrants should be paid in the order of their issue, it was meant that those of each fiscal year should be so paid. Words not in the statute would have to be understood as having been intended to authorize this construction of this provision, if unaffected by any considerations not contained in the law itself; and when construed in the light of the practice (known to the legislature) of treating all the outstanding warrants as a single class, in determining the question of priority, it is impossible to presume that the legislature intended by the language used that, in determining such priority, they should be divided into classes covering the several fiscal years in which they were issued. Some cases have been cited on the part of the appellants which seem to support their contention. But, when they are examined in the light of the constitutional and statutory provisions existing in the states in which they were decided, they furnish such contention little, if any, support. Two cases from the state of California are relied upon,—that of *Gas Co. v. Brickwedel*, 62 Cal. 641, and *Shaw v. Statler*, 74 Cal. 258, 15 Pac. 833. In each of these cases it was held that the funds derived from a certain tax could be used only in payment of the expenses for the ensuing year; and, if the provisions of the constitution and laws of California had been similar to ours, these cases would be of great weight. But they were so dissimilar that, to our mind, they are entitled to no weight at all, under the conditions existing here. Under the constitution and laws of that state, counties were not authorized to incur an indebtedness exceeding in any year the income and revenue provided for such year. This being so, it could well be held that it was the intention that each year must take care of itself, that there would be no debt carried by the counties, and that the expenses for the ensuing year were alone to be provided for. Prior to the decision of these cases, the supreme court of California had, under provisions substantially the same as ours, held directly contrary to what was held in the cases above cited. See *Taylor v. Brooks*, 5 Cal. 332, and *McCall v. Harris*, 6 Cal. 281. And in a case decided subsequently the supreme court of that state, when six of its judges were sitting together, substantially disapproved of the doctrine therein announced, and stated that if it was a new question they should probably come to a contrary conclusion, and only allowed such doctrine to stand by force of the rule of stare decisis. See *Schwartz v. Wilson*, 75 Cal. 502, 17 Pac. 449. The fact that, under the constitutional and statutory provisions in force in California, there was the least doubt as to the rightfulness of the construction con-

tended for, furnishes the highest authority for its absolute denial under those in force here. A careful examination of the other cases cited will show that the provisions construed are so unlike ours that they can have little or no force here.

The appellants have sought to meet the argument against their position, growing out of the condition in which those would be left who held warrants upon the different county treasurers if the construction contended for by them were adopted, by referring to the funding law which it was understood had been adopted by the legislature of 1895. We do not deem it proper to go into an investigation of this statute. It could furnish no aid in determining what was in the mind of the legislature of 1893 when it passed the law under consideration. In our opinion, the superior court arrived at the proper conclusion, and its judgment will be affirmed.

ANDERS and GORDON, JJ., concur.

(11 Wash. 640)

SCHOLPP v. FORREST, Commissioner of Public Lands, et al.

(Supreme Court of Washington. April 19, 1895.)

EXCAVATION OF WATERWAY — CONTRACT WITH STATE—VALIDITY—CERTIFICATE OF PART PERFORMANCE—DUTIES OF LAND COMMISSIONER.

1. A contract with the state for the excavation of a waterway, which contains all the requirements of Sess. Laws 1893, p. 241, providing for such contracts, and giving contractors liens upon the tide and shore lands belonging to the state, is not rendered invalid by a provision apportioning such liens in a manner different from that prescribed by the statute.

2. Sess. Laws 1893, p. 241, prescribing the manner in which waterways may be excavated by private contract, authorizes their excavation through lands not belonging to the state, with the approval of the harbor line commission, when, in the judgment of the commissioner of public lands, they will promote the interests of commerce.

3. The fact that the state, after having contracted with certain parties for the excavation of a waterway, executed a second contract with the same parties to excavate material from the same waterway, to be used in filling and raising above high tide lands not named in the first contract, did not render either contract invalid.

4. It is for the commissioner of public lands to determine when a contractor is entitled to a certificate to be issued under Act 1893, which provides that, upon the completion of a part of the waterway capable of separate use for commerce, the contractor shall be entitled to a certificate for the cost of the part so completed.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Frederick Scholpp against W. T. Forrest, commissioner of public lands, and the Seattle & Lake Washington Waterway Company, a corporation. Judgment for defendants, and plaintiff appeals. Affirmed.

Struve, Allen, Hughes & McMicken, for appellant. W. C. Jones, Atty. Gen., and J. F. Hale, for respondents.

ANDERS, J. On October 27, 1894, the state, by its duly-authorized agent, the commissioner of public lands, with the approval of the governor, entered into a contract with Eugene Semple, under and in pursuance of an act of the legislature of the state of Washington approved March 9, 1893, entitled "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract; providing for liens upon tide and shore lands belonging to the state; granting rights-of-way across lands belonging to the state" (Sess. Laws 1893, p. 241), for the excavation of a waterway from the deep waters of Elliott Bay to Lake Washington, and with the material taken therefrom to fill in and raise above extreme high tide the tide lands lying in front of the city of Seattle, which contract was on the same day duly assigned to the defendant waterway company, and is now owned and held by it. On February 23, 1895, the state entered into an additional contract with the defendant company, which provides for the excavation of the material from the waterways mentioned and described in the first contract, and for filling in and raising above high tide, with the material so excavated, certain tide lands therein described, but not embraced in the first contract. All of the requirements of the law necessary to authorize the execution of the contracts were fully complied with prior to the execution thereof, and the bond required by the contract was duly executed, approved, and filed. These contracts were duly recorded in the office of the county auditor of King county, and by virtue thereof the waterway company claims a lien upon the tide lands therein described. Pursuant to section 4 of said act, the commissioner of public lands has adopted a form of certificate which he proposes to deliver to the defendant company upon completion of the whole or any portion of the work provided for by said contract, capable of separate use for the purposes of navigation, which form of certificate has been approved by the attorney general. These certificates, when delivered and filed in the office of the county auditor of the county in which the lands are situated, will constitute a lien on the lands described therein in favor of the holder thereof, for the amount therein specified, and 15 per cent. additional thereon, with interest on said amount and additional percentage at 8 per cent. per annum from date until paid. This action was brought to enjoin and restrain the defendant company from performing the work commenced and contemplated by it upon the tide lands described in the complaint, and from trespassing thereon, and to restrain the commissioner of public lands from issuing any certificates under the contracts above mentioned, and for a decree discharging and freeing said lands from the alleged cloud caused by the execution and recording of said contracts. The superior court denied the relief prayed for in whole and in part, and gave

judgment in favor of the defendants, from which the plaintiff appeals.

None of the facts alleged in the complaint were denied in the answer, and it is conceded that, if the conclusions of law deduced therefrom by the trial court are correct, the judgment and decree must be affirmed. In addition to the facts already stated, it appears from the complaint, as well as from the findings of fact, that the plaintiff is entitled, under the law, to a preference right of purchase, and that he has duly and legally applied to purchase, from the state, the tide lands described in his complaint, and has filed such application with the commissioner of public lands. It also appears that the defendant corporation has entered upon these lands, and has commenced work, under and by virtue of the said contract, with the intention and for the purpose of filling in said lands and raising them above high tide, and will, unless restrained by the court, fill and raise said lands above high tide, and claim a lien thereon for the cost of filling the same, as provided for in said contracts. And it further appears that the commissioner of public lands will, unless restrained by the court, upon application therefor by the defendant corporation, issue his certificate for the cost of filling said lands, and raising them above high tide, under and by virtue of said contract; and that the said defendant will file such certificate in the office of the auditor of King county, Wash., and claim a lien upon the lands so filled in and raised; and that the said defendant will issue said certificate in the form and at the times set forth in the complaint.

The only question to be determined on this appeal is whether the contracts and the certificate proposed to be issued thereunder are in accordance with the provisions of the statute. The learned counsel for appellant claim that the contracts in question are ineffectual and void, because (1) they contain a provision which is contrary to the rule laid down by the law with reference to the manner of apportioning liens among the several owners of land covered by a certificate issued under the contracts and the law; (2) because the first contract entered into contains a provision for the excavation of a waterway through the high lands between the head of Elliott Bay and Lake Washington; and (3) because the last contract provides for the excavation of material from the same waterways described in the first.

The provision of the contracts which it is claimed invalidates them is as follows: "In apportioning the cost of such work to any lot or parcel of land to which any person or corporation has a pre-emption right of purchase, the cost of the bulkhead shall be apportioned to the several lots inclosed within and protected by such bulkhead, in such proportion as the area of such lot or parcel bears to the entire area inclosed within such bulkhead. But the charge against any lot or par

cal for filling in shall be in such proportion to the entire cost of the work of filling in as the number of cubic yards required to fill in such lot bears to the entire number of yards required for the filling in of the entire area included within any bulkhead." The rule of apportionment prescribed by the aforesaid act reads as follows: "Such lien shall not be in solido, and upon the sale by the state to any person, or by any owner claiming under the state to any other person, of any of the tide and shore lands specified in such certificate, the lien herein granted may be discharged as hereinbelow provided, as to any such part of said lands, separately granted or owned, upon the payment of such part of the amount for which the lien upon the lands was given in the first instance as shall bear the same proportion to said whole amount which the area of such separate part of said lands bears to the area of the whole thereof." It will be seen that this provision of the contracts is at variance with the law; and, this being so, the question is, what is the effect upon the contracts, if any, of such provision? An examination of the law and the contracts discloses that all of the conditions and provisions which the statute requires are contained in the contracts, exclusive of the provisions objected to, and the trial court held that such provision is without any force or effect whatever, and that it should be treated as mere surplusage. The learned counsel for respondents insists that the conclusion of the court was right, and we are inclined to agree with him. The law itself provides the manner in which the liens shall be apportioned, and how they may be paid and discharged, and these matters are therefore not the subject of contract. The amount and character of the work to be performed, the manner and time of doing it, and the price to be paid, are all subjects of stipulation between the parties to the contract; but the manner in which the resulting liens are to be apportioned, being fixed specifically by the law governing the contracts, is incorporated into the contracts, and becomes a part thereof, whether mentioned or not. It is admitted by appellant that these contracts contain all that the law requires them to contain, irrespective of the objectionable provision; and, that being true, we perceive no foundation for his contention that they are illegal and void by reason of such provision.

As to the second point made by appellant, that the law does not contemplate the letting of contracts for excavating waterways through any lands other than tide lands, we are led to the conclusion, by a careful examination of the act under which the contracts were executed, that appellant's position is not tenable. Section 1 of that act provides that "the commissioner of public lands of the state of Washington may, when in his judgment the interests of commerce would be subserved thereby, enter into contract with any person or persons, or incorporated companies doing

business in the state of Washington, for the excavation of any waterway or waterways through any lands belonging to the state of Washington, or to any citizen or corporation of said state," etc. Said act further provides, in section 2, "that when harbor lines and waterways have been established by the harbor line commission of the state, no other waterways shall be excavated except the waterways exhibited on the final maps of said harbor line commission, except with the consent and approval of such harbor line commission; and where no harbor lines and waterways have been so established then the plan mentioned in said contract must, before being adopted by said commissioner, be submitted to and approved by the harbor line commission." And this further provision is found in section 9 of said act: "All waterways excavated through any tide or shore lands belonging to the state of Washington by virtue of the provisions of this act, so far as they run through said tide or shore lands, are hereby declared to be public waterways, free to all citizens upon equal terms, and subject to the jurisdiction of the proper authorities, as provided by law." From these provisions it seems clear that it was the intention of the legislature to authorize contracts for excavating waterways through lands not owned by the state, to be entered into by the commissioner of public lands, with the consent and approval of the harbor line commission. The record shows that this consent and approval have been obtained, and we therefore think that the contracts under consideration properly include that portion of the waterways therein mentioned which extends through the high lands between Elliott Bay and Lake Washington. We are not prepared to say, in opposition to the opinion of the commissioner of public lands, that such a waterway would not subserve the interests of commerce, and, if it will, it is certainly such as is contemplated by law. Nor do we think that the fact that both of these contracts embrace the same waterways invalidates either. They are both between the same parties, refer to the same subject-matter, and relate to the same public improvement; and the latter merely enlarged the scope of the former, without otherwise affecting it. In effect, they both constitute but one contract.

It is next objected that the form of the certificate which has been adopted by the commissioner of public lands, to be issued to the contracting parties upon proof of their having complied with the requirements of the contract and the law, does not conform to the requirements of the act in question. All we need say upon this proposition is that an examination of the certificate set forth in the record convinces us that it is in all respects in conformity with the law under which it was prepared.

Lastly, it is insisted that the plan adopted by the commissioner for issuing his certi-

cates is not warranted by law. It appears that the waterway company proposes to excavate the waterways described in the contracts by excavating material from the deep water end, and also from the end next to the upland; and, when it has filled a portion or portions of the tide lands described in the contracts, it will then apply to the commissioner of public lands for a certificate or certificates in the form adopted by him, embracing the whole or a part of the lands so filled, and the commissioner will then issue such certificate or certificates covering the whole or any part of the tide lands so filled. The law provides that the commissioner, upon completion of the work provided for by the contracts, or any part thereof, capable of separate use for the purposes of commerce, shall issue his certificate to the contracting parties or their assigns. This would clearly seem to contemplate that such contracting parties may ask for and receive certificates for the cost of such part of the work as may have been performed in accordance with their contracts, provided that such part is capable of separate use for the purposes of commerce, without waiting for the completion of the whole work. The law vests the commissioner with the duty and discretion of determining when he shall issue his certificates, and we do not see anything in the plan proposed which authorizes us to say that it is not within his discretion. We cannot presume that he will either violate the law or abuse the discretionary power vested in him. Before the waterway company can rightfully claim a certificate under the law and its contract, it must create the waterway therein mentioned, or a portion thereof capable of use as such; and until, at least, a portion of the lands included in the contract are filled, there is nothing to which the lien which is provided for by the statute can attach. But, as we have intimated already, it is the province of the commissioner of public lands to determine, in the first instance, when a certificate has been earned. The judgment is affirmed.

HOYT, C. J., and GORDON and SCOTT, JJ., concur.

(11 Wash. 586)

CHERRY et al. v. WESTERN WASHINGTON INDUSTRIAL EXPOSITION CO. et al.

(Supreme Court of Washington. April 13, 1895.)

INJUNCTION — BOND — LIEN OF JUDGMENT — APPOINTMENT OF RECEIVER — EFFECT.

1. Code Proc. § 273, providing that no injunction shall be granted until the petitioning party shall enter into a bond, applies to a petition by a receiver.

2. Where a judgment is a lien on the property of a corporation, and the proceedings leading to the sale are regular, the fact that a receiver is appointed prior to such sale does not divest any right acquired thereunder, and the purchaser was entitled to a deed from the sheriff.

3. Where a receiver seeks to cancel a cer-

tificate of sale under execution held by one not a party to the receivership proceedings, he must bring an independent action therefor.

4. Where one has acquired a judgment lien on the property of an insolvent corporation, his rights thereunder will not be affected by the subsequent appointment of a receiver before execution has been levied.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Appeal by the Clark-Blatchly Company, judgment creditor of the Western Washington Industrial Exposition Company, from a decree rendered on the application of Charles A. Murray, appointed receiver of the exposition company in the suit of Cherry & Parkes against it, canceling a certificate of sale, and restraining the sheriff from issuing a deed thereon. Reversed.

Hoxie, Bogle & Richardson, for appellant.

ANDERS, J. The Clark-Blatchly Company, appellant, recovered a judgment in the superior court of Pierce county against the Western Washington Industrial Exposition Company for \$1,148.86, which was duly filed, and became a lien on the defendant's property. Execution regularly issued on this judgment, and was levied by the sheriff on the interest of the defendant in blocks 3712 and 3713 in the city of Tacoma, and the property was advertised for sale, and sold thereunder on March 27, 1893, when appellant became the purchaser in satisfaction of its judgment. A certificate of purchase was properly issued to the purchaser, and on the 2d day of September, 1893, the sale was confirmed by the superior court. On May 3, 1894, one Charles A. Murray, as receiver of the Western Washington Industrial Exposition Company, appointed in the cause of Cherry & Parkes against the Western Washington Industrial Exposition Company, filed a petition in that cause, asking that the sheriff be restrained from issuing a deed to appellant, and that appellant be cited to show cause why the certificate of sale should not be canceled and annulled. This petition alleges, as the ground for relief asked, that the sale was made after the appointment of this receiver, and after he had duly qualified and taken possession of the property of said defendant, but admits that the execution issued and was levied by the sheriff prior to the appointment of the receiver. On filing the petition, the court, without notice to the appellant, and without bond from the receiver, granted the restraining order, and ordered the citation to issue as prayed. Appellant thereupon appeared, and moved the court to revoke and set aside this order, because it was made *ex parte*, and without bond being required. This motion was overruled, and the appellant then demurred to the petition; and, its demurrer having been overruled, it answered, alleging that its judgment, levy, and advertisement of sale preceded the appointment of the receiver; that it was not a party to the proceedings in which the receiver was appointed; that the

sheriff took possession of this property under his levy prior to the appointment of the receiver; that the sale was regularly made and confirmed by the court; and claiming that it was legally entitled to a deed from the sheriff. The receiver demurred to this answer, on the ground that the answer did not show any defense to the petition, nor any right to the certificate of sale or deed. The court sustained this demurrer, and, the Clark-Blatchly Company declining to plead further, a final decree was entered, canceling the certificate of sale, and perpetually enjoining the sheriff from issuing a deed to appellant. From this decree this appeal is prosecuted, and appellant assigns these several rulings of the court as error.

Our statute provides that restraining orders may be granted without notice to the opposite party in cases of emergency, to be shown by the complaint. Code Proc. § 270. But it is insisted by appellant that no such emergency as the statute contemplates to justify an ex parte order was shown, and that, even if the showing was sufficient, the court should have withheld the order until a proper bond was given by the receiver. Section 273, Id., provides that "no injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such sum as shall be fixed by the court or judge granting the order, with surety to the satisfaction of the clerk of the superior court, to the adverse party affected thereby, conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order"; and that this provision applies to temporary restraining orders is made certain by the language used in the succeeding section. From these provisions it follows that the receiver should have been required to give bond, unless he was entitled to immunity therefrom by virtue of his office; and we do not think that the fact that he was a receiver conferred upon him any privilege not accorded to other suitors. In proceedings against a stranger to the action in which he was appointed, a receiver must conform to the requirements of the law applicable thereto. He must commence his action by the same process that others are required to employ, and must comply with all conditions imposed upon other persons who seek similar relief. The receiver in this instance not only should have given bond as provided by law, but he should also have commenced an independent action against this appellant to cancel the certificate of sale.

It is not alleged that either the sheriff or appellant took any property from the possession of the receiver which was rightfully in his possession, or in any way impeded or hindered him in the discharge of his duties; and, under such circumstances, appellant could not properly be made a party to the receivership proceedings, and subject to the order of the court, simply by filing a petition therein. Not having been a party thereto, its

rights should not have been determined or inquired into in that action. Beach, Rec. § 665; Andrews v. Paschen, 67 Wis. 413, 30 N. W. 712; Receiver of State Bank of New Brunswick v. First Nat. Bank of Plainfield, 34 N. J. Eq. 450.

Nor did the fact that the receiver was appointed before the sale was made divest the appellant of any right it had acquired thereunder. It is admitted by the pleadings that the judgment recovered by appellant and the levy of the execution under which the property was sold preceded the appointment of the receiver. It is also admitted that the judgment was a lien on the real estate of the defendant; and, if appellant had had no other right in or to the property in question than that dependent upon its judgment lien, such right would not have been affected by the appointment of the receiver. Under such circumstances, it could have lawfully proceeded, notwithstanding any claim of the receiver, to make its debt by execution, levy, and sale of defendant's property. 1 Black, Judgm. § 475. And this court held in State v. Superior Court of Spokane Co., 7 Wash. 77, 34 Pac. 431, that, where a creditor has attached property, the court has no authority to direct a receiver appointed in an action other than the attachment suit to take possession of the attached property, as the attachment creditor has not only the right to have his debt paid out of the proceeds of such property, but to have the sheriff retain it intact in the meantime. The same doctrine was again announced in State v. Superior Court of Chehalis Co., 8 Wash. 210, 35 Pac. 1087. But, where the lien will still be preserved, the receiver may be allowed, under some circumstances, to take possession of the property thereby affected. State v. Superior Court of King Co. (Wash.) 39 Pac. 244.

It is not claimed or suggested that there was any irregularity in the proceedings which culminated in the sale, and our conclusion is that, upon the showing made, the appellant is entitled to a deed from the sheriff. The judgment is reversed, and the cause remanded, with directions to dismiss the petition.

HOYT, C. J., and GORDON, J., concur.

(11 Wash. 632)

KAUFMAN et ux. v. TACOMA, O. & G. H. R. CO.

(Supreme Court of Washington. April 17, 1895.)

CONSTRUCTION OF RAILROAD IN STREET—DAMAGE TO ABUTTING OWNER—RIGHT TO OFFSET BENEFITS.

1. One who acquiesces in the taking and grading for railroad purposes of a city street on which his property abuts waives his right to have his damages paid in advance of the taking.

2. A railroad company which procures a grant from a city to lay its tracks on certain streets is liable for damage resulting to abutting property owners, though the grant fails to so provide.

3. Under the constitutional provision that damages shall be assessed for taking or damaging private property, irrespective of benefits, except in the case of municipal corporations, and a provision of a city charter that benefits arising from the grading or improvement of streets shall be assessed against the contiguous property, a railroad company which grades a street, by authority of the city, for the purpose of laying its road thereon, may offset the benefits against the damages resulting to an abutting property owner.

4. In an action to recover for damage sustained by an abutting property owner from the grading of a street for railroad purposes by authority of the city, it is immaterial whether the fee to the street is in the city or the owner.

5. The city is not a necessary party defendant to an action by an abutting owner for damage caused by the grading of a street by a railroad company under authority of the city.

6. A railroad company is primarily liable for damage resulting to an abutting property owner from the running of its trains over a street, though it operates its road by authority of the city.

7. In an action by an abutting owner for damages for construction of a railroad in a street, special damages for building a bridge, making changes in sewer connections, and filling in a lot, not having been specially pleaded, cannot be recovered.

Dunbar, J., dissenting.

Appeal from superior court, Thurston county; W. H. Pritchard, Judge.

Action by G. Kaufman and wife against the Tacoma, Olympia & Gray's Harbor Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Ashton & Chapman, for appellant. John R. Mitchell, for respondents.

SCOTT, J. The plaintiffs were owners of a certain tract of land abutting on Seventh street, in the city of Olympia, and had a residence thereon; and they brought this action for damages, against the defendant, for constructing its line of railway along said street. The grounds of damages alleged are, in substance, that the defendant cut a deep tunnel along said street, adjacent to the plaintiffs' premises, and constructed a railway through the same, and covered the said tunnel with timbers and plank, for the purpose of making a roadway along said Seventh street for public travel, thereby raising the grade of said street several feet above the grade that had been previously established by the city of Olympia, and leaving plaintiffs' lots at a depth of several feet below the top of said covered way, and that, in the running of trains through said tunnel, great quantities of smoke and sparks from the engines are thrown off, and that the noise produced by the trains is very great, whereby the residence of the plaintiffs is endangered, and rendered unsafe and uncomfortable, and the value of their said property greatly impaired and lessened. The defendant answered, denying certain of the material matters alleged in the complaint, and pleaded, by way of an affirmative defense, that it was a railroad corporation duly organized under the laws of this state; that the city of Olympia was and is a municipal corporation created and existing under and by virtue of an act of the legislature of the territory (now state) of Washington, entitled "An act incorporating the city of Olympia," approved November 28, 1883, and under and by virtue of the laws of said state,—and, among other things, alleged that the city of Olympia had granted to the defendant the right to construct, equip, maintain, and operate its line of railroad over, along, through, across, and under certain streets and alleys in said city, which included the street in controversy, and

that the defendant had in all respects complied with the terms and conditions of said ordinance, and that by the construction and maintenance of the roadway, and the construction of said tunnel, the plaintiffs' property had been drained, and otherwise greatly benefited. A demurrer was interposed to this affirmative defense, which was sustained by the court. A trial was had, and verdict and judgment rendered for the plaintiffs, from which the defendant has appealed.

It is contended that the court erred in sustaining the demurrer to this affirmative defense. By section 5 of its charter, the city of Olympia was granted exclusive control of all streets within its limits. By section 10 it was empowered to authorize or prevent the location and laying down of railway tracks and street railways on all streets, alleys, and public places; and this and other sections of the charter authorized the city, in case of the grading or improvement of streets, to assess the benefits against the contiguous property. The railroad was constructed after the adoption of the state constitution, which provides that damages shall be assessed for taking or damaging private property, irrespective of benefits, except in the case of municipal corporations. If the railroad company had appropriated or damaged any land of the respondents, it could not have offset any benefits accruing to them; but in case the city should change the grade of, or improve, a street, it could offset benefits against any damages suffered by the parties interested. The charter provided that, before private property should be taken or damaged, the damages should be ascertained and paid, and the constitutional provision aforesaid was to the same effect. This was not done, but the respondents saw fit to allow the work to proceed without attempting to restrain the performance of it, or to recover damages prior to its completion, and thus waived payment in advance, and were confined to their right to bring an action to recover. In enacting said ordinance the city made no provision for the payment, by the railroad company or otherwise, of any damages that might be caused thereunder to abutting property. We are of the opinion, however, as the change of grade was made upon the railroad company's motion, and for its benefit, that the fair inference to be drawn therefrom is that the railroad company was to be responsible therefor. In asking the change, and accepting the rights conferred, it should be held to have assumed all liability for damages occasioned thereby. But what was the measure of its liability? The material question is, was any greater burden imposed upon it, in this particular, than rested upon the city? We think not. No land of the respondents was directly appropriated in building the road, as the land used was and continued to be a street.

It was a contested question upon the argument of the case whether the fee to land occupied for streets rested in the city, or in the abutting property owners. But we do not regard this question as material. The abutting property of the respondents might have been damaged, although the fee was in the city. This court so held in *Hatch v. Railroad Co.*, 6 Wash. 1, 32 Pac. 1063, which was a like action for this same work, and which is again before us on other questions; it, with a similar case brought by *Silsby v. Railroad Co.*, 6 Wash. 295, 32 Pac. 1067, having been submitted herewith. The city changed the grade of the street, and authorized its improvement by the construction of a tunnel, and the building of a plank roadway thereover. This could have been done solely for a municipal purpose, and the special benefits arising therefrom could have been offset against, or, if blended therewith, taken into consideration in arriving at, the damages sustained by abutting property owners.

As to the rule of damages, the constitutional provision aforesaid makes no distinction as to

the purposes for which land is taken or damaged, except as it may be limited by the powers of the party taking, but it does make a distinction as to persons. A municipal corporation can assess or offset benefits. No other can. The city having changed the grade and authorized the improvement of the street as aforesaid, if it was an improvement, it should make no difference, as to the rule of damages, whether the city contracted for the performance of the work directly, or simply empowered another party to perform it. This could not alter the case, as to the respondents. Suppose, after the enactment of the ordinance, and the performance of the work in accordance therewith, the railroad company had seen fit to change the location of its road, and had constructed it elsewhere. The improvement of this street was the city's property,—the city's work; and, in an action brought for damages, benefits could have been taken into consideration. The question is determined by determining who caused the injury, if any. Clearly, the city changed the grade, and authorized the improvement. No other power, unless, possibly, the legislature, could have done this. The railroad company had no such rights. Upon the former appeal in the Hatch Case we said, in reversing it, "It is not shown or alleged that the city did any of the acts or things of which appellants complain." This statement of a fact may possibly need some qualification. At least, it must be understood, in so far as constructing the tunnel and building the roadway is concerned, as having reference to the actual performance of the work only, for it was and is conceded that the city passed the ordinance. That case was then before us on an appeal by the plaintiffs from an order of the lower court requiring them to make the city a party defendant, and we held it was not necessary for them to do so. The foregoing discussion may seem somewhat in conflict with that holding, but it is only nominally so, at most. Conceding that the plaintiffs could have primarily proceeded against the city for the construction of the tunnel and the change of grade, the city might have recovered any sum it was thus required to pay of the railroad company. Conceding, if the railroad company and the city were both joined as defendants, as the lower court held they should be, that the court could have determined the rights of the defendants, as between them, it was not incumbent on the plaintiffs to make them both parties, and they did not elect to do so. As the railroad company would have been ultimately liable, it could lose nothing by not having the city made a defendant also. But the plaintiffs not only sought to recover for the cut and the grade, but damages occasioned by the running of trains as well. For this the railroad company was primarily and solely liable, and the city in no wise responsible. In any event, that holding became the law of the Hatch

Case, and the question is not raised in either of the others. In the Hatch Case the railroad company had set up the ordinance aforesaid as a complete defense, and a majority of the court held that it did not constitute one. When the cause was remanded, new pleadings were filed, and the answers of the railroad company in the three cases are similar. In so far as the property of the plaintiffs was specially benefited by the construction of the tunnel and roadway, these answers are a defense to the plaintiffs' action, except as to damages occasioned by the running of trains. As against the damages in this respect, no benefits can be offset.

We have observed that some proof was admitted which was inconsistent with the rulings of the court in sustaining the demurrer, probably because such testimony was not objected to, but the whole case shows that the question of benefits was not fairly submitted to the jury, and the error of the court in sustaining the demurrer was not thereafter remedied.

Certain questions raised which relate to the instructions are connected with and dependent upon the one above decided, and are substantially disposed of thereby.

Some proof was admitted relating to special damages sustained by the plaintiffs in several particulars, one of which was as to the necessity for and cost of building a certain bridge, and another as to making changes in sewerage connections. This proof was objected to on the ground that it was inadmissible under the pleadings, there being no allegations in the complaint of damages in the respects claimed; and we think the point was well taken. Plaintiffs were entitled to show only such damages as were the natural and necessary consequence of the changes that had been made by the defendant, in the absence of any allegation as to special damages. Another relates to proof offered by the plaintiffs to show the cost of filling in the lot or raising it to the grade as changed. We think this proof was objectionable also, as it was not alleged or shown that such filling was necessary. As all of these questions were of the same general character, it will be unnecessary to discuss each one in detail, what we have said being sufficient for the guidance of the court upon a retrial of the cause. Reversed, and remanded for a new trial, with leave to the parties to amend their pleadings, if desired.

HOYT, C. J., and ANDERS, J., concur.

DUNBAR, J. I dissent. I think all the material questions raised in this case were decided in favor of the respondent's contention in the case of Hatch v. Railroad Co., 6 Wash. 1, 32 Pac. 1063.

GORDON, J., having been of counsel, did not sit.

(11 Wash. 581)

BROTTON v. LUNKLEY et al.

(Supreme Court of Washington. April 12, 1895.)

INDEMNITY TO CONSTABLE—SEIZURE ON EXECUTION—LIABILITY ON BOND.

1. Code 1881, §§ 1807, 1808, authorizes the constable, in case a third person claims property seized under execution against another, to surrender the property unless the execution creditors give an indemnity bond, and for trial of claim as in attachment, or by other legal remedies. Sections 1737 and 1738, providing, in attachments, for the filing of an affidavit by a claimant, and for trial of his claim, and authorizing the constable to demand an indemnity bond, were repealed. *Held*, that the repeal of such sections did not impliedly repeal section 1807 so far as it authorized the constable to demand an indemnity bond.

2. Under a bond to "indemnify a constable against a claim of a person to property seized under an execution against a third person, the obligors, on failure, when notified, to defend an action by the claimant against the constable for the seizure, are liable for the necessary expenses incurred in defending the action, though claimant failed to recover.

3. The fact that other creditors of the judgment debtor, who did not give indemnity bonds, were benefited by the seizure and sale, does not affect the execution creditor's liability for "all" the necessary expenses incurred by the constable in successfully defending an action for seizure of the property.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by M. Brotton against Frank Lunkley and another. There was a judgment for plaintiff, and defendant Hoska appeals. Affirmed.

H. W. Lueders, for appellant. Taylor & McKay, for respondent.

ANDERS, J. The defendant Frank Lunkley recovered a judgment against one Peter Westlin, in a justice court in Pierce county, on which an execution was issued, and placed in the hands of M. Brotton, who was then constable, for service. In pursuance of the writ, Brotton levied upon and took into his possession, as the property of the execution defendant, a certain lot of liquors and other personal property then in the Exchange Hotel in the city of Tacoma. The property so levied on was claimed by one Charles Langert, who demanded the possession thereof from the constable. The latter thereupon refused to longer keep the property, unless the execution plaintiff would indemnify him against said claim, which he agreed to do, and accordingly, with defendant Hoska as surety, executed a bond of indemnity, which reads as follows: "Whereas, Charles Langert, of Tacoma, claims to be the owner of and have the right to possession of certain personal property, to wit, a certain lot of liquors, fixtures, and personal property, in that certain Exchange Hotel, No. 1156 Railroad street, Tacoma, as shown by inventory, now in possession of said M. Brotton, which was taken by M. Brotton, constable in Tacoma, Pierce county, upon an execution by Charles N. Senter, justice of the peace in

and for the county of Pierce, upon a judgment obtained by Frank Lunkley, plaintiff, against Peter Westlin, defendant: Now, therefore, we, Frank Lunkley, plaintiff, and A. F. Hoska, acknowledge ourselves bound unto the said M. Brotton, constable, in the sum of five hundred dollars, to indemnify the said M. Brotton, constable, against such claim." The constable then proceeded to sell the property under the execution, and thereafter Langert sued him for damages on account thereof. After an extended litigation, both in the district and supreme courts, the constable was finally successful, and recovered a judgment against Langert for his costs. He then demanded payment of the expenses of the litigation, including attorney's fees, from Lunkley, which was refused; whereupon he instituted this action to recover the same. A demurrer was interposed to the complaint, and sustained, after which an amended complaint was filed, which was also demurred to, but the demurrer was overruled. A motion to strike out parts of the complaint, and to make it more definite and certain, was filed and denied, and defendant Hoska then answered, admitting the execution of the bond, but denying all other allegations of the complaint. A trial was had, resulting in a judgment for plaintiff, from which defendant Hoska appealed.

The appellant contends that the court erred in overruling the demurrer, for the reason that the amended complaint stated no facts sufficient to constitute a cause of action. This position is based upon the propositions (1) that there was no law authorizing the respondent to demand a bond, and that the bond given imported no liability, and was without consideration and void; and (2) that, even if the undertaking was a simple contract of indemnity, still the liability thereunder was fixed by its terms, and there was no breach of any of its covenants or conditions alleged in the complaint which would warrant a recovery by the respondent.

As to the first proposition—that there was no law authorizing the constable to require a bond in this case—it is urged that section 1807¹ of the Code of Washington (1881), pursuant to which the bond was demanded, was so dependent on sections 1737 and 1738² for its enforcement that the repeal of these sections by a subsequent act of the legislature (Laws 1885-86, p. 46) operated to repeal it also by implication. But the objection to this position is that section 1807 does not purport to prescribe the method of procedure for

¹ Code 1881, § 1807, authorizes the constable, in case a third person claims property seized under execution against another, to surrender the property, unless the execution creditor gives an indemnity bond, and provides for the trial of claimant's right in the same manner as in attachments.

² Code 1881, §§ 1737, 1738, provide, in attachments, for the filing of an affidavit by a claimant of attached property, and trial of his claim to the property, and authorize the constable to demand an indemnity bond.

a recovery on the bond. It simply designates how a claimant may proceed upon affidavit to try title to property levied on at the suit of another person. Nor is he confined to the procedure therein prescribed, for the following section explicitly provides that "nothing contained in the last section shall be so construed as to prevent the claimant of property levied on by execution from resorting to any legal remedy he may choose to pursue, instead of proceeding in the manner therein prescribed." We do not think that the repealing statute either destroyed or affected the right of the officer to demand a bond.

And the next question is, was the constable entitled, by the terms of the bond, to recover the expenses incurred by him in resisting Langert's claim to the property levied upon? The agreement of the obligors in the bond was to "indemnify M. Brotton, constable, against such claim." Appellant takes the position that this means simply that they were to be liable only in case Langert made good his claim to the property, and that, when it was determined that he had no lawful claim, the liability of appellant ended. Now, the proof shows that the respondent was put to great expense and trouble on account of the very claim mentioned in the bond. He was sued for selling the property. The obligors, or at least the principal one, knew it, and yet failed to furnish counsel for the defense. He was compelled to employ counsel himself, and to pay for his services; and we are unable to perceive why he should not recover the necessary and legitimate expenses incurred in that action. He was not personally interested in the property sold, and, in all probability, would not have retained it in his possession or sold it had the bond of indemnity not been given.

It is further insisted by appellant that some of the property claimed by Langert, and for the sale of which he claimed damages, was not sold under the Lunkley execution, and that the amount recovered, if any, in this action, "should be prorated in proportion to the amount sold under Lunkley's execution, compared to the whole amount sued for by Langert." But it appears from the record that the sale was made under the execution issued on Lunkley's judgment, and, that being so, the fact that some other persons who did not give indemnity bonds may have been benefited thereby in no way affects the liability of those who executed the bond. 2 *Suth. Dam.* (2d Ed.) § 762; *Chamberlain v. Beller*, 18 N. Y. 115. And, besides, the amount of property claimed by Langert was not material matter, as no judgment was recovered against the respondent for the value of any property, and he only seeks to recover the expenses of the suit brought against him by Langert.

The court instructed the jury to render a verdict in favor of the plaintiff, and directed them to find the amount of his damages. This instruction is complained of; but we think, under the circumstances, it was right. As we have already said, the execution of the

bond was admitted, and all other facts necessary to sustain plaintiff's cause of action were proved, and there was no countervailing testimony on the part of the defendant. Under such a state of facts, the question of the amount of damages was the only question of fact for the jury to determine.

It is not necessary to allude to some other points made in the brief of appellant further than to observe that, in our opinion, they are not well taken. The judgment is affirmed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

(11 Wash. 541)

GLENN v. HILL.

(Supreme Court of Washington. April 5, 1895.)

ESCROW—GUARANTY—CONSTRUCTION—REVIEW ON APPEAL.

1. Defendant executed two notes to plaintiff, in payment for certain shares of stock, and the notes and stock were deposited with a third person, under a written agreement whereby the notes were not to be delivered to payee until matured, nor stock delivered to purchaser until paid for. *Held*, such deposit of the notes was not a delivery in escrow.

2. A guaranty to hold a purchaser of corporate stock harmless from "existing liabilities" of the corporation, and that the accounts of the company are collectible, cannot be made to cover a failure of the corporation to deliver its assets to the purchaser.

3. Plaintiff sold defendant 145 shares of stock, when the total number of shares was 300, and guarantied to hold defendant harmless in proportion to the interest purchased. Defendant subsequently bought from others the remaining shares. *Held*, plaintiff is liable only to the extent of $\frac{1}{2}\%$ of any loss.

4. An appellate court will not consider alleged errors of the trial court where no appeal is taken from the judgment.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by J. H. Glenn against Joseph B. Hill on two notes, and to foreclose a lien securing same. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bausman, Kelleher & Emory, for appellant. J. T. Ronald, for respondent.

GORDON, J. On the 30th day of January, 1892, the respondent was owner of a portion of the capital stock of a corporation known as the Haley-Glenn Company, doing business at Seattle, which he was at that time desirous of selling to the appellant, who, prior to that time, had no interest in the corporation; and on said day respondent delivered to the appellant the following guaranty: "To Joseph B. Hill, Esq., Seattle, Washington—Dear Sir: In consideration of your agreeing to become a purchaser of stock of the Haley Grocery Company, I undertake to hold you harmless against any loss which may accrue to you from any of the existing liabilities of the Haley-Glenn Company; and I guaranty that all the accounts assigned by the Haley-Glenn Company to the Haley Grocery Compa-

ny can and will be collected. This guaranty and agreement to hold harmless shall be in proportion to the interest you may purchase in said Haley Grocery Company. Very truly, [Signed] J. H. Glenn." For the purpose of effecting the sale, it was agreed that the same should be carried out through the medium of a new corporation, to be known as the Haley Grocery Company, to be organized by respondent, appellant, and the stockholders of the Haley-Glenn Company; that the Haley-Glenn Company should transfer all of its assets to the Haley Grocery Company. There were 300 shares of stock in the new corporation, of which respondent was entitled to 190. Forty-five shares he sold to one Haley. The other 145 shares he sold to the appellant, for a consideration of \$15,030.70; appellant paying \$10,000 in cash, and executing two notes, of \$2,515.35 each, bearing date on said January 30, 1892, and due, respectively, one and two years after date, with interest at the rate of 10 per cent. per annum from date until paid, said notes containing the following stipulation: "Interest to be paid quarterly, and, if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note." Respondent delivered to appellant 100 shares of said stock, and the remaining 45 shares, together with said notes, were then deposited with one Graves, under the following agreement:

"Seattle, Washington, January 30, 1892. E. O. Graves, Esq., Seattle, Wash.—Dear Sir: We deposit herewith the following papers: 1st. Two notes of Joseph B. Hill, for \$2,515.35 each,—one dated on or before one year after date; the other dated on or before two years after date. 2d. Two notes of John Haley, exactly similar to the preceding. 3d. Forty-five shares of the capital stock of the Haley Grocery Company, originally issued to James H. Glenn, and by him indorsed to Joseph B. Hill. 4th. Forty-five similar shares, indorsed by J. H. Glenn to John Haley. The papers are left with you with the following mutual agreement and understanding: Messrs. Hill and Haley have purchased each the shares mentioned, respectively, and have paid J. H. Glenn in their respective notes. The shares are not to be delivered up to the purchasers until the notes are paid, nor are the notes to be removed or negotiated by the payee during the period which they run. On the payment of these notes, which can be done at any time before or after maturity, you will please deliver to the purchasers, respectively, their shares, and each of the purchasers shall have a right to a separate release on the payment of his individual notes. J. H. Glenn. Joseph B. Hill. John Haley.

"Witness: Fred Bausman.

"I assent to hold the aforesaid papers on said terms. E. O. Graves."

Respondent brought this action for the purpose of recovering judgment upon said notes, and foreclosing the lien claimed by him on

the stock so deposited. Appellant denied the delivery of said notes, and, by way of affirmative defense and offset, set up the guaranty herein set out; that he relied upon the guaranty in making said purchase and in executing said notes; also that, "relying on the guaranty, he [respondent] further purchased shares in the Haley Grocery Company, and subsequently became the owner of all its capital stock." He also alleges that, of the accounts assigned by the Haley-Glenn Company to the Haley Grocery Company, the amount of \$3,216.94 was uncollected and uncollectible, after the exercise of diligence, etc., and that the various debtors owing said accounts were and are insolvent; also, that certain assets purchased by the new company of the old corporation have not been delivered to the new company, the value of said property amounting to \$3,842.26; also, that other assets were found to be deficient in value to the amount of \$1,897.80. The respondent replied, denying the various allegations of new matter set up in appellant's answer. The court below directed a reference for the purpose of determining what accounts assigned by the old corporation to the new remained uncollected and uncollectible. A great deal of testimony was taken by the referee, who thereafter reported to the court that accounts amounting, with interest, to the aggregate sum of \$4,002.46, remained uncollected and uncollectible, and that appellant was entitled to be credited upon said notes in said sum. This report was modified in the lower court by reducing the amount to \$3,134.46, of which amount the lower court held that the appellant was entitled to be credited upon said notes in the sum of \$1,514.96 only, being $\frac{22}{100}$ of the whole amount of accounts found uncollectible. The court refused to receive proof upon behalf of appellant in support of the other items of counterclaim set up in the answer, and rendered judgment in favor of respondent in the sum of \$4,388.88, said judgment being declared to be a lien upon the shares of stock so deposited, etc., and directing the sale thereof to satisfy said judgment. From said judgment this appeal is taken.

Assignments 1, 2, and 5 of appellant's assignments of error relate to the delivery of the notes, and will be considered together. Appellant insists that the proof shows that the notes were delivered in escrow, and that plaintiff cannot maintain the action. Upon the trial it was shown that plaintiff never had possession of the notes, but that Graves, with whom they had been deposited, held them until they were produced by him upon the trial. We do not think appellant's position is well taken. The terms and conditions upon which the notes and certificate of stock were deposited with Graves were in writing. In his affirmative answer, appellant expressly alleges that they were deposited in accordance with the terms and conditions of a written agreement which he makes a part

of his answer. He does not assert or claim in his pleading that they were deposited pursuant to any other arrangement or upon any other terms or conditions than those expressed in said written statement. A delivery in escrow is a delivery to a "third party (not the payee) to hold until a certain event happens or certain conditions are complied with, and then the liability of the party commences as soon as the event happens or the conditions are fulfilled, without actual delivery by the depository to the promisee." Daniel, Neg. Inst. § 68. "The condition to make the instrument an escrow must be one to be performed by the grantee, and not by the grantor." *White's Adm'rs v. Williams*, 3 N. J. Eq. 376. In determining what constitutes an escrow, we must look to the language employed, the situation of the parties, the object to be attained, and such other facts as may throw light upon the intention of the parties. In his answer, appellant admits that the notes in suit were executed in payment of the shares of stock which he purchased from respondent. There was an absolute sale of the stock, and appellant admits that these notes constituted the consideration paid therefor. The agreement recites that "Messrs. Hill and Haley have purchased each the shares mentioned, respectively, and have paid Glenn in their respective notes. The shares are not to be delivered up to the purchasers until the notes are paid, nor are the notes to be removed or negotiated by the payee during the period in which they run." We do not think that the language of the agreement under which both the notes and the stock were deposited supports the contention of the appellant that the notes were delivered in escrow, nor do we think that the nature of the transaction, the circumstances surrounding the parties, or their manifest purpose, justifies any such conclusion. The deposit of the notes was made merely for the convenience of the appellant, to insure him against any transfer of them pending their maturity, and their validity was not dependent upon the performance by respondent of any condition. He had transferred the stock, and accepted these notes in payment, and nothing remained for him to do. Their delivery was unconditional, save that they were not to be negotiated. The agreement not to negotiate them was for the purpose of protecting appellant upon the guaranty, and to enable him to set off his losses arising thereunder against the notes; and that is precisely what he has sought in this action by interposing his counterclaim. He admits that the stock was bought absolutely, and paid for by these notes, and he, as owner of the stock (including these 45 shares), has asked and obtained in this litigation damages growing out of the sale and respondent's guaranty; and this, we think, is all that he is entitled to. Nor does the fact that the notes were never, prior to the commencement of the suit, in the actual possession of the respondent, defeat his right

to a recovery. *Taylor v. Thomas*, 13 Kan. 217; Daniel, Neg. Inst. § 68.

The lower court refused to allow the appellant to show that the Haley-Glenn Company had failed to deliver to the new corporation certain assets which he claims were included in the sale, and also refused to permit him to make proof that certain other assets actually delivered were deficient in value, etc.; and the court's rulings in these regards are assigned as errors. The learned counsel for appellant insists that he is entitled to recover the same upon the written guaranty above set out, and that "the word 'liabilities,' as used in the guaranty, was the most general word that could be used, and was supposed to include, as the parties intended it should, a liability that might arise by putting in a fictitious item among the gross assets." We do not think that the language of the guaranty admits of any such construction. All that respondent guarantied was: First, against loss accruing to the appellant from any of the existing liabilities of the Haley-Glenn Company; and, second, that the accounts assigned by the old company to the new "can and will be collected." The language employed is neither ambiguous nor uncertain. It will not admit of the meaning which is sought to be attached to it by the appellant, and we think the proof was properly excluded.

Upon the trial the appellant sought to show that there was a liability amounting to the sum of \$360 for unpaid taxes, which did not appear in the schedule of the liabilities furnished to appellant at the time of accepting the guaranty in question and making the purchase, and that it was a loss to the appellant, from which the respondent in the written guaranty has covenanted to hold him harmless. Upon respondent's objection the court excluded the proof. Conceding that this was a liability within the meaning of the guaranty, and was a claim against which the appellant, to the extent of the interest which he purchased from respondent in the new company, was entitled to be protected against, still he made no claim for the same in his answer, and manifestly was not entitled to make proof of it upon trial. Nowhere in his answer does he assert that the liabilities of the old company were in excess of what they were represented to be by the officers of the old corporation or by the respondent. He sought no relief in that regard, and plainly was not entitled to give testimony upon the trial in support of a claim which he had not asserted in his pleadings.

Finally, appellant complains of the action of the court in modifying the report of the referee, and reducing the amount of the credit allowed to the defendant upon said notes by reason of the uncollectibility of the accounts transferred by the old company to the new corporation. As already stated, the total number of shares of stock in the new

corporation is 300. Of that amount, 145 shares were sold by the respondent to the appellant, and the guaranty of the respondent is "to hold [appellant] harmless in proportion to the interest [which he] may purchase in said Haley Grocery Company." Subsequent to the purchase of respondent's stock, it appears that appellant became the purchaser from others of the remaining stock in the corporation. The referee reported that he was entitled to be credited with the entire amount of accounts found uncollectible. The lower court, however, credited him with $\frac{22}{100}$ thereof, being that proportion of the whole sum which the shares of stock purchased by him from respondent bore to the entire stock of the corporation; and we think the court committed no error. It seems to us that in this particular the plain purpose of the guaranty was to protect the appellant merely to the extent of any interest in the corporation which he might purchase from the respondent. It was intended to cover and embrace the then pending negotiations, and cannot be considered as extending to subsequent purchases from other stockholders in which respondent could have no possible interest.

Counsel for the respondent devotes considerable space in his brief to supposed errors of the court committed to the prejudice of the respondent; but, inasmuch as he has taken no appeal from the judgment, we are unable to notice them. "Without an appeal, a party will not be heard in an appellate court to question the correctness of the decree of the trial court." *U. S. v. Blackfeather*, 15 Sup. Ct. 64. The judgment will be affirmed.

HOYT, C. J., and ANDERS, J., concur.

(4 Idaho, 463)

SECURITY SAVINGS & TRUST CO. v. PIPER. Judge.

(Supreme Court of Idaho. April 17, 1895.)

DISSOLUTION OF CORPORATION—RECEIVER.

Under sections 5185-5187, Rev. St. Idaho, the trustees and stockholders of a corporation may make application to the district court for its dissolution, and, upon such application being made, the court is authorized, by section 4320, Rev. St., to appoint a receiver, when necessary, to take charge of the property of such corporation.

(Syllabus by the Court.)

Original proceeding by certiorari at the suit of the Security Savings & Trust Company, a corporation, against W. G. Piper, judge of the district court, Second judicial district, to review a decree dissolving the Farmers' Bank of Moscow, and appointing a receiver of its property. Affirmed.

In the matter of the dissolution of the Farmers' Bank of Moscow on the 2d day of January, 1895, four of the six trustees and the cashier of the said bank file their petition in the district court for Latah county,

and allege that said bank is a corporation; that at a meeting of the stockholders of said corporation held on the 2d day of January, 1895, over two-thirds of the members and stockholders of said corporation voting therefor, a resolution was passed that the said corporation be dissolved, and its affairs be placed in the hands of a receiver; that an application be made to the district court for said dissolution, and that E. R. Headley be appointed as receiver, he being one of the stockholders thereof. On the same day said E. R. Headley filed his petition in said court, setting forth substantially the same facts, and, in addition thereto, stating that the plaintiff herein, on the 31st day of December, 1894, brought suit against said bank for the sum of \$2,300, issued an attachment therein, and levied the same upon the property, real and personal, of said bank. On the said 2d day of January, 1895, over two-thirds of the members and stockholders of said bank file their consent and request for the appointment of said Headley as receiver. It also appears as a fact that said corporation was then insolvent. It also appears from recitals in the judgment and decree of the district court herein that the plaintiff in this cause appeared in said suit by its attorney, and then and there in open court consented and requested that said Headley be appointed receiver as aforesaid; that said plaintiff was one of the largest creditors of said Farmers' Bank of Moscow. Upon consideration of said petition and facts appearing in said cause, the said E. R. Headley was appointed a receiver therein, with instructions to take possession of all the property and assets of said Farmers' Bank of Moscow, and take charge of all the business of said bank, and conduct it in such manner as will be for the best interest of the stockholders and creditors of said bank, subject at all times to the orders of the court. It further appears that by virtue of said order of said district court the said receiver so appointed has taken possession of the property and assets of said bank, and now holds the same, subject to the order of said district court. To the said order and decree of the said district court the plaintiff herein then and there excepted, and brings the action of the said district court to this court by writ of certiorari for review, and asks to have the action of the said district court annulled and set aside for want of jurisdiction.

Forney, Smith, Moore & Winfree, for plaintiff. James E. Babb, Sweet & Steele, and Geo. W. Goode, for defendant.

MORGAN, C. J. (after stating the facts). This was an application for a dissolution of the corporation, the Farmers' Bank of Moscow, under sections 5185-5187 of the Revised Statutes of Idaho. All the requirements of said sections seem to have been complied with. The application is in writing, is vol-

untary, was resolved upon by a two-thirds vote of all the stockholders and members of the corporation, was signed by a majority of the board of trustees and the cashier of said corporation, and was duly verified. The application was proper, under said statutes. No order of dissolution has yet been entered, and none can be, until notice is given as required by section 5188, Rev. St. Idaho. A receiver has been appointed to take charge of the assets of the corporation and settle up its affairs. This action is authorized by subdivision 5 of section 4329, Rev. St. Idaho, which states that "a receiver may be appointed by the court in which an action is pending or has passed to judgment"; "In the case where a corporation has been dissolved or is insolvent, or in imminent danger of insolvency," etc. An action for the dissolution of this corporation is pending. It abundantly appears by the admitted facts that said corporation was at the time insolvent, or in imminent danger of insolvency. Appellant states in its petition that it presented its certificate of deposit to said bank for payment on the 31st of December, 1894, and payment was refused; and that thereupon appellant commenced suit against said bank, issued its attachment, and levied upon the property of said bank, including the bank building. As a result thereof, the said bank closed its doors, being unable to meet its obligations.

There could hardly be more convincing evidence of insolvency or imminent danger of insolvency of a bank than that it should fail to pay due obligations on presentation, and close its doors, cease to do business in the regular way, or at all, and file a petition for dissolution. The appointment of a receiver was fully authorized, under the circumstances by the statutes above quoted. No notice of the application for dissolution of the corporation has been given, for the reason that the time for such notice to be given had not yet arrived when this petition for review was presented; and no order of dissolution can be made until this notice is given in accordance with section 5188, Rev. St. The cases quoted by appellant are not similar. In the French Bank Case, 53 Cal. 550, the application for the appointment of a receiver and for dissolution of the corporation was made by a private individual, a creditor of the bank, and was resisted by the corporation. The court says: "There is no statute which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver." In the case at bar the action for dissolution was not commenced by a private person, but by the officers of the bank, duly authorized by a two-thirds vote of the stockholders and mem-

bers of the corporation, substantially in accordance with the statutes. The judgment of the lower court is affirmed, with costs to respondent.

SULLIVAN and HUSTON, JJ., concur.

(16 Mont. 117)

MONTANA LUMBER & MANUFACTURING CO. v. OBELISK MINING & CONCENTRATING CO.

(Supreme Court of Montana. April 29, 1895.)

REMAND ON APPEAL—PROCEDURE.

Where, on appeal, the lower court is directed to modify its judgment, it has no discretion in the matter.

Appeal from district court, Jefferson county; Frank Showers, Judge.

Action by the Montana Lumber & Manufacturing Company against the Obelisk Mining & Concentrating Company. From the judgment, plaintiff and defendant both appealed, and the judgment was modified. 37 Pac. 897. On a remittitur to the district court, the court declined to modify the judgment as ordered, and plaintiff appeals. Modification ordered.

Walsh & Newman, for appellant. Corbett & Wellcome, for respondent.

DE WITT, J. This is the same case as that decided by this court September 24, 1894, reported in 37 Pac. 897. In the opinion on the former appeal we said: "If this was a case where some particular piece of machinery had been added to a mill owned and leased along with the mine, it would, of course, be proper to restrict the lien for such machinery to that which was added by the lessee, and such ruling would be in conformity with the views here expressed, because it is here held that the lien for things furnished the lessee cannot extend to the interest or estate of the lessor; but there is no contention in this case that any of the improvements upon which plaintiff sought to have its lien foreclosed, or any part of the same, existed on said premises, and was owned by the lessors, Hight & Fairfield, when they leased said premises. There is no denial that the improvements described in plaintiff's lien were wholly added to the leased premises by the lessee; and, if that be true, the same are subject to plaintiff's lien. The judgment should therefore be modified by decreeing the foreclosure of plaintiff's lien upon the structures described therein, and shown to have been placed on said property entirely by the lessee. The cause is therefore remanded for modification of the judgment in conformity with the views herein expressed. Judgment modified." On the remittitur to the district court, the court declined to modify the judgment by including in the property upon which the lien was to be foreclosed a certain boiler and engine. That boiler and engine were some of the improvements described in plaintiff's lien. It

was the law of the case, as decided by the former appeal, that there was no denial that these improvements were wholly added to the leased premises by the lessee. It was also the law of the case, as then decided, that those improvements were subject to plaintiff's lien. We do not understand that it is possible that the district court would refuse to follow the directions of this court; nor do we understand how it is possible that the opinion of this court, as formerly expressed, could have been misunderstood. The district court is now instructed to do that which it was ordered to do in the former opinion, namely, to modify its original judgment by including the said boiler and engine in the property upon which the lien is to be enforced. Remittitur forthwith.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 38)

LAVELL et al. v. FROST.

(Supreme Court of Montana. April 29, 1895.)
DEATH OF DEFENDANT—ABATEMENT—STATUTE OF
FRAUDS—ORDER—CONSIDERATION.

1. Where the complaint is filed before defendant's death, though the summons has not been served, the action survives, under Code Civ. Proc. § 22, and must be defended by his representatives.

2. An oral acceptance of an order is not within the statute of frauds.

3. An agreement not to file a lien on an owner's lot is a good consideration for his acceptance of an order.

4. An order was drawn by a firm of contractors, in favor of plaintiffs, on defendants' intestate, for \$428. Defendants, to disprove an oral acceptance thereof, offered to show that the order was given to plaintiffs in liquidation of an indebtedness of the contractors to plaintiffs, which plaintiffs claimed was due for materials furnished by them in a house built by the contractors for defendants' intestate; that the material so furnished did not exceed \$150, and that that amount had been paid; and that the balance claimed was for materials furnished by plaintiffs to the contractors for houses other than defendant's. *Held*, that the evidence was competent to establish the fact that no acceptance was made.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action on bill of exchange by Geoffrey Lavell et al. against Hattie Frost. From a judgment for plaintiffs, defendant appeals. Reversed.

This is an action upon a bill of exchange, called by the witnesses an "order." It appears that a firm by the name of McGuire & Anderson repaired a house for one James W. Frost, the defendant's intestate. It is claimed by the plaintiffs that McGuire & Anderson owing them for lumber which went into the Frost house, and Frost owing McGuire & Anderson for their services, the latter gave an order upon Frost to pay the plaintiffs \$428, which order Frost accepted. The order was in writing. The acceptance by Frost, if any, was oral. It was claimed

by plaintiffs that there had been a payment of \$150 by Frost upon the order. The acceptance of the order by Frost was denied by the defendant, she contending that the payment of \$150 by her intestate to the Lavells was in full for all that was owing McGuire & Anderson. Frost died after the complaint was filed, and the present defendant, his administratrix, was substituted in his stead. Verdict and judgment were for plaintiffs for \$278,—the balance on the order after deducting the payment of \$150.

F. T. McBride, for appellant. John W. Cotter and Robinson & Stapleton, for respondents.

DE WITT, J. (after stating the facts). It does not appear whether Frost was served with summons before his death, but the action was commenced before his death. An action is commenced by filing a complaint. Code Civ. Proc. § 86. "An action or defense shall not abate by the death of a party, but shall survive and be maintained by his representatives." *Id.* § 22. The administratrix of Frost, the present defendant, was substituted, and the action proceeded against her. The plaintiffs presented their claim to the administratrix after the death of James Frost. Prob. Prac. Act, § 150. Appellant claims that, as the acceptance of the order by Frost was not in writing, it cannot be relied upon by respondents, because it was a promise to answer for the debt, default, or miscarriage of another. Comp. St. p. 652, § 223. But the acceptance of the order was not the promise to pay the debt of another. As far as Frost's acceptance was concerned, if there were any, it was simply to pay his own debt, if anything; that is, the debt which he is alleged to have owed to McGuire & Anderson. If he accepted the order, he simply agreed to pay his own debt to those persons, to wit, Lavell Bros., to whom his creditors, to wit, McGuire & Anderson, requested him to pay such debt.

It was claimed that there was no consideration for the Frost acceptance. The Lavells furnished materials for the Frost house. It appeared in evidence that they threatened to file a lien upon the real estate. We are of opinion that there was evidence tending to show that the Lavells agreed not to file the lien, in consideration of Frost's accepting the order. It is not contended but this was a good consideration, if it were the fact, and, as remarked, there was evidence tending to show that it was the fact.

So far, as we are of opinion, there was no error in the case. But we now come to the consideration of a point wherein we are of opinion that the court did err. As noted above, the plaintiffs relied wholly upon an oral acceptance of the order by Frost. Their employes testified to such oral acceptance, and payment by Frost of \$150 on the order. The defendants then offered to introduce tes-

timony which may be summarized as follows: They called McGuire, of the firm of McGuire & Anderson, and wished to prove by him the contract between Frost and his firm. Their offer was for the following purpose, and they proposed to prove the following facts, namely: The amount of extras which were put upon the house by McGuire & Anderson, and that Frost's full contract price was \$1,645, and that when the extras were put in the \$150 which was paid to the Lavells was full payment for the extras, and that there was no other indebtedness to McGuire & Anderson, and that the bill of the Lavells for lumber, for which the order was made, was for material used in houses other than Frost's. They offered to prove by this witness that, when Frost paid \$150 to the Lavells, he had fully paid to McGuire & Anderson the whole contract price and the extras. They offered to prove that McGuire & Anderson were building other houses and doing work for other parties at the same time when they were working for Frost. They offered to prove that the material for such other houses and buildings was part of the material which went to make up the balance of the \$428 for which the McGuire & Anderson order was made. They offered to prove that certain items in the bill for which the order was drawn went into certain other specified buildings. To this whole testimony objection was made by the plaintiffs, and sustained by the court. We are of opinion that, under the circumstances of this case, the testimony was competent. It might have been different if there had been a written acceptance by Frost. But the acceptance relied upon was oral only. The evidence rejected tended to show that, at the time when Frost was alleged to have orally accepted an order for \$428 drawn by McGuire & Anderson, he in fact owed McGuire & Anderson only about \$150. If such were the facts, they certainly tended to show that Frost would not be likely to accept an order for \$428, when he owed only \$150; and, as the whole matter of the acceptance of the order rested in parol only, we think the rejected testimony was competent. This view is further supported by the fact that one of plaintiffs' own witnesses, the person who received the payment of the \$150, testified that Frost said, when he paid it, that he did not know whether he ought to pay it to the Lavells. The court said, in refusing to receive this testimony, "I shall refuse to admit any evidence except that this order was not accepted, or that Frost did not agree to pay it." As remarked above, if Frost's acceptance had been in writing, the situation might have been different; but, it being oral, we think that the testimony offered tended to show just that which the court said it would accept testimony upon, namely, that Frost did not accept the order, or agree to pay it. The offered testi-

mony certainly tended to show that fact. The judgment is reversed, and the case is remanded for new trial. Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

(6 Colo. A. 25)

BRITISH-AMERICAN ASSUR. CO. v. COOPER.¹

(Court of Appeals of Colorado. March 11, 1895.)

CONTRACT OF INSURANCE — AGENT ACTING FOR BOTH PARTIES—CANCELLATION OF POLICY.

1. A contract of insurance entered into by one acting as agent for both the insurer and insured may be avoided by either party if, at the time of the contract, he did not know of such person's agency for the other party, or has not, with a full knowledge of the facts, ratified it.

2. Evidence showing a right to avoid a policy of insurance is inadmissible under a denial by defendant that it ever insured plaintiff.

3. One acting as agent for leasing and collecting rents of a building, when directed by the owner to insure it, informed him that he was agent for several insurance companies. The owner then directed him, without specifying the amount of insurance or designating the company, to insure in one of his companies; and the agent issued a policy of one of these companies, and paid the premium out of rents which he held as agent of insured. *Held*, that he acted only as agent of the insurance company.

4. The appointment of one as agent to procure insurance does not authorize him to accept notice of cancellation of the policy procured by him under such authority.

Appeal from Arapahoe county court.

Action by Job A. Cooper against the British-American Assurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Sylvester G. Williams, for appellant. Pattison, Edsall & Hobson (E. E. Whitted, of counsel), for appellee.

THOMSON, J. Action on policy of insurance against loss by fire. Judgment for plaintiff, from which defendant appeals. The answer of appellant (defendant below) contained four defenses. By the first it denied that it ever insured the plaintiff. By the fourth it denied that the plaintiff had complied with the conditions and requirements of the policy. The second is as follows: "And, further answering, defendant says that the policy of insurance of defendant company alleged to have been issued to the plaintiff was not a valid contract of insurance, because of the following facts, to wit: That said policy was issued by the firm of Schwanbeck & Wile, local agents of defendant, and at the town of Creede, in the state of Colorado. And, upon information and belief, defendant says that, at the time said policy was so issued, the said Schwanbeck & Wile were duly-authorized general agents of the plaintiff herein in respect to the property sought to be so insured, with general charge and supervision thereof, and duly authorized in the premises,

¹ Rehearing denied April 8, 1895.

and charged, among other things, with the duty and authority to have said property insured, and to deal fully with respect to the insurance thereon; that said Schwanbeck & Wile, then and there assuming to act in the double relation and capacity of agent for the plaintiff and as agent for the defendant in the same transaction, wrote said policy of insurance; that thereafter, and at all times prior to the 18th day of May, 1892, said policy remained in the possession of said Schwanbeck & Wile; that on or about the 13th day of May, 1892, the defendant, then and there believing that said policy had been duly and properly issued, and believing that the same was then in full force and effect, caused said policy to be canceled in accordance with the terms and conditions thereof, and long prior to the destruction of said property, viz. on or about the 18th day of May, as aforesaid, the policy was duly surrendered and returned to defendant; that not until after the alleged destruction of said property did defendant have knowledge of the fact that said Schwanbeck & Wile were the agents of the plaintiff herein." To this defense a demurrer was sustained for insufficiency.

We think the court erred in sustaining the demurrer. It is distinctly stated in this answer that, in effecting the insurance, Schwanbeck & Wile were the agents of both parties to the transaction. They were the local agents of the defendant at Creede, and authorized to act in its behalf. They were also the general agents of the plaintiff, fully empowered to act for him in procuring insurance upon his property; and in pursuance of their authority to procure insurance for him, and of their authority to write policies for the defendant, this policy was written. They, therefore, as agents of the plaintiff, contracted with themselves, as agents of the defendant, for the insurance which is the subject of this action. If the averments of this answer are true,—and the demurrer admits that they are,—they constitute a complete defense. The views of contracting parties are supposed to be in conflict. During the negotiation the interest of each is uppermost in his own mind, and his efforts are directed to securing a recognition of that interest. If he acts by agent, he is entitled to the exclusive services of the agent in the transaction, and to the full benefit of the agent's judgment and ability in making terms with the other party. It is manifest that, where the same person assumes to act for both parties to a bargain, he takes upon himself duties which are incompatible. If he is honest, leaving out of consideration any unconscious bias which might incline him towards one or the other side, the utmost that can be expected of him is impartiality; but impartiality is exactly the qualification which is inconsistent with agency. The agent is chosen to represent the interest of his principal against the hos-

tile interest which he is to meet. He cannot discharge his duty and be impartial. It is therefore impossible for a person acting in the same transaction for two opposing parties to perform his duty to both; and a contract made by him in this double capacity may be avoided by either party, unless it was so made by his express authority, or unless, with full knowledge of the facts, he afterwards ratified it. And it is not necessary, for the purpose of avoiding it, that the contract should be tainted with fraud, or be disadvantageous to the complaining party. His right to repudiate it grows out of the nature of the transaction itself, and is not connected with any question of fraud or of benefit or detriment which might accrue from it to him. *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132; *Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408; *Lee v. Smith*, 84 Mo. 304; 1 May, Ins. § 125; *Mechem, Ag.* § 67.

The following is the third defense: "For further answer, defendant says that said policy contained the following condition and stipulation, viz.: 'This policy shall be canceled at any time at the request of the assured; or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void, or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium.' That in accordance with the condition of said policy, and more than five days prior to said fire, to wit, on or about the 13th day of May, 1892, the defendant gave due notice to plaintiff of the cancellation of the said policy, and returned to the plaintiff the pro rata premium for the unexpired term of said policy. That on or about the 18th day of May, 1892, the plaintiff delivered and surrendered said canceled policy to the defendant." The plaintiff replied, denying the allegations concerning the cancellation of the policy. The cause was then submitted to the court upon an agreed statement of facts, of which the following is the substance: The plaintiff having contracted for the erection of the building which was the subject of the insurance, it was constructed by the contractor under the supervision of Schwanbeck & Wile, who were real-estate agents, and the cost of the building was paid through them. After its completion Schwanbeck & Wile were employed by the plaintiff as his agents to lease it to tenants and collect the rents, and they remained such agents until its destruction by fire. Prior to its completion, the plaintiff directed Schwanbeck & Wile to cause it to be insured against loss by fire as soon as it should be completed; but, upon being informed by them

that they were themselves insurance agents, he authorized them to insure it in companies which they represented, without designating the companies or specifying the amount of insurance desired. When the building was completed, Schwanbeck & Wile did not insure it in any of the companies then represented by them, but a short time afterwards, having been appointed local agents at Creede of the defendant company, they insured it with the defendant, and issued the policy in suit, whereby the defendant, in consideration of a premium of \$50, agreed to insure the plaintiff against loss or damage by fire to the building to the amount of \$500 for the period of one year. The premium was paid by Schwanbeck & Wile out of rents collected by them as plaintiff's agents. The premium rate was determined by the Underwriters' Union, of which the defendant was a member. The policy contained the condition and stipulation concerning cancellation which is set forth in the answer. The policy, after it was issued, remained in the possession of Schwanbeck & Wile, and was never actually delivered to the plaintiff. About two months after the issuance of the policy, H. T. Lamey, the general agent and manager of the defendant for Colorado, having his headquarters in Denver, sent a communication to Schwanbeck & Wile, informing them that instructions had been received from the home office to close the Creede agency, and cancel all outstanding insurance, and directing them at once to issue the five days' notice of cancellation to the persons insured required by the terms of the policy, so that all existing risks might be canceled. He also forwarded to them the unearned portions of the premiums which had been paid. The communication and the money were duly received by Schwanbeck & Wile, who thereupon indorsed the policy in controversy "Canceled," and caused it to be returned to Lamey, who then stamped it "Canceled," and transmitted it to the home office. No notice of this proceeding was ever given to the plaintiff. The plaintiff never received the return premium, nor was he credited with it upon any account or statement rendered to him by Schwanbeck & Wile. They claimed to have held it for the purpose of obtaining other insurance in place of that alleged to have been canceled, but no other insurance was ever procured. The premises were afterwards totally destroyed by fire. The plaintiff did not know until after the fire that his building was insured with the defendant, or that any attempt at cancellation of the policy had been made. The relations existing between the plaintiff and Schwanbeck & Wile were unknown to the defendant or its general agent. After the fire, the plaintiff, learning that his property had been insured with the defendant, made due proof of loss, but the defendant refused to recognize the policy as being in force, or to pay any portion of the loss. It was stipulated that the facts admitted should be consid-

ered only as they might be legally relevant to the issues as they then stood, the third defense being out of the case.

The denial by the defendant that it ever insured the plaintiff amounts, at most, to a denial of the execution of the policy, and is not sufficient in itself to admit proof of facts or circumstances which would give the defendant the right to avoid the policy after it was executed. Therefore, the only question for consideration is whether the facts stated amount to a cancellation of the policy. It is contended in behalf of the defendant that, in the insurance transaction, Schwanbeck & Wile were the agents of the plaintiff, and that, therefore, notice to them was notice to the plaintiff. The general doctrine that the knowledge of an agent pertaining to business which he is authorized to transact, obtained while he is engaged in its transaction, or while his authority in relation to it exists, is the knowledge of the principal, cannot be questioned. However, peculiar conditions may exist to which it would not apply. The first question here is, do the agreed facts bring Schwanbeck & Wile, in their relation to the plaintiff, within the rule as stated? And, second, if so, how is the application of the rule affected by the relations which they at the same time sustained to the defendant?

1. The statement shows that Schwanbeck & Wile at first acted for the plaintiff in overlooking the construction of his building, and that afterwards, upon its completion, they were employed by him to lease it and collect the rents. They thus became the plaintiff's agents, but only for certain specified purposes; and, outside of this defined authority, they were not, by virtue of such employment, his representatives. Without further power, they could do no act in relation to insurance by which he would be bound. But, while the building was in process of construction, he directed them to have it insured as soon as it reached completion. If they had acted upon this order, they would have done so as his agents. But the authority given was limited to the procuring of insurance. By its terms it extended no further, and upon causing the building to be insured, their authority would have been exhausted, and their agency in that particular at an end, so that no subsequent notice to them in relation to the insurance would have bound the plaintiff, or affected him in the slightest degree. See *Grace v. Insurance Co.*, 100 U. S. 278, 3 Sup. Ct. 207. But this instruction was not carried out. After it was given, they informed him that they were insurance agents, representing insurance companies, and he then instructed them to insure the building in their own companies. In conformity with this last direction, they placed the insurance, which is the subject of this suit, in the defendant company, as its agents. Instead of procuring insurance from the outside upon the plaintiff's building, they insured it themselves. Now, in what degree did this last order constitute them his agents

in the insurance transaction? It seems to us to amount to nothing more than an application to them, as insurance agents, for insurance upon his property. If he had directed a firm of agents with whom he had no business connection to insure his building in one of their companies, and they had complied with his instruction, he would, of course, be bound by their act, because he had authorized it; but it can hardly be said that he would thereby have constituted them his agents, any more than he would have made the company his agent if he had gone to the home office, and left the same order there. And, disembarassing this case of an agency which did in fact exist, but which did not in any manner concern insurance or involve Schwanbeck & Wile in any obligation inconsistent with their duty to the defendant, we are unable to discover anything in the plaintiff's direction more than an informal application for insurance, in conforming to which they acted solely as the defendant's agents. It is true that the plaintiff did not specify the amount of insurance which he desired, nor designate the companies in which it should be placed; but we do not understand how these facts can affect the situation. Being without instruction as to amount, they must have exercised their own discretion in fixing it; and, there being nothing in the record from which a contrary inference can be drawn, it is conclusively presumed that they exercised that discretion in the interest of their company, and as its agents. In applying to them as insurance agents, it does not matter that he did not name any company, or that he did not even know its name. It was through them as agents that the insurance was sought, and when, in pursuance of the application, they issued the policy in suit, the act which they performed was the act of the defendant. Neither can any valid argument be based upon the retention of the policy by Schwanbeck & Wile. If they had been his general agents in matters of insurance, effecting new insurance, and procuring renewals, in their discretion, and having the custody of his insurance papers, a different case would be presented. But no such relationship existed. They owed the same duty to him that they owed to any other applicant. When the policy was executed and the premium paid, the contract was completed, the policy belonged to him, he was entitled to it upon demand, and the law regards it as having been delivered. 1 May, Ins. § 60. The payment of the premium out of money in their hands belonging to him is equally without significance. It is the fact, and not the mode, of payment, which is material. 2 May, Ins. §§ 345, 345a. Upon a careful examination of the record and the briefs of counsel, we are forced to the conclusion that Schwanbeck & Wile were not the agents of the plaintiff so as to render service upon them, after the policy was executed, of any notice to which he was entitled, effective for any purpose.

2. But if we concede the contention of counsel that Schwanbeck & Wile were the agents of the plaintiff, and continued to represent him until the alleged cancellation, we do not see wherein the defendant's case is in the least strengthened. They were the agents of the defendant. If they were also the agents of the plaintiff, they were acting in the double capacity of agents for both parties; and the same objection exists to every act done by them in that double capacity. If they could not make a valid contract with themselves, they could not make a valid service of notice upon themselves. They were instructed, as agents of the defendant, to give the proper notice, and if they issued the notice as the defendant's agents, and served it upon themselves as the plaintiff's agents, the act was void. The same reasons that would invalidate the contract of insurance would invalidate the notice. *Insurance Co. v. Raden*, 87 Ala. 311, 5 South. 876. It is our opinion that there was no cancellation of the policy.

The agreed statement was made solely with reference to the pleadings as they stood after the demurrer was sustained. What evidence would have been brought forward by the defendant in support of its third answer, if that had been suffered to stand, of course we do not know; but, having charged that its agents were also the agents of the insured, the defendant was entitled to a trial upon the question thus presented; and, because of the error in sustaining the demurrer, the judgment will be reversed and remanded, with leave to the plaintiff to reply to the rejected answer. Reversed.

(8 Colo. App. 170)

SOLOMON v. SALLY.

(Court of Appeals of Colorado. April 8, 1895.)

PRESUMPTIONS ON APPEAL — ATTACHMENT — RELEASE OF PROPERTY — BILL OF EXCEPTIONS.

1. In the absence of a bill of exceptions to an order denying a motion to strike out the traverse to an affidavit in attachment, it is presumed that the traverse was sufficient.

2. A defendant in attachment may turn over to the levying officer sufficient money to satisfy the claim and costs, to abide the suit, in order to release the property seized.

3. It will be presumed that, on the trial of an issue raised by a traverse of an attachment, everything affecting the attachment and the parties' rights thereunder was inquired into, and that the order dissolving the attachment was warranted by the facts.

4. Exceptions can be preserved only by a bill of exceptions.

Appeal from Arapahoe county court.

Attachment by Joseph Solomon against E. A. Sally. From a judgment for defendant, plaintiff appeals. Affirmed.

Alfred Muller, for appellant. J. E. Robinson, for appellee.

THOMSON, J. Solomon commenced an action against Sally, before a justice of the peace, to recover an indebtedness of \$95, and

caused a writ of attachment to be issued, by virtue of which certain property of the defendant was seized. The return of the constable recites the levy, and the release of the attached property upon payment to the justice of \$105. The affidavit in attachment was traversed, and a trial of the issue thus made was had, resulting in the dissolution of the attachment. Judgment was rendered in plaintiff's favor upon his cause of action. The plaintiff appealed the cause to the county court. The money deposited with the justice followed the appeal. In the county court the defendant moved for leave to file a forthcoming bond, and for an order releasing the money deposited, upon the filing of the bond, and by agreement of counsel for the respective parties this motion was set for hearing. Afterwards, by agreement of parties, the hearing was postponed to a subsequent time. On the day fixed by the last order the plaintiff filed a motion, stating that it was based on "the returns and writs in the case," to strike out the traverse of the affidavit in attachment, for the reason that it was irrelevant and immaterial. No action appears to have been taken upon defendant's application for leave to file a forthcoming bond. A trial was had of the issue made by the traverse, which resulted in an order dissolving the attachment, and judgment against the plaintiff for costs. Judgment was then given in his favor for the amount of his claim. This appeal is from the judgment against the plaintiff upon the attachment.

The appellant assigns for error the denial of his motion to strike out the traverse to the affidavit in attachment, and the judgment against him upon the issue made by the traverse. There is no bill of exceptions in the record, and we do not know upon what evidence the court sustained the traverse. We must therefore assume that it was sufficient. The motion to strike, upon its face, is not predicated upon any tangible reasons. Those assigned are that the traverse is irrelevant and immaterial, but it is simply a denial of the grounds of attachment set forth in the affidavit, and is therefore both relevant and material. In counsel's argument, however, he sets forth the reasons in full why, in his opinion, the motion should have been sustained. These are that the statutory method of releasing attached property is by the giving of a forthcoming bond, that money cannot be received in lieu of a bond, and that its payment to the justice, and the resultant release of the property, was a conclusive admission of every fact necessary to the recovery of the judgment and the sustaining of the attachment. The difficulty here is that the record seems to justify an inference that the money was not intended to take the place of a bond, or to be applied in payment of any judgment which might be rendered, but as a substitute for the property itself, and that by virtue of the arrangement under which it was deposited the writ of attachment oper-

ated upon it, instead of the property. There is no reason why a defendant, if he does not desire his property seized and taken into the custody of an officer, may not turn over sufficient money to satisfy the claim and costs, and have it subjected to the writ to abide the decision upon the attachment. The subsequent proceedings indicate that this was the purpose for which the money was deposited, and that the plaintiff acquiesced in its substitution for the property. The proceedings before the justice were conducted upon the hypothesis that it was the money which was attached, and the first time this was questioned by the plaintiff was in the county court, after the defendant moved to release it. If the question was a proper subject of investigation upon such a motion, it could have been investigated as well in the trial of the issue made upon the affidavit for attachment; and it will be presumed that at that trial everything was inquired into affecting the attachment, and the rights of the parties under it, and that the order dissolving the attachment was warranted by the facts. We would therefore not feel authorized to disturb the judgment, even if exceptions had been preserved to the rulings complained of. There should have been exceptions to the order dissolving the attachment, and the final judgment against the plaintiff for costs. Exceptions can be preserved only by bill of exceptions. *Burnell v. Wachtel*, 4 Colo. App. 536, 36 Pac. 887. There is nothing of the kind here, and therefore we could not review the judgment, even if the evidence were before us. The judgment will be affirmed. Affirmed.

(6 Colo. App. 177)

SMITH et al. v. RAMER.

(Court of Appeals of Colorado. April 8, 1895.)
RECEPTION OF EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. Where plaintiffs gave evidence as to the value of property involved in a suit, which was uncontradicted by defendant, error in rejecting additional testimony on plaintiffs' part on the same question was harmless.

2. Where plaintiffs were not entitled to any instruction regarding a rescission of the contract which they sought to avoid, an instruction given on that question, erroneous in law, does not constitute reversible error.

Error to Larimer county court.

Action by L. A. Smith and A. G. Smith against Rachel V. Ramer. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

E. A. Ballard, for plaintiffs in error. Robinson & Love, for defendant in error.

BISSELL, P. J. A brief statement of the facts will make plain this controversy. In October, 1892, Mrs. Ramer was the lessee and proprietor of the Tedmon House, in Ft. Collins. A little while before the day of the sale, L. A. Smith, who is the husband of the other coplaintiff, entered into negotiations

with Mrs. Ramer's husband with reference to the purchase of the lease, good will, and furniture in the house. They culminated in a purchase. The consideration was \$500 in cash, and \$1,000 evidenced by 10 promissory notes, maturing at regular intervals. At the time of the sale, Post, the agent of the hotel, went through the house with his inventory to see whether there still remained in the building what had been leased with the house to Mrs. Ramer. Smith's evidence shows that, within a day or two of the time when he took possession, he was advised by Post of the extent of the lessor's claims. Smith gave a good deal of evidence respecting Ramer's representations concerning what belonged to him, and the difference between what he got and what Ramer said his wife owned. It is not quite clear, though reasonably certain, that he had this information before the execution of the notes. If he did not, he had it immediately afterwards. The Smiths, however, remained in possession, and were in possession at the time of the bringing of the various suits, which will be referred to, and at the time this action was brought in the ensuing year. No offer had been made to cancel the trade or restore the goods or put the parties back into their original condition. The sale included not only part of the stuff in the hotel, but the lease and good will, and the Smiths received the benefit of sundry repairs which had been put on the place by Mrs. Ramer, and for which a monthly credit or rebate was given on the rent account. The notes were not paid at maturity, and Mrs. Ramer commenced suit on some of the notes. When the case reached the county court, the Smiths attempted to defend by an assertion of a counterclaim growing out of the transactions. There were some legal obstacles to the practice, and the litigation ultimately came to this court. It is wholly unnecessary to refer to that litigation, since the principle of it is not involved here. Afterwards this suit was brought in the county court. Its basis is not easily understood. The complaint proceeds to state the transaction, alleges the false representations and the reliance placed on them by the plaintiffs, the inducements which they were to the trade, and alleges that on account of it the consideration had wholly failed, sets up the institution of three suits, and then prays that Mrs. Ramer's claim may be adjudged satisfied, and that she may be ordered to surrender the notes for cancellation.

The complaint was not happily conceived for the purpose of securing any relief. It could hardly be deemed other than an action to rescind the contract, in which event the complaint was wholly insufficient to justify a judgment in the plaintiffs' favor. There was no allegation that there had been an offer to restore the goods or put the parties in statu quo. If the action is to be treated as an action for rescission or the ground of a

total failure of consideration, it is wholly unsupported by the testimony. The plaintiffs got the lease, were regarded as tenants by the landlord, received the benefit of the rebate on the rental, which came from the repairs put on the house by Mrs. Ramer, and certainly got a part, and a very considerable part, of the property which Smith supposed he bought when he made the trade with Ramer. This shows that there was no such total failure of consideration as entitled the party to maintain this kind of an action. We do not undertake to say, if the consideration had partially failed, and the plaintiffs were able to sustain their allegations of fraud and misrepresentations to the satisfaction of the jury, they were not entitled to some relief. On this matter we do not express an opinion. We simply say the record does not support the action as now conceived.

Plaintiffs' counsel, who appears in this court, has evidently recognized the difficulty with the case, and has suggested for our consideration but two errors. One of these is based on a rejection of testimony. One witness was produced who was asked respecting the value of some of the property which was included in the sale. The court excluded this evidence, and the ruling is assigned as error. There are two reasons why the objection was not well based. One is, the witness had not shown himself competent to testify on the subject-matter inquired about; and the second is, the plaintiffs gave testimony about it, and the defendant offered nothing per contra. Had the evidence been admissible, no harm came to the plaintiffs by reason of its rejection.

The other error is based on the giving of an instruction which proceeded on the theory that this suit could not be maintained if the jury found, as a matter of fact, that the plaintiffs remained in possession of the property which they bought, and the hotel, without offering to surrender or cancel the contract which had been made. The instruction probably ought to have been modified by the insertion of some limitations which the law affixes to the right to rescind, and it would probably have been wise to have explained the difference between a rescission based on fraud and one which rests on a failure of consideration. Even though the instruction may be conceded to be defective, it would not operate to reverse the judgment. The plaintiffs were not entitled to any instruction regarding a rescission of contract, or one respecting the right to rescind an agreement because of the failure of consideration. Their action was not properly conceived with reference to either proposition. They were not entitled to recover upon the case as made, and an erroneous instruction will not, therefore, compel us to overturn the judgment.

We perceive no error in the record which compels us to disturb the judgment, and it will accordingly be affirmed. Affirmed.

(6 Colo. App. 285)

TAUGHENBAUGH et al. v. CLARK et al.

(Court of Appeals of Colorado. April 8, 1895.)

IRRIGATION—APPROPRIATIONS.

In 1885 appellants acquired priorities to an irrigating ditch. There was a second appropriation, by enlargement, in 1887. In the interim, water rights of others intervened. At the time of the first appropriation the appellants filed no plat or declaration of intention to appropriate a further quantity, nor was the construction of the enlargement prosecuted within a reasonable time. *Held*, the rights of the appellants to the second appropriation by enlargement are inferior to those whose rights attached in the interim.

Appeal from district court, Garfield county.

Proceeding by petition by George F. Taughenbaugh et al. against George A. Clark et al. to reform the decree of the district court in declaring priorities and quantities to which different ditches were entitled. From the decree made therein petitioners appeal. Affirmed.

This was a proceeding by petition in the district court by appellants, the owners of the irrigating ditch, to reform the decree of the district court in declaring priorities and quantities to which different ditches were entitled, made in May, 1888, and for a readjustment of water rights and redistribution of the water in the district. The ditch of appellants took water from Beaver creek. The defendants were proprietors of or interested in other ditches taking water from the same stream. In the original hearing and decree fixing the rights of each, Mr. Taylor (attorney for appellants) was appointed to examine the statute, and proceeded to hear and determine the respective rights of different parties. He found the ditch of appellants (numbered 24) contemplated appropriating water to the extent of 90 cubic feet per minute, July 28, 1885. First enlargement, March 3, 1887, increasing its capacity and water appropriated to 510 cubic feet per minute. The ditch of J. A. Clark (No. 27) to date from September 5, 1885, with 120 cubic feet of water per minute. The Smith ditch (No. 47) to date from November 20, 1886, with 70 cubic feet of water per minute. The Smith & Neve ditch (No. 48) to date from February 26, 1887, with 300 cubic feet of water per minute.

The following special findings in regard to the respective ditches became important in determining the rights of the different ditches, and so much of each as is deemed necessary are copied in extenso:

Ditch of appellants: "Work was commenced on or about July 28, 1885. Considerable work was done thereon during that season, and it was completed during the spring of 1886, and during that season about 20 acres of land was irrigated thereunder. The capacity of said ditch as originally built was about 90 cubic feet of water per minute of time; the dimensions thereof being from 8 to 10 inches deep, from 12 to 15 inches wide on bottom, with grade $\frac{3}{8}$ inch to the rod, to

which amount of water priority dates from July 28, 1885. That on or about March 3, 1887, the first enlargement thereon was commenced, whereby the dimensions of said ditch were increased to 2½ feet wide on bottom slope of banks, one to one, depth of water flow 18 inches, grade remaining the same as before; and the computed capacity was thereby increased 510 additional cubic feet of water per minute, to which amount of water priority dates from said March 3, 1887. That in 1887 was irrigated under said ditch about 65 acres. There are under said ditch about 740 acres practicably irrigable lands. The entire amount of water appropriated by said ditch at present time is 600 cubic feet per minute. That the construction, enlargement, and uses of the waters thereby appropriated have been pursued with reasonable diligence."

The special finding in regard to the J. A. Clark ditch and Smith ditch are not given.

Those relating to the Smith & Neve ditch are as follows: "Work was commenced on said ditch on or about the 26th day of February, A. D. 1887, and was completed during that year. The dimensions of said ditch are estimated at 2½ feet on bottom; slope of banks one to one; depth of water flow, 1 ft.; grade 6 inches to the 100 feet; capacity computed at 100 cubic feet of water per minute, to which amount priority dates from said time. The work of constructing said ditch has, under the circumstances of this case, been pursued with reasonable diligence. There are about 25 acres of feasible irrigable lands under said ditch."

The findings of the referee appear to have been adopted by the district court, and the decrees of that court in regard to the rights of appellants' ditch and those of the Smith & Neve ditch (between which the principal controversy seems to exist) were as follows:

Appellants' ditch: "And it is hereby adjudged and decreed that there be allowed to flow into said ditch from said creek, for the use aforesaid, and for the benefit of the parties lawfully entitled thereto, under and by virtue of the appropriation by original construction priority No. 34, so much water as will flow into said ditch, it being estimated at from 12 to 15 inches wide on bottom, slope of banks one to one, depth of water flow 8 to 10 inches, with grade of $\frac{3}{8}$ inch to the rod, computed at 90 cubic feet of water per minute of time. And that there be further allowed to flow into said ditch as aforesaid, for the use and benefit aforesaid, under and by virtue of the appropriation by first enlargement priority No. 66, so much additional water as will flow in said ditch from said creek, it being estimated at 2½ feet wide on bottom, depth of water flow 18 inches, slope of banks and grade remaining the same, computed at 510 cubic feet of water per minute. The whole amount of water to which the ditch is at present entitled is 600 feet per minute of time. Provid-

ed, that 520 cubic feet of water per minute of said appropriation shall only be granted and allowed to flow into said ditch from said creek for the use and benefit aforesaid in proportion as said parties shall increase their feasibly irrigable lands thereunder over and above the amount of 65 acres in the ratio of 60 cubic feet of water per minute to 50 acres of such additional lands. And provided further, that said increase of said additional lands, and the user of the said proportionate additional amounts of water appropriated therefor thereon, be made by said parties with reasonable diligence."

The Smith & Neve ditch: "That said ditch is entitled to priority No. 65. * * * And it is hereby adjudged and decreed that there be allowed to flow into said ditch from said creek, for the use aforesaid, and for the benefit of the parties lawfully entitled thereto, under and by virtue of the appropriation by original construction priority No. 60, 300 cubic feet of water per minute: provided, that all of said appropriation shall only be granted and allowed to flow into said ditch from said creek for the use and benefit aforesaid, in proportion as said parties shall bring under practicable cultivation and increase their feasibly irrigable lands thereunder, in the ratio of 60 cubic feet of water per minute to 50 acres of such additional land: and provided further, that said increase of such additional lands, and the user of the said proportionate additional amount of water appropriated therefor thereon, be made by said parties with reasonable diligence."

The allegations in the petition are, in effect: That the original finding of the referee and the decree of the court based upon it were erroneous, in that it only allowed petitioners 90 cubic feet of water per minute in priority of appropriation and date of July, 1885, and that the amount going to make up the 528 cubic feet per minute was decreed as of the date of March 3, 1887, when it should have been made as of the earliest date (July, 1885); also that the date of March, 1887, was erroneously given and decreed as the date of the first enlargement of appellants' ditch, when it should have been of June 7, 1886. That by decree the Smith & Neve ditch was given priority No. 65 as of February 26, 1887, when it should have been of October 13, 1887. That the Smith ditch, which was given priority No. 63, of the date of November 20, 1886, with 70 cubic feet of water per minute, had not sufficient irrigable land under it to warrant an appropriation of over 20 cubic feet per minute. That such ditch had been but very little used by the owner, and was practically abandoned.

The respondents George A. Clark, and Josephine A. Clark filed an answer, denying the material allegations in the petition, and setting up affirmatively that petitioners' ditch, by its original appropriation and priority No. 34, as shown by the evidence taken before the referee, was not entitled to 90 cubic feet of

water per minute, or to more than 24 cubic feet of water.

There is no allegation in the petition charging any irregularity in the decree as far as the Clark ditch is concerned. Yet the owners of that are the only respondents and contestants, as shown by the pleadings. All that occurs in the petition is: "That the parties interested adversely to this application are [naming the owners of appellants' ditch and the Smith ditch, and the owners of the J. A. Clark ditch]." Much testimony was heard upon the trial pertaining to each of the ditches. The court found and decreed: First. That neither the petitioners nor respondents were entitled to have the former decree (May 5, 1888) in reference to appellants' (the Taughenbaugh) ditch modified, changed, or altered in any respect. Second. That the decree giving the Smith ditch 70 cubic feet of water per minute be modified, reducing the amount to 50 cubic feet per minute. Third. That the original appropriation of the Smith & Neve ditch, of 300 cubic feet per minute as of February 26, 1887, be reduced to 150 cubic feet, and that the remaining 150 feet per minute date from the enlargement of the ditch from October 13, 1887. A motion for a new hearing was denied, and appeal taken from the decree.

Edward T. Taylor, for appellants. John T. Shumate (H. T. Sale, of counsel), for appellees.

REED, P. J. (after stating the facts). The controversy in this case arose, as in many others all over the state, in claiming and decreeing a much greater quantity of water than the supply stream furnished. In nearly all decrees for water rights and the distribution of water no account was taken of the supply from which the water was to be drawn. Beaver creek, from which all the conflicting ditches were to be supplied, was of limited capacity, and the water allotted to either ditch would have exhausted it. There was very little conflict in the testimony. Most of it was directed to the ditch of appellants in an attempt to show that by virtue of its construction and appropriation of water it was entitled to a greater amount as its first priority of July 28, 1885, which was decreed to be 90 cubic feet per minute. The second appropriation by enlargement, of the date of March 3, 1887, was 420 cubic feet per minute, making the aggregate 510 cubic feet. The contention was not that the proprietors were entitled to more than the aggregate quantity, but that they were entitled to the full quantity under the first priority of July 28, 1885. The testimony in regard to the Smith & Neve ditch and the Smith ditch was very meager, and while, perhaps, sufficient to establish the date of commencement of construction, was hardly sufficient to establish the date of application of the water to the land, and the quantity the ditches car-

ried; while as to the Clark ditch there was no testimony. It appears to have been established by the evidence, and practically conceded, that appellants were the first to appropriate and apply the water of the stream. The finding of the court as to the facts, under the well-settled rule of this court, will not be reviewed. It appears to have been fully warranted by the evidence. The only question is whether, under the constitution, statutes, and state decisions, the court properly applied the law to the facts as found.

Appellants commenced construction at a point too far down stream to get the necessary fall. The ground was flat, and, by its loose, open, and rocky character, unfit to carry water. A small quantity was carried through it. For the first 1,200 feet the ditch was small and inadequate. From that point down it was dug larger, and by reason of greater fall was capable of carrying a large quantity, if not the entire volume claimed. Early in the spring of 1886 water was taken through the ditch; about 20 acres, under it, planted in crops, and irrigated. Work was done upon the ditch in the summer and fall and perhaps winter of 1886. In the spring of 1887 the head of the ditch was moved up the stream about 400 feet, to obtain necessary fall; a new ditch dug, about 1,200 or 1,400 feet long, intersecting and discharging into the original ditch. During the year 1887 three of the owners used water from the ditch, irrigating land variously estimated by different witnesses from 45 to 47 acres. In the interim, and before the change was made in the head and alignment of the ditch, the water rights of the Clark ditch (September 5, 1885), the Smith ditch (November 20, 1886), and Smith & Neve ditch (February 26, 1887) attached. In determining the amount of water appropriated by appellants we are not aided, but confused, by the declaration of the parties. It was not executed and verified until March 2, 1888; and is so at variance with the testimony of the same party, and the facts as established, that it is worse than none. It is said: The date of the appropriation of water by the original construction of said ditch is the 28th day of July, 1885, and the amount of water claimed by and under such construction is 30 cubic feet per second of time. The date of appropriation by enlargement of said ditch is of March, 1887, and the amount of water claimed by and under such enlargement is 20 cubic feet per second of time, and the capacity of the ditch at that date (1888) was stated to be 30 cubic feet per second, making the first appropriation and priority 1,800 cubic feet of water per minute, and by enlargement 1,200 cubic feet per minute, aggregating 3,000 cubic feet, when all that was attempted in proof was, from July 28, 1885, to March 3, 1887, 90 cubic feet per minute, with no ditch capacity for carrying it, and, after the last date, 510 cubic feet per minute. Upon the trial much

testimony was taken in regard to the intention of the parties at the time of the first appropriation. Such intention, unless established by notice or in some other public manner, could in no way be known to or control others wishing to take water from the same stream, and such intention could only be inferred or deduced (1) from the capacity of the ditch at its head and perhaps (2) the amount of irrigable land of the ditch proprietors upon which it could reasonably be supposed that they intended to apply it. By the testimony it was shown that at the time of the alleged appropriation in July, 1885, the only parties in interest and who had land to be covered by the ditch were George W. Taughenbaugh, John F. Taughenbaugh, and House. In the fall of that year W. A. Taughenbaugh located a claim. In the spring of 1886 F. M. Taughenbaugh located a claim. Alrod bought the claim of W. A. Taughenbaugh in the fall of 1887. At what time F. M. Taughenbaugh located his claim is not stated, but presumably in 1886, as we first hear of him as working on the ditch in that year. George W. Taughenbaugh testified: "Elrod bought in the ditch in the fall of 1887. He bought of W. A. Taughenbaugh, who came in, like my father, by enlargement right." He also testified that J. A. Taughenbaugh, House, and himself were the original owners; consequently the original appropriation could only have been for the irrigable land of those three, as it is expressly stated that the others came in under the enlargement, which was not made until the spring of 1887. Taking these facts, the intention of these parties at the time of the first appropriation and application cannot be extended so as to include parties who had neither interests in the ditch nor land upon which to apply water. That the later parties did not consider themselves entitled to any rights under the original appropriation, and also realized the inadequacy of the appropriation and the ditch as designed and excavated, is evidenced by the fact of the change and enlargement of the ditch in the spring of 1887. The court was warranted, under the law, in finding the original appropriation to have been only for the three claims, and the amount of water applied, previous to the spring of 1887, quite limited, both by the faulty construction of the ditch and the small number of acres upon which water was to be applied; and that it could not have exceeded, if it equaled, the claim of 90 feet per minute. The court was also warranted in finding that respondents' rights by appropriation antedated the appropriation of the later claimants, and that their rights had attached before an effort was made to enlarge the ditch and take the water.

The inequitable character of the claim that all present owners in the ditch should be decreed to have rights relating back to the date of the first appropriation and cutting

out intervening appropriators, becomes apparent. I shall not attempt to determine the question whether the undertaking by the three original proprietors was prosecuted with diligence, and completed within a reasonable time. All authorities agree that both are conditions precedent to the right to the use of water. "Appropriation is the intent to take, accompanied by some open, physical, demonstration of the intent, and for some valuable use." *Larimer Co. R. Co. v. People*, 8 Colo. 616, 9 Pac. 794; *Thomas v. Guirand*, 6 Colo. 533; *Reservoir Co. v. Southworth*, 13 Colo. 114, 21 Pac. 1028; *McDonald v. Mining Co.*, 13 Cal. 220. "To constitute a legal appropriation, the water must be applied within a reasonable time to some beneficial use; that is, the diversion ripens into a valid appropriation only when the water is utilized by the consumer." *Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 531, 21 Pac. 711; *Reservoir Co. v. Southworth*, 13 Colo. 115, 21 Pac. 1028. It was wisely and humanely said in *Siebert v. Frink*, 7 Colo. 154, 2 Pac. 901: "What shall constitute such reasonable time is a question of fact depending upon the circumstances connected with each particular case." Men of limited means, pioneers in a new territory, who have not only to "grub" and clear land, but erect houses, and provide means of living while making a home, should not be held to the same rule with those more favored, and having abundant capital. As long as the settler in the desert does not abandon, but continues in good faith to prosecute his construction of a ditch, and the application of water to his land, as rapidly as his means and circumstances will permit, he should be held to be within the limit of a "reasonable time." Nor should his incipient construction and application of water be held as the extent of the appropriation, when land requires clearing and grubbing to prepare it for cultivation. The law should not and does not require a man to apply water to 100 acres where he can only cultivate 10 acres. Hence the wisdom of statutory provisions requiring a claimant of water to file a plat and statement as public notice of intention and the extent of the right claimed. The diligent and enterprising pioneer who attempts to wrest a home from the arid desert should secure water rights adequate to his wants. In this instance no plat or declaration of intention appears to have been filed as a notice to others, but, as no question is raised in regard to it, it must be considered as waived.

Cross errors were filed by appellees, but the questions presented were those of fact, and seem to have been properly disposed of by the court. It cannot be said that the original allotment of 90 cubic feet of water to the three original claimants was excessive in quantity, or insufficient for the three farms. If the appropriation of the other ditches was excessive, the court very prop-

erly reduced them. If the water in appellants' ditch was not sufficient for all owners, the three original proprietors are entitled to priority in the distribution of the water, and the later comers must take as of the date of their appropriation, and suffer the consequences of delay as in all other cases where there is not an adequate supply of water. By reducing the volume of water allowed respondents' ditches, the ditch of appellants will practically get all the water to which it is entitled. The decree appears to have been just and equitable, and will be affirmed. Affirmed.

(6 Colo. App. 187)

NORTON v. YOUNG.

(Court of Appeals of Colorado. April 8, 1895.)

APPEAL TO DISTRICT COURT—WAIVER OF IRREGULARITIES—ACTION FOR TRESPASS—BREAKING DOWN FENCE.

1. Where a defendant, upon the overruling of his motion for the dismissal of an appeal from a judgment of nonsuit, taken without a motion made to set aside the nonsuit, as required by Sess. Laws 1885, p. 158, takes no exception to the ruling, and proceeds with his defense, without renewing his objection or standing on his motion, he waives the want of jurisdiction caused by failure to comply with the statute.

2. Where, in an action of trespass, the complaint alleges a title sufficient to sustain the action, and no issue is taken on it in the answer, plaintiff can recover without proof of title.

3. The fact that a fence inclosing land is not of the kind prescribed by statute will not defeat recovery by the owner against one who willfully breaks down the fence and injures the land.

Appeal from district court, Arapahoe county.

Action of trespass by S. P. Norton against Dewert E. Young. From a judgment for defendant, plaintiff appeals. Reversed.

Charles M. Garwood, for appellant. Ooe & Carpenter, for appellee.

BISSELL, J. This is an extraordinary judgment, for which no reason can be found in the record. In the late spring and summer of 1892 the appellant, Norton, was in possession of a section of land in Arapahoe county. During his occupancy the appellee owned a lot of sheep, which were either running in the vicinity, on unoccupied land, or were being moved between two different points. The land was inclosed with a fence made of three barbed wires of sufficient size and strength to turn sheep. The flock was in charge of a herder. The sheep were turned onto the land occupied by Norton, ate up the pasturage, and Norton sued for the damage. The case was first tried in the county court, where the plaintiff was nonsuited, and, without making a motion to set aside the nonsuit, according to the provisions of the act of 1885 (Sess. Laws 1885, p. 158), he took an appeal to the district court. The defendant there moved to dismiss it, and the court denied the motion. The record shows no exception taken to this action, but afterwards

the defendant went on with the regular prosecution of his defense, without renewing his objection or standing upon his motion. He introduced witnesses, made a motion for a nonsuit, and regularly appeared, as though there were no irregularities in the proceedings which brought him there. While the testimony was being introduced, the defendant objected to Norton's evidence of title to the land, although no issue respecting it was raised by the pleadings. It appeared that Norton was in possession, and there by virtue of some leasehold right given to him by the owners of the property. When Norton tried to prove the sheep were on the land and consumed the grass, the defendant objected, because the evidence disclosed the fence to be not a statutory or lawful fence as prescribed by the law. The court sustained this objection, and Norton then offered, while the witness was on the stand, to prove in such a form that the record fairly presents the matter for our consideration that the sheep did not break through, but that the fence was cut and torn down by the defendant and his herder, and the sheep turned onto the land deliberately for the purpose of pasturage. The court refused to hear the testimony, holding the proof inadmissible, because the fence which was destroyed was not a statutory fence. This statement practically decides the case, and the expression of the legal reasons on which our judgment is based is almost a matter of supererogation. The appellee asserts a lack of jurisdiction in the district court to hear and try the case, because it was brought there in disregard of the act of 1885. Under some circumstances this contention might be well based, and the party who took the case to the district court under such circumstances might be precluded from trying it in that forum. However this may be, no such case is presented by the present record, because it is clearly brought within the doctrine of waiver of this jurisdictional matter by the acts of the defendant in the district court. This is a court of general jurisdiction, and it acquired jurisdiction of the defendant by the procedure. *Railroad Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542; *Schoolfield v. Brunton* (Colo. Sup.) 36 Pac. 1103; *Canal Co. v. Fosdick* (Colo. Sup.) 39 Pac. 332.

The other positions taken by the appellee are equally without merit. The weakness of the plaintiff's proof respecting his title may be disregarded for two reasons: First, the title was sufficiently alleged in his complaint, and there was no issue taken on it in the answer. It must thus be true that the plaintiff had a right to recover, if he alleged a title which would sustain trespass. This he had done. A better reason is, trespass may be maintained by one who is in the occupancy of property as against a wrongdoer who has no better right. 2 Wat. Tresp. c. 5.

The only remaining matter urged upon our

attention is the anomalous defense that a party has a right to occupy another's land with his stock, cutting down his fences for the purpose, providing they are not lawful fences according to the statute. It is impossible to concede that the existence of a lawful fence is necessary to protect one's property against a willful trespasser, who breaks into an inclosure, and destroys his property. *Fugate v. Smith*, 4 Colo. App. 201, 35 Pac. 283. If Norton was able to prove that the defendant or his herder, or both of them, tore down the fence and turned in the sheep, he was entitled to recover for whatever damages he was able to prove he had sustained from the trespass. The judgment will be reversed, and the case remanded for a new trial. Reversed.

(6 Colo. App. 246)

BURLINGTON & M. R. R. CO. v. SHELTER.

(Court of Appeals of Colorado. April 8, 1895.)

ACTION AGAINST RAILROAD COMPANY — INJURIES TO STOCK—TIME OF TAKING EFFECT OF ACT.

In an action brought in May, 1893, to recover of a railroad company for stock killed in June, 1892, a charge submitting the case to the jury, under the provisions of an act which did not go into effect until July, 1893, making the killing of stock prima facie evidence of negligence, was error.

Appeal from Arapahoe county court.

Action by L. S. Shelter against the Burlington & Missouri River Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Wolcott & Valle and William W. Field, for appellant.

THOMSON, J. On the 21st day of June, 1892, a locomotive engine of the railroad company defendant, while being driven and propelled along its right of way within the corporate limits of the city of Denver, struck and killed a mule belonging to the plaintiff, which had strayed upon its track. This action was commenced on the 4th day of May, 1893. The evidence of negligence on the part of the defendant is unsatisfactory and doubtful, but the instructions given render an inquiry into its sufficiency unnecessary. The court gave the following, among other, instructions to the jury: "This is an action brought for the killing of stock. The law of this state is in the following words: 'The killing or injury of any animals by a railway company or corporation shall be prima facie evidence of the negligence of said railway company or corporation, and every railway company or corporation in this state, and every assignee or lessee thereof, shall be liable to pay to the owner the schedule value of all schedule stock killed, and the full value of each and every animal killed not scheduled, and all damages to each and every animal damaged by the engine or cars of such railway company or corporation in this state and every as-

signee and lessee thereof, unless the railway company or corporation or assignee or lessee thereof shall, by competent evidence, affirmatively show that such killing and wounding was not caused by the negligence of such railway company or corporation or assignee or lessee thereof.' The negligence of a railway company is presumed, or, in other words, the killing of the animal is *prima facie* evidence of negligence. It is necessary to show on its part the use of such ordinary skill and care in the operating of its road as would be employed by ordinarily careful and prudent men in the conduct of their own private business affairs." The jury returned a verdict for the plaintiff, upon which judgment was entered. The law quoted is section 2 of an act of the legislature approved April 8, 1893 (Sess. Laws 1893, p. 406). The act did not go into effect, and therefore was not the law, until July 7, 1893,—90 days after its passage. The animal was killed before the passage of the act, and the suit commenced before it went into effect. The action was therefore not brought under this act, and, there being no other statute in force which applied to it, the rights of the parties were governed by the rules of the common law. These cast upon the plaintiff the burden of proving that the killing of the animal was in consequence of the defendant's negligence, and, if there was any proof in that direction, the jury should have been so instructed. The instruction quoted reversed the rule applicable to the case, and was erroneous. The judgment will be reversed. Reversed.

(27 Or. 219)

RAYMOND v. FLAVEL et al.

(Supreme Court of Oregon. April 29, 1895.)

EQUITABLE SUIT—SUBMISSION OF ISSUE TO JURY—ADVERSE POSSESSION BY TRUSTEE—LACHES—BONA FIDE PURCHASER—NOTICE FROM COMMON REPUTATION.

1. Const. art. 1, § 17, providing that in all civil cases the right of trial by jury shall remain inviolate, guaranties such right only in cases in which it was demandable at common law.

2. Hill's Ann. Laws, § 396, providing that whenever, in an equity case, it becomes necessary or proper to inquire of any fact by the verdict of a jury, the court may direct a statement thereof, and a jury may be formed to inquire of the same, is merely declaratory of the common-law equitable procedure, and in such an action the submission of a question of fact to a jury is within the sound discretion of the court.

3. The question whether a person is precluded from equitable relief by the staleness of his demand is for the court, and not for a jury.

4. Where the trustee disavows his trust, and the cestui que trust has notice thereof, limitations begin to run, as against the cestui que trust, unless he is under statutory disability, or under influences superinduced by the trustee.

5. Under Hill's Ann. Laws, § 382, providing that a suit for the determination of "any right or claim to or interest in land" shall be deemed within the limitation provided for actions for the recovery of land, which is 10 years, a suit to hold a grantee taking with notice that his grantor is merely a mortgagee, though the conveyance to him was absolute, as a trustee *mala fide*, is barred in 10 years after a clear disavowal by

the grantee of the trust relation, and an adverse holding of the land.

6. Plaintiff deeded land absolutely, as security for a loan. Thirteen years later the grantee conveyed the land to the grantor's daughter, with notice of the trust. She and her grantees retained possession of the land, making valuable improvements thereon, for 19 years. Plaintiff, though he lived in the neighborhood,—part of the time with his daughter, and part of the time on public charity,—never asserted his title to the land. Neither the original grantee, nor those claiming under him, ever practiced any fraud to prevent plaintiff from asserting his claim. *Held*, that plaintiff was barred by his laches from seeking to have the original conveyance declared a mortgage.

7. One claiming under a bargain and sale deed, with covenant of warranty against all persons claiming under the grantor merely, is not precluded from claiming as a bona fide purchaser.

8. The fact that a person contemplating the purchase of certain land was told by a third person that if he did so he would have trouble with certain persons, and that the person from whom he intended to purchase the land had stolen it, does not affect his rights as a bona fide purchaser, since such remarks afford no tangible clew by which the purchaser could discover prior equities; he having paid full value for the land, and employed counsel to investigate the title.

9. Hill's Ann. Laws, § 776, subd. 12, providing that a person is presumed to be the owner of land from exercising acts of ownership over it, or from "common reputation," does not render common reputation as to the ownership of land constructive notice of the reputed owner's title, as against a purchaser who was living in a town five miles distant from the land.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

Action by George William Raymond against George C. Flavel and others. There was a decree for defendants, and plaintiff appeals. Affirmed.

This suit was instituted for the purpose of having defendant declared a trustee of certain real property, described as the S. ½ of the donation land claim of William W. Raymond and wife; being claim No. 44, Not. No. 7,926, in township 8 N., R. 10 W. of the Willamette meridian, in Clatsop county, Or. It is alleged: That on December 7, 1859, William W. Raymond, being then the owner of said premises, and the same having been sold under execution at sheriff's sale, and the time for redemption being about to expire, borrowed of one John Adair \$200, with which to satisfy said execution, and, for the purpose of securing Adair in the repayment thereof, executed to him a deed of general warranty for the premises, but that in fact said deed was intended as a mortgage, and that Adair never went into possession under said instrument. That Raymond paid off the loan in 1862, but that, in consequence of mutual dealings and confidence, no reconveyance was ever made. That on November 20, 1873, Adair executed in favor of Raymond's daughter, Martha A. Loomis, a deed of conveyance for said premises, to be held by her upon the same terms and conditions attached to the conveyance to him, but without any clause for possession, and without any warranty, except "against the lawful claims and

demands of all persons whomsoever claiming by, through, or under" him, and that Martha A. Loomis took with full knowledge of the facts, and upon the same trust under which Adair held. That possession of said land was not taken until February 3, 1886, when defendant entered. That on said 3d day of February, 1886, Martha A. Loomis and John Loomis, her husband, without the consent or knowledge of Raymond, sold, and by deed conveyed, the premises to defendant. That at the time of purchasing said land, and prior thereto, defendant had notice of Raymond's rights therein. That defendant was informed by George W. Raymond, the son of William W. Raymond, "that said land was his father's property, and that the said Loomis and wife had no right to sell the same; that said Loomis had not paid for his mother's half, and had stolen the title to his father's half from Adair." That at the time of said last-named conveyance, and for 12 years prior thereto, William W. Raymond was aged and decrepit, and incapacitated for business, which defendant well knew. That defendant and William W. Raymond have resided in Clatsop county since long prior to December 7, 1859, and ever since and up to February 3, 1886. That they were well acquainted, and lived within four miles of each other, in the same community. That up to 1875 there were but few residents in the community, and all were familiar with the affairs of each other. That Moses Rogers, the purchaser of the land at sheriff's sale, was the brother-in-law of defendant, and that defendant was fully aware of said sale and redemption, and of the execution of said deed to Adair, and knew that Adair had no claim to the real ownership of the premises. That all of said facts as to the title were matters of common reputation in the community, and that defendant had knowledge thereof. That since February 3, 1886, defendant has been in the adverse possession of the premises. That the value of the use and occupation thereof for six years is \$2,000 per annum, and that, since the last-named date, William W. Raymond has sold and conveyed to plaintiff all his right, title, and interest in said premises. The defendant, after denying all the material allegations of the complaint, except the execution of the several deeds, the relationship of Moses Rogers, and the adverse possession of defendant for the six years last past, set up other and further and separate answers, under which the following defenses are claimed: First, that the defendant is a purchaser in good faith, for value, and without notice of the alleged equities of plaintiff; second, that plaintiff's suit is barred by the statute of limitations; and, third, that plaintiff's claim is stale, and equity will not now interfere to grant relief, for the reason that plaintiff has been guilty of gross laches in prosecuting the same,—and prays a decree that he is the owner in fee of said premises, and that his title be quieted.

Trial was had before the court, and the following are its findings, as conclusions of fact: "(1) That on the 7th day of December, 1859, and prior thereto, one William W. Raymond, as donor under the act of the congress of the United States commonly called the 'Donation Act,' was the owner in fee simple, and in possession, of the south half of the donation land claim of said William W. Raymond and his wife, Almira Raymond, situated in Clatsop county, state of Oregon, and being claim No. 44, and notification No. 7,926, and being parts of sections nine and sixteen in township No. eight north, of range number ten west of the Willamette meridian. (2) That on the 7th day of September, 1859, the said William W. Raymond, being indebted to one John Adair in the sum of two hundred dollars, in order to secure the payment of the same, by a deed absolute on its face, and in form and by its terms a general warranty deed, executed and acknowledged, granted, bargained, sold, and conveyed the said south half of the said donation land claim to the said John Adair; and the said deed of conveyance was on the 21st day of January, 1860, duly filed for record and recorded in the office of the county clerk of said Clatsop county, at page 393 of Book B, record of deeds for said county of Clatsop, and has ever since been so of record. (3) That, at the time said conveyance of said premises was made by said William W. Raymond to said John Adair, it was understood and agreed between them that, when said Raymond should pay the said John Adair the said sum of two hundred dollars and interest, he, the said John Adair, would convey to him the said premises, or would convey the same to any member of his, said Raymond's, family, that he, said Raymond, might request him to. (4) That thereafter, on the 20th day of November, 1873, the said John Adair still held the title to the said south half of said donation land claim under the conveyance to him aforesaid, and on said day, in consideration of the sum of two hundred dollars to him paid by one John Loomis and Martha A. Loomis, his wife, by a deed duly executed and acknowledged, granted, bargained, sold, and conveyed the said south half of said donation claim unto the said Martha A. Loomis, and she, the said Martha A. Loomis, immediately went into possession thereof, and of the whole thereof, claiming to own the same, and did occupy the same, and the whole thereof, openly, notoriously, and adversely to the claim of the plaintiff and the said William W. Raymond and all other persons, from the said 20th day of November, 1873, up to the date that she and her said husband conveyed the same to the defendant, to wit, the 3d day of November, 1886. (5) That, at the time the said Martha A. Loomis purchased the said premises as aforesaid, she had notice of the claim of the said William W. Raymond; but she denied the same,

and held the said premises adversely, as aforesaid. (6) That the said deed of conveyance from the said John Adair to said Martha A. Loomis was on the 20th day of November, 1873, duly filed for record, and recorded at page 798 of Book C, record of deeds for the said county of Clatsop. (7) That thereafter, on the 3d day of November, 1886, the said Martha A. Loomis and her said husband, John Loomis, in consideration of the sum of nine thousand dollars to them paid by the defendant George Flavel, by a deed duly executed and acknowledged, and in form a general warranty deed, granted, bargained, sold, and conveyed unto the said defendant George Flavel, his heirs and assigns forever, the whole of the said donation land claim of said William W. Raymond and his wife, Almira, above described, including the said south half of said claim, and the price so paid was the actual value thereof at said time; and the said defendant thereupon, and on the said 3d day of November, 1886, went into the actual possession of the whole of the said donation land claim, and continued from that date, up to the commencement of this suit, to hold and occupy the same openly, notoriously, and adversely to the claim of the plaintiff and said William W. Raymond and all other persons; and said defendant, after he so purchased the said premises, and prior to the commencement of this suit, and prior to receiving any notice whatever of the claim of the said plaintiff or the said William W. Raymond to the said south half of the said claim, or to any part thereof, made valuable and permanent improvements on the said south half of the said claim, at an expense of, and of the value of, not less than ten thousand dollars. (8) That at the time the defendant George Flavel purchased the said premises, namely, on said 3d day of November, 1886, he had not, nor had he at any time prior thereto, any notice, knowledge, information, or belief whatever that the said William W. Raymond claimed any right, title, or interest whatever in or to said south half of said donation land claim, or in or to any part thereof, or made any claim thereto; but he was a bona fide purchaser thereof, without any notice of any adverse claim. (9) That on the — day of —, 1892, the said William W. Raymond, by a deed executed and acknowledged in due form, granted, bargained, sold, and conveyed unto the plaintiff all his right, title, and interest in and to the said south half of said donation land claim. (10) That the said William W. Raymond, from the time that the said Martha A. Loomis purchased the said premises and entered into the possession thereof as aforesaid, had notice of the fact that she had entered into possession thereof under the said deed from said John Adair to herself, and was occupying and possessing the same openly, notoriously, and adversely, and claiming to own the same

as against him and all others; but he made no attempt at any time to recover the said premises, or any part thereof, but he stated on the witness stand that he did not do so as he did not want to have any trouble or litigation, and knew he would have to have trouble and litigation to recover the land from said Martha A. Loomis. (11) That there is no evidence that said William W. Raymond ever paid the claim of said John Adair, or ever had any settlement with him, or ever endeavored to secure a reconveyance of the premises."

The court further finds, as conclusions of law: "(1) That the claim of the plaintiff and his grantor, William W. Raymond, to the said south half of the donation land claim of Wm. W. Raymond and his wife, Almira Raymond, above described, is barred by the statute of limitations, and that by reason thereof the plaintiff has no right, title, or interest, or claim thereto, or in or to any part thereof. (2) That whatever equity or right the said Wm. W. Raymond or the plaintiff, through him, ever had, is, by lapse of time, become stale; and it would be inequitable to recognize or permit the same to be asserted at this date, and for that reason the plaintiff is not entitled to recover in this suit. (3) That the defendant George Flavel was and is a bona fide purchaser, without notice of any adverse claim of the said premises in controversy, and for that reason the plaintiff is not entitled to recover in this suit. (4) That the defendant is the owner in fee simple of the premises in controversy, and that the plaintiff's complaint herein should be dismissed, and defendant should have a decree quieting his title to the said premises, as against said plaintiff, and for his costs and disbursements."

On July 27, 1892, before any testimony was taken in the case, the plaintiff filed a motion asking the court to frame issues of fact (1) as to whether, at the time of, or prior to, the conveyance from Martha A. Loomis and John Loomis to the defendant, he (defendant) had any notice or knowledge of the rights of William W. Raymond in the premises, or of any facts or circumstances sufficient to put a reasonable man upon inquiry; and (2) whether the statute of limitations had run against the rights of plaintiff,—and that a jury be called to inquire of the same. This motion was overruled by order of the court, which order is assigned as error. The conveyances from William W. Raymond to John Adair, and from Martha A. Loomis and husband to George Flavel, are in the ordinary form of deeds, containing the usual covenants of warranty. The deed from John Adair and wife to Martha A. Loomis is as follows: "Know all men by these presents, that we, John Adair and Mary Ann Adair, his wife, in consideration of six hundred dollars to us paid by Martha A. Loomis, do hereby bargain, sell, and convey to said Martha A. Loomis, and

to her heirs and assigns forever, the following described parcel of real estate, * * * together with the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining, and also all our estate, right, title, and interest at law and in equity therein or thereto, including dower or claim of dower; to have and to hold the same to the said Martha A. Loomis, and to her heirs and assigns forever. And we do covenant with the said Martha A. Loomis and her legal representatives forever that the said real estate is free from all incumbrances, and that we will, and our heirs, executors, and administrators shall, warrant and defend the same to the said Martha A. Loomis, and to her heirs and assigns forever, against the lawful claims and demands of all persons whatever claiming by, through, or under us." Other evidence, sufficient for a full understanding of the points decided, will appear in the opinion. The decree was for defendant, and plaintiff appeals.

Sidney Dell, for appellant. C. W. Fulton and W. P. Lord, for respondents.

WOLVERTON, J. (after stating the facts). The important questions involved in this case have been presented upon both sides with great force and rare ability, and received our careful attention. It is stoutly contended by appellant that the refusal of the court below to award an issue, and direct a jury to be formed to try certain questions of fact, was reversible error. The basis for the contention is that the evidence is conflicting and doubtful, and, while it is admitted that the awarding of an issue lies in the discretion of the court, yet it is claimed that it is a judicial discretion, and subject to review by this court. It is further claimed that this is a right guaranteed by the state constitution, and prescribed by statute. Article 1, § 17, Const. Or., provides, "In all civil cases the right of trial by jury shall remain inviolate." This section simply secures to suitors the right of trial by jury in all cases where it was demandable at common law. It is not an enlargement, but a guaranty of the right as it existed before the adoption of the constitution. It applies to equitable suits to the extent only that in whatever instances a jury was demandable as of right, at common law, it is demandable now, under the constitution, but the class of cases formerly determined by the court alone is not affected by it. *Tribou v. Stowbridge*, 7 Or. 156; *Davis v. Dyer*, 62 N. H. 235, 237; *Le Guen v. Gouverneur*, 1 Johns. Cas. 500, 501. By section 396, Hill's Ann. Laws Or., it is provided: "Both issues of law and of fact shall be tried by the court, unless referred. Whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, the court may direct a statement thereof, and that a jury be formed to inquire of the same. The statement shall be tried as an issue of fact in an action, and the

verdict may be read as evidence on the trial of the suit." This section is declaratory of the common-law equitable procedure in the manner of trial, and of the necessity and propriety of calling a jury for the determination of certain issuable facts; and hence we must look to the law as it stood before the constitution and the statute, to ascertain in what instances, under what circumstances, and for the determination of what issues, a commission will issue for the interposition of a jury. It was the privilege of an heir at law, and of a rector or vicar, in suits to establish a will or modus, to demand a hearing before a jury, and this was granted as a matter of right. Aside from these exceptions, the granting of an issue, at common law, was discretionary with the court. It was not demandable as of right. *Adams, Eq. *377*; 2 *Daniell, Ch. Prac. § 1080*; *Barton v. Barbour*, 104 U. S. 133; *Railway Co. v. Wade*, 91 Cal. 456, 27 Pac. 768; *Koons v. Blanton*, 129 Ind. 393, 27 N. E. 334; *Brown v. Circuit Judge*, 75 Mich. 274, 42 N. W. 827. Formerly an issue was directed only in cases where there was a want of evidence, or wherein the testimony was contradictory, or so nearly balanced that it was necessary to have an open and rigid cross-examination of the witnesses, where they could be seen and heard by the jury, who were to decide the questions of fact submitted to them. The awarding of an issue was merely a matter of discretion, resting with the chancellor, and its purpose was to inform his conscience. *Clark v. Society*, 45 N. H. 336; *Townsend v. Graves*, 3 Paige, 456; 2 *Daniell, Ch. Prac. *1078*; *State v. Churchill*, 48 Ark. 436, 3 S. W. 352, 880. But in all cases where there was sufficient evidence to satisfy the conscience of the chancellor, or where the evidence, though somewhat conflicting and contradictory, unless it created a doubt in his mind, by reason whereof he was unable to come to a conclusion of his own, an issue was not directed. *Reed v. Cliffe's Heirs*, 9 Grat. 136; *Le Guen v. Gouverneur*, supra; *Newark & N. Y. R. Co. v. Mayor, etc., of Newark*, 23 N. J. Eq. 515; *Harding v. Handy*, 11 Wheat. 125; 2 *Daniell, Ch. Prac. *1072, 1073*; *Beaumont v. Bramley*, 1 Turn. & R. 55. The propriety of granting or refusing an issue for a jury is always spoken of in the books as being a matter resting within the sound discretion of the court. Its exercise is judicial in its nature, and was, at common law, subject to appeal. *Beasley, C. J., in Newark & N. Y. R. Co. v. Mayor, etc., of Newark*, supra, says, "The course of this practice has been uniform, and its propriety has never been, so far as I can learn, judicially criticised or questioned." The doctrine is recognized and stated by Mr. Daniell (2 *Daniell, Ch. Prac. *1075*) as follows: "Except in cases of an heir at law, or of a rector or vicar, who were entitled to issues as a matter of right, the granting of an issue by a court of equity was entirely a matter of discretion in the court, which it would not, how-

ever, exercise without due deliberation, and a mistake in the exercise of which was a just ground of appeal; and therefore, if the court refused an issue, and the court of appeals thought that the contrary decision would have been a sounder exercise of discretion, it would rectify the order of the court below accordingly; and so, when the house of lords thought that the court below had directed issues improperly, it reversed the order directing the issues, and remitted the cause, with directions to the judge to decide upon the matter himself." Lord Chancellor Eldon, in *Hampson v. Hampson*, 3 Ves. & B. 42, says: "Courts of equity have an original jurisdiction, which, I agree, must be exercised according to a sound discretion, to try questions of fact without the intervention of a jury; and which aid is sought, according to the common expression, for the purpose of informing the conscience of the court. I agree that a mistake in refusing to send the case to a jury is a just ground of appeal, if the court of appeal should think that the contrary decision would have been a sounder exercise of discretion; but it is a competent exercise of the authority and duty of the court in every case, and throughout every case, and in every stage, to determine, according to its discretion, whether it does or not want that assistance." This doctrine has been recognized, and the practice followed, in this country. Radcliff, J., in *Le Guen v. Gouverneur*, supra, says: "The chancellor is, constitutionally, the judge both of law and fact. Whether the institution of such a court be expedient or wise is not now the subject of inquiry. Its power is established, and the trial by jury is there unknown. However excellent that mode of trial may be, it is not the right of any party seeking his remedy in that court to demand it. It ought regularly to proceed from the chancellor himself, to inform his own conscience, where the evidence is insufficient for that purpose; and, even with respect to him, it is not a power to be exercised at pleasure, and depending on arbitrary discretion." See, also, *Chase v. Winans*, 59 Md. 479. So that at common law, in cases of equitable cognizance, where the evidence was so conflicting and contradictory as to render the true state of affairs doubtful and uncertain, a jury was not demandable by either party as of right. It was a matter residing within the sound discretion of the court whether an issue for a jury should be awarded. This was a legal discretion, not to be arbitrarily exercised, and was the subject of review by the appellate courts. And under our statute cited above this doctrine must govern as to suits in equity in this state. It is the abuse of discretion that is reviewable, that it may not be arbitrarily exercised. The language of the statute is that "whenever it becomes necessary or proper to inquire of a fact by the verdict of a jury the court may direct a statement," etc. It is in many instances proper to call a jury when it is not necessary

or legally essential to do so. It is legally essential only when the law requires it.

Such being the state of the law, it remains for us to determine whether there was an abuse of discretion by the court below in not directing a statement for a jury upon the two questions,—one of notice, and the other of the statute of limitations. It may be doubted whether plaintiff's motion for a statement was made at the proper time (see *Chase v. Winans*, supra), but our views as to other aspects of the case render this question unimportant. We have very carefully read and considered the whole of the voluminous testimony brought here, and have given especial attention to the portions thereof bearing upon the question of notice and the statute of limitations; and, while there is some conflict in the statements of witnesses, we are left in no appreciable doubt as to the correctness of the findings of the court below. Without restating or discussing the evidence here, let it suffice to say we are fully satisfied that the presiding judge, exercising his functions as a chancellor in a case like this, of purely equitable cognizance, did not arbitrarily refuse the plaintiff's request for a jury, and hence there was no abuse of discretion in such refusal. But, even if it were otherwise, this case would not be sent back for the purpose of having it go to a jury, for the very cogent reason that we have elsewhere determined that plaintiff is pursuing a stale demand, which is a question of law, and not of fact for a jury, and it could make no kind of difference how a jury should find upon the question sought to be submitted to their consideration. *Newark & N. Y. R. Co. v. Mayor, etc., of Newark*, supra. It is doubtless true that, as a general proposition, express or continuing trusts, clearly established, do not come within the statute of limitations, for the reason, as stated by Lord Redesdale (*Hovenden v. Lord Annesley*, 2 Sch. & L. 607), "If a trustee is in possession, and does not execute his trust, and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title"; or, as put by Strahan, C.J., in *Manaudas v. Mann* (Or.) 30 Pac. 422, "The trustee holds in right of the cestui que trust, and * * * as long as he holds in that right his possession cannot be hostile or adverse." Mr. Wood, in his work on Limitations (volume 2, § 200), says, "This doctrine rests upon the case of *Cholmondeley v. Lord Clinton*, 2 Jac. & W. 171, * * * and has been universally adopted in the courts of this country, as well as in England, ever since." See, also, *Perry, Trusts*, § 863; *Speidel v. Henricl*, 120 U. S. 386, 7 Sup. Ct. 610; *Decouche v. Savetier*, 3 Johns. Ch. 214; *Seymour v. Freer*, 8 Wall. 202. "But," says Mr. Justice Gray in *Speidel v. Henricl*, "this rule is, in accordance with the reason on which it is founded, and

as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to this qualification: that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest, which is clearly and unequivocally made known to the cestui que trust, as when, for instance, such transactions take place between the trustee and the cestui que trust as would, in case of tenants in common, amount to an ouster of one of them by the other." See, also, *Perry, Trusts*, § 864; *Bacon v. Rives*, 106 U. S. 99, 107, 1 Sup. Ct. 3; *Phillippi v. Phillippe*, 115 U. S. 151, 5 Sup. Ct. 1181; *Otto v. Schlappkahl*, 57 Iowa, 228, 10 N. W. 651; *Janes v. Throckmorton*, 57 Cal. 388; *Hastie v. Aiken*, 67 Ala. 316; *Hubbell v. Medbury*, 53 N. Y. 98; *Ward v. Harvey* (Ind. Sup.) 12 N. E. 399; and *Decouche v. Savetier*, supra. It thus appears that where the trustee disavows his trust, and assumes complete ownership of the trust property, and treats it in such a manner and under circumstances as to give the cestui que trust actual or constructive notice that he has repudiated all trust relations, the statute attaches and begins to run, as against the cestui que trust, from that time, unless he is then under some statutory disability, or under influences superinduced by the trustee. Such a denial of the trust relations and the assertion of an adverse or hostile claim by the trustee is an abandonment of the fiduciary character in which he theretofore acted as to the property; and from the time that it is made to appear clearly that the cestui que trust had knowledge, either directly or indirectly by necessary implication, of the repudiation or adverse and hostile claim of the trustee, the statute begins to run, and if it continues for the statutory period the cestui que trust is barred. 2 Wood, Lim. § 212. *Ward v. Harvey*, supra, was a case where it was sought to charge the administrator with funds which he had received from the sale of lands of which his intestate held the title. It was contended by appellants that they had furnished part of the purchase money, and that a trust resulted in their favor. The court there say: "Conceding that when the land was acquired and title taken, as it was, by John Ward, in 1850, and that it was taken in trust, there can be no recovery, because the evidence shows that more than twenty years prior to the time that this action was brought there was an open disavowal of the trust. The evidence indeed shows more than a disavowal of the trust, for it shows that the appellants acquiesced in the intestate's assertion of title. There is evidence very clearly showing that the intestate treated the land as his own, and that the appellants dealt with him as the owner. Under this evidence there can be no recovery, for it is well settled that where there is a disavowal of the trust, and it is brought to the notice of the beneficiary,

the statute will run." *Hubbell v. Medbury* is a case where the trustee bought in lands held in trust by him at a foreclosure sale, and it was held that the statute began to run as soon as the trustee took possession in pursuance of the foreclosure sale, and "began openly and notoriously to occupy them as his own, asserting an individual right thereto." *Phillippi v. Phillippe*, supra, is much in point. The question came up on demurrer to a bill showing that Antonio Phillippi claimed as his own since 1856 the property alleged to have been bought with partnership or trust funds, the knowledge of which was brought home to Angelo M. Phillippi, the ancestor of plaintiff, but that from the year 1856 down to the death of Angelo, in 1874 (18 years), and down to the commencement of the suit, in 1879 (a period of 23 years), defendant had maintained his possession, and used and enjoyed as his own the property, and its issues and profits; during all the period up to his death, Angelo lived in the same town with defendant, in poverty, and some of the time in distress for want of means, but that defendant never paid to Angelo any part of the proceeds of the large property which the bill avers he was holding in trust. The court say: "There could be no clearer line of conduct on the part of Antonio Phillippe to show his repudiation of the alleged trust, and his claim of title to the alleged trust property; and all was, of necessity, known by Angelo." The statute of limitations in Alabama, where the cause of suit arose, was 20 years, and it was held that the plaintiff's suit was barred. By section 382, Hill's Ann. Laws Or., a suit for the determination of any right or claim to or interest in real property shall be deemed within the limitations provided for actions for the recovery of the possession of real property. Under this statute it has been held that the same period which will bar an action for the recovery of real property will bar a suit touching a claim or interest therein, which is 10 years. *Springer v. Young*, 14 Or. 285, 12 Pac. 400. So that a clear disavowal by the trustee of the trust relations, and an adverse or hostile holding of real property for a period of 10 years, the cestui que trust having had notice and knowledge thereof during the entire time, will bar a right of recovery, under our statute, by the cestui que trust.

It is further urged as an objection to plaintiff's recovery in this suit that his claim is stale, and that, aside from the statute of limitations, a court of equity should not lend its aid, at this time, by granting the relief demanded. In order to call into activity a court of equity, there must be an exercise of good conscience, good faith, and a reasonable diligence; and where time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continu-

ance, the court is passive, and does nothing, because of its inability to do complete justice. 2 Wood, Lim. § 214; Taylor v. Blair, 14 Mo. *437; Williams v. Society, 1 Ohio St. 494, 495; and Badger v. Badger, 2 Wall. 94. Both or either of these objections based upon the lapse of time are fatal to plaintiff's cause of suit.

On December 7, 1859, Gen. John Adair loaned to W. W. Raymond, the father of plaintiff, \$200, to secure the payment of which Raymond executed and delivered to Adair a deed to the premises in question. So it is found by the court below, and is probably correct, although the evidence upon which it is based is somewhat obscure and unsatisfactory. On November 20, 1873 (nearly 14 years thereafter), Adair executed and delivered a deed to the premises to Martha A. Loomis, the daughter of W. W. Raymond, for the consideration of \$600. Mrs. Loomis, with her husband, John Loomis, while living on a tract of land adjoining, took possession, and in about a year thereafter inclosed the same by a substantial inclosure. They continued in possession, making such use of the premises as it was capable of, until February 2, 1886 (more than 13 years), when they sold and conveyed them by deed to the defendant, who took immediate possession, and occupied the same up to the date of the commencement of this suit (July 15, 1892); so that more than 32½ years have elapsed since the transactions transpired by reason of which it is claimed the trust relations had their inception. Conceding that the deed to Adair was intended as a mortgage, he became, by reason thereof, a trustee of the legal title, by express understanding between the parties. It is claimed that Mrs. Loomis took from Adair with the express understanding that she should assume the trust obligations of Adair, but this is not proven, although it is apparent that she had knowledge of such obligations. Mrs. Loomis then took with notice of the trust, and became a trustee *ex mala fide*, or by implication or construction of law, and it has often been held that the statute of limitations will run against a resulting trust. This, however, we do not now decide. Mrs. Loomis' holding began to be adverse and hostile to that of W. W. Raymond from the time she took possession, and so continued to the date of her transfer to defendant, who continued in the adverse possession to the date of the commencement of this suit. There was a repudiation and disavowal by Mrs. Loomis of all trust relations, and a claim of absolute title and ownership by her, of which Raymond clearly had knowledge. "Where the trustee makes a conveyance of the trust property in breach of the trust, and his grantee continues to hold adversely, the statute applies." 2 Perry, Trusts, § 864. These facts make the statutory bar effectual. Beyond this, it appears that, during all the 32½ years inter-

vening from the time of the execution of the deed to Adair, W. W. Raymond lived in the immediate neighborhood, and part of the time with Mrs. Loomis, yet he never at any time asserted his alleged rights as a cestui que trust. Much of this time he lived in poverty, and upon the county and the charity of his neighbors. He himself testified that he did not broach the subject of settlement to his daughter or son-in-law for fear of disturbing the family relations of amity and friendship, and he certainly never did inform the defendant of his alleged claim. Nor is there a scintilla of testimony in the whole case to the effect that any of the grantees, from Gen. Adair down, have practiced any fraud or deception upon him to prevent the enforcement of his demand, or to lull him into silence and repose. The relations of the parties have greatly changed; witnesses have died; the defendant has made valuable improvements upon the land; and the land itself has greatly enhanced in value; so that equity cannot now do complete justice, as between the parties. Very similar were the facts attending the Philippi Case, and were held to constitute unwarranted laches. And so in this case Raymond has been guilty of laches, by reason of which his claim has become stale. A court of equity will not, at this late date, lend its aid to grant him or the plaintiff, who is his grantee, the relief demanded.

The question of notice, both actual and constructive, is involved in this inquiry. We have decided in a late case,—Bowman v. Metzger (Or.) 39 Pac. 3,—wherein it was sought to charge a purchaser of a promissory note before due with notice of infirmities in the title, that the question for the determination of the jury was whether Bowman purchased in good or bad faith, and that it was error for the court to instruct the jury that notice of facts and circumstances that a prudent man would take notice of and inquire about, and which, if followed up, would disclose the truth, was equivalent to notice. The principle is applicable here. Circumstances which one man might look upon with suspicion, and cause him to make careful inquiry concerning them, might escape the notice of another person, of equal prudence and caution; so that the incidental question of common prudence is not a safe criterion by which to determine a question of notice. It might be, and often is, a circumstance tending to show bad faith, as fraud or guilty knowledge may be imputed either by direct proof, or evidence of a circumstantial nature, the same as any other fact, but the real and ultimate question for determination is the *mala fides* of the transaction. If a person has actual notice of latent equities, and purchases notwithstanding, the presumption of *mala fides* is irresistible, or rather he takes the estate laden with the equities, and stands in no better position

than his grantor. The attempt to claim as an innocent purchaser is the fraud of which the owner of the equitable title may complain.

The deed from John Adair to Mrs. Martha A. Loomis, the defendant's immediate grantor, is a bargain and sale deed, with special covenants of warranty against the grantor's own acts. It is claimed that the effect of this deed—it appearing in defendant's chain of title—is to impute actual notice of outstanding equities. The doctrine contended for is that "the absence of the usual covenants of warranty of title in the conveyance to his immediate grantor is a warning of an outstanding equity to the purchaser, who has actual notice of such defect; and the burden of proof is on such purchaser to show consequent careful inquiry in good faith, and the receipt of a satisfactory explanation for such a defect. Otherwise he will be held to have actual notice of the equity." Many authorities hold to the doctrine that one taking and holding directly under a quitclaim deed cannot be considered a bona fide purchaser without notice of prior equities. Some hold that the legal effect of a quitclaim deed found in the chain of title is such as to impute notice to the purchaser. Such is the purport of the opinion of Mr. Justice Thayer, in which the other justices did not concur, in *Baker v. Woodward*, 12 Or. 3, 6 Pac. 173. The doctrine has since been restated in *Mortgage Co. v. Hutchinson*, 19 Or. 334, 24 Pac. 515, and alluded to in *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678. Other authorities sustain the position that one who purchases from another holding under a quitclaim deed cannot, by reason of that fact, claim to be a purchaser without notice, as limited and qualified by McIver, J., in *Aultman v. Utsey*, 34 S. C. 572, 13 S. E. 848. He says: "While we are not prepared at present to go to the full extent to which the doctrine has been carried by some of the cases, yet we are satisfied that the fact that the immediate grantor of the purchaser holds under a quitclaim deed is a circumstance well calculated to excite inquiry, which, if not pursued properly, will affect the purchaser with notice of every fact which such inquiry, pursued with due diligence, will disclose." From this case, and the case of *Merrill v. Hutchinson*, 45 Kan. 62, 25 Pac. 215, comes the doctrine of "warning," which the counsel for appellant so strenuously insists is applicable here. The latter case is one wherein the purchaser, Hutchinson, took under a quitclaim. The court says: "The form of the deed alone did not conclude Hutchinson, nor prevent him from becoming purchaser in good faith; it simply operated as a warning to him, and put him upon inquiry. It was his duty then to look further, and ascertain why the deed was made without covenants of warranty, and he took it loaded with such outstanding equities or interests as he might have discovered by the exercise of reasonable diligence." But in whatsoever

of these several phases this doctrine may have been announced, limited, and qualified, it is severely criticised and very much shaken by the strong and forcible reasoning and logic of Justices Field and Brewer in the cases of *Moelle v. Sherwood* and *U. S. v. California & O. Land Co.*, 148 U. S., found, respectively, at pages 21 and 31 and pages 426 and 458, 13 Sup. Ct. The doctrine of those cases is that "the receipt of a quitclaim does not, of itself, prevent a party from becoming a bona fide holder; and the doctrine expressed in many cases, that the grantee in such a deed cannot be treated as a bona fide purchaser, does not rest upon any sound principle." But we are not called upon here to declare the bona fides of a purchaser, whether holding under a quitclaim, or taking from one so holding, or taking upon finding a quitclaim in the chain of his title. The defendant took under a deed with full covenants of warranty, and his immediate grantor under a deed of bargain and sale, with special covenants of warranty against the acts of the grantor. The latter deed, as well as the former, binds and passes every estate or interest which the grantor may subsequently acquire. *Taggart v. Risley*, 4 Or. 235; *U. S. v. California & O. Land Co.*, supra. A deed of this nature purports to pass the whole estate, and the fact that it contains a limited warranty, or if it contained no warranty at all, could not, of itself, impute notice of prior or latent equities, nor would it operate as a warning to put the purchaser upon inquiry at his peril. No presumption of the want of bona fides in the purchaser is thus cast upon him, as the warranty forms no part of the conveyance, and a perfect title passes without it. *Taylor v. Harrison*, 47 Tex. 460; *Richardson v. Levi*, 67 Tex. 363, 3 S. W. 444; *Garrett v. Christopher*, 74 Tex. 453, 12 S. W. 67; *Snowden v. Tyler*, 21 Neb. 215, 31 N. W. 661; *Melkel v. Borders*, 129 Ind. 533, 29 N. E. 29; *Chapman v. Sims*, 53 Miss. 163; and *Moelle v. Sherwood*, supra. We have been cited to no authority holding that the doctrine contended for by the counsel for appellant is applicable to a deed of bargain and sale, such as we find in this record, and we believe none can be found.

It is next contended that defendant had, at the time of his purchase, actual notice of the equities of plaintiff's grantor. This is a question of fact, to be determined from the evidence. The evidence which it is claimed shows that Flavel had actual notice of W. W. Raymond's outstanding equity at the time of his purchase is as follows, as collated in the brief of counsel for appellant: John B. Morris testifies: "In January, 1886, Capt. Flavel and McGuire came there [to Tanzy Point]. * * * Captain asked me, 'Jack, do you know what my errand is?' and says, 'I am bargaining with Loomis about this place, but he says he would have nothing to do with it till we had fixed up things, because he heard I had a claim on the place.' * * * 'But,' says I, 'Capt. Flavel, if you purchase his

place, I am very much afraid you will have trouble with the Raymond folks some time or another,' and he didn't seem to take any heed of it at all. I told him that after I got outside, under a little willow tree near a cabin." G. W. Raymond testifies: "Late in 1885 I heard that Loomis was offering to sell the Raymond donation land claim to George Flavel. A short time before the deed, I went to see Flavel. * * * I told Capt. Flavel that Loomis had no rights there. It was down here on the street by the Occidental Hotel." Again he says: "I told him [McGuire] not to have anything to do with it; that Loomis had no rights there, that he had bought mother's half, and never paid for it, and was trying to steal the old man's altogether." Let it be assumed that McGuire was the agent of Flavel,—the evidence shows, however, that he was not,—and let it be further assumed that this conversation took place shortly prior to the execution and delivery of the deed by Loomis to Flavel. Is there enough in all this to charge Flavel with notice, or to superinduce inquiry, without which he could not complete the purchase with a conscience void of offense? The purchaser must have received information of facts tangible in their nature, and such as are capable of being verified by reasonable inquiry. Vague rumors and covert insinuations will not suffice. The reason is that such rumors and statements do not furnish any positive information, any tangible clew, by the aid of which he may commence and successfully pursue an inquiry, and thus discover the real truth. Such rumors and insinuations, therefore, do not bind the conscience. 2 Pom. Eq. §§ 597, 602; *Wilson v. McCullough*, 62 Am. Dec. 347. Morris testifies that he said to Flavel, "If you purchase this place I am very much afraid you will have trouble with the Raymond folks some time or another." And George Raymond states, at one time "I told Capt. Flavel that Loomis had no rights there," and McGuire, at another, "not to have anything to do with it; that Loomis had no rights there, but he had bought mother's half, and never paid for it, and was trying to steal the old man's altogether." Now, at the time of the purchase by defendant it is claimed that Mrs. Loomis was a trustee in regard to the title, and W. W. Raymond the cestui que trust, and that the deed under which Mrs. Loomis held the title was in reality a mortgage to secure a loan of long standing, the defeasance resting in parol. What is there in either of these assertions to afford Flavel a clew to this secret trust? That he might have trouble with the Raymond folks was possible, or might have been even probable, but it was not made apparent what fact would induce the trouble. And the assertion that Loomis had no rights there was surely not suggestive of a secret trust abiding in Mrs. Loomis for the benefit of Raymond. Nor was the assertion "that Loomis had no rights there," coupled with the one "that he

[Loomis] had bought mother's half, and never paid for it, and was trying to steal the old man's altogether," any more explicit as the statement of a fact which could be laid hold of, and which, when followed up, would lead directly to the discovery of this secret trust. The language is strong to assert that one person is trying to steal another's land, and one would infer that an attempt was being made to commit a grievous fraud. But from such an expression how is one going to find out of what the fraud consists? It would be fruitless to go to Loomis, and inquire of him if he was trying to steal the land, and it might well have been assumed that George Raymond told him all he knew about it. So that, taking the testimony in its strongest light, we find no suggestion of any fact of a tangible nature which bears any indication whatever of the existence of a secret trust connected with the deed, which was, in effect, but a mortgage incumbering the land which Flavel was about to buy. A court of equity acts upon the conscience, and it is upon the grounds of mala fides that a purchaser for value is affected with notice of a prior claim. The notice must be more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted, with respect to the existence of a prior right, as to make it fraudulent in him afterwards to take and hold the property. *Hall v. Livingston*, 3 Del. Ch. 348. This case cites several others, with facts very similar to the case at bar. It may be remarked, however, in passing, that the fact of these alleged warnings being given by the witnesses Morris and George Raymond to Flavel and McGuire is disputed by the latter, or at least to the extent of materially modifying and explaining their meaning and bearing. On the other hand, it has been proved beyond question that Flavel paid \$9,000 in cash for the land and some 40 head of cattle,—all that the land and cattle were worth; that before completing the purchase he took the precaution of having the record searched as to the land, and to procure the advice of an attorney skilled in such matters. He was also careful to see that a claim of John B. Morris against Loomis, which it was thought might incumber the land, was provided for, before he would consummate the purchase. Flavel found Loomis in full possession of the land, acting as owner thereof, and he himself took possession directly from Loomis. In all this we are unable to discover that Flavel acted in bad faith in any particular, and the evidence fully warrants the position that he was a purchaser in good faith, for value, and without notice of the secret equities of W. W. Raymond.

Two other questions remain to be noticed: (1) As to the "burden of proof"; and (2) as to "common reputation." It is asserted that, "upon proof of the equitable title of plaintiff, a defendant who relies upon the defense of being an innocent purchaser in good faith must set up the union of the legal title with a

superior equity, arising from the payment of the money and receiving the conveyance without notice, and with a clear conscience." This doctrine seems to be based upon good authority. See *Rhodes v. McGarry*, 19 Or. 222, 23 Pac. 971, and *Boone v. Chiles*, 10 Pet. 211. But the defendant has done, by his answer, precisely what the rule requires, and the evidence offered supports it.

It is further claimed that the court below was in error in excluding evidence as to common reputation of ownership of this land at and during the time that Gen. Adair held the deed thereto. The object of offering this proof was to charge Flavel with notice. The statute provides (section 776, subd. 12, Hill's Ann. Laws Or.) "that a person is (presumed to be) the owner of property from exercising acts of ownership over it or from common reputation of his ownership." This statement is an innovation upon the common law. Prior thereto it was incompetent to prove ownership by common reputation. *Wilson v. Maddock*, 5 Or. 480. It was also held in that case that "by this provision common reputation is placed on an equal footing with possession, as furnishing a presumption of ownership." Now, it is contended for this that, as possession is notice of ownership, common reputation of ownership serves the same purpose as to such notice. Whether this is so or not, reputation of ownership could hardly have effect to give notice to persons residing without the community in which the land was situated. It was shown that Capt. Flavel lived at Astoria, then quite a village, some five or six miles from the land, and by reason of this fact he was not likely to have become cognizant of such reputation, even if it was common in the community in which the land is situated. There was no error in excluding the testimony. The decree of the court below will be affirmed.

(27 Or. 188)

STATE v. LITTSCHKE.

(Supreme Court of Oregon. May 4, 1895.)

CRIMINAL LAW—FORMER JEOPARDY—EMBEZZLEMENT.

1. Hill's Ann. Laws, § 1338, providing that an acquittal "on the merits" is a bar to a second prosecution, though the indictment was defective in form or substance, does not render an acquittal by direction of the court, for defects in the indictment, a bar.

2. A bailee appropriating money intrusted to him by a thief is guilty of embezzling the same from the thief.

3. In a prosecution for embezzlement, evidence that the person intrusting the money to defendant had stolen it, and that the rightful owner had demanded the same from defendant, is admissible to show good faith on defendant's part in retaining the money.

Appeal from circuit court, Multnomah county; T. A. Stephens, Judge.

William Littschke was convicted of embezzlement, and appeals. Reversed.

John M. Gearin, for appellant. J. J. Fitzgerald, for respondent.

BEAN, C. J. This is an appeal from a judgment against the defendant upon his conviction of the crime of larceny by bailee. The indictment charges that on August 29, 1893, the defendant was in possession as bailee of \$525, the property of Elizabeth Hess, and while so in possession embezzled and feloniously converted the same to his own use. Issue was joined by the plea of not guilty and former acquittal. The latter defense is based upon the fact that defendant was placed on trial before a jury for the same offense on an indictment which did not state facts sufficient to constitute a crime, and for that reason, after the testimony for the state was in, the court directed the jury, on motion of the defendant, to find him not guilty, and upon the return of the verdict, as directed, the court further ordered the cause resubmitted to the grand jury, who subsequently returned the present indictment. It is conceded by the defendant that by the weight of authority an acquittal on an indictment which is fatally defective will not support a plea of former jeopardy, but the contention of his counsel is that this rule has been changed by section 1338, Hill's Ann. Laws, which provides that when a defendant is acquitted on the merits he is to be deemed acquitted of the same crime, notwithstanding a defect in form or substance in the indictment on which he was acquitted. This section only changes the rule so that when a criminal trial proceeds to verdict on the merits, and the defendant is acquitted, he may plead such acquittal in bar of a further prosecution for the same offense, although the indictment on which he was tried may have been defective either in form or substance. But the record here shows affirmatively that the defendant was not acquitted on the merits, nor was the question of his guilt or innocence submitted to the jury as a question of fact, but the verdict was directed by the court for the reason that the indictment did not state facts sufficient to constitute a crime; and hence the case does not come within the section referred to, and there was no error in charging the jury that upon a plea of former acquittal their verdict must be for the state.

The other assignment of error is directed to the refusal of the trial court to permit the defendant to show that the money which he is accused of embezzling did not belong to Elizabeth Hess, but had been stolen by her from one Theodore Liebe; that Liebe had demanded of him the possession thereof, and ordered and directed him not to pay it over to Mrs. Hess, and at the same time notified him that if he did he would be held responsible therefor. It does not appear from the indictment, nor very clearly from the bill of exceptions, that the defendant was the bailee of Mrs. Hess. But from the nature of the questions propounded to the witnesses by defendant's counsel, and the rulings of the court thereon, we assume that Mrs. Hess, while in possession of the money, delivered it to the defendant as her bailee, and that the evidence of-

ferred was excluded on the theory that her possession was sufficient to support the allegation of ownership in the indictment. If this assumption is correct, and the defendant, after having received the money from Mrs. Hess, as her bailee, feloniously, and with intent to steal, converted it to his own use, it would be immaterial whether Mrs. Hess had stolen the money or not, because, as said by Chief Justice Nelson, "possession of property in the thief is sufficient to make it the subject of larceny; and the title may be laid either in the owner or the thief. Thus, if A. steal goods from B., and C. afterwards steal the same goods from A., C. is a felon both as to A. and B." *Ward v. People*, 3 Hill, 398, and affirmed in 6 Hill, 144; 2 Bish. New Cr. Law, § 789; 1 Whart. Cr. Law (9th Ed.) § 945. But notwithstanding this rule the evidence was clearly competent on the question as to whether the money was in fact feloniously converted by the defendant to his own use, with an intent to steal it. A felonious intent is an essential ingredient of the crime charged in the indictment, and is always a question for the jury. Without a felonious and criminal intent on the part of the defendant, there could have been no crime, although there may have been a breach of trust, and although Liebe's claim to the money may constitute no defense in a civil action by Mrs. Hess to recover possession, because of the rule that a bailee cannot dispute the title of his bailor. But this is a criminal prosecution, and the conversion by the defendant must not only have been a tortious act, but it must have been with a felonious intention; and this, as we have already said, was a question of fact for the jury, under all the circumstances of the case. If he was the bailee of Mrs. Hess, and in good faith retains possession of the money, and refused to pay it over to her because of Liebe's claim and demand, but with no intention of converting it to his own use, he cannot be convicted of the crime charged in the indictment, because in such case there would be an entire absence of the felonious or criminal intent which is an essential ingredient of the crime. For this reason we think the evidence was competent, and the judgment must be reversed, and a new trial ordered.

(37 Or. 205)

KERN v. A. P. HOTALING CO.

(Supreme Court of Oregon. April 29, 1895.)

RELEASE OF MORTGAGE—TAKING NEW MORTGAGE—MISTAKE AS TO INTERVENING EQUITIES—RE-INSTATEMENT OF FORMER MORTGAGE.

Plaintiff made a deed of land, taking notes secured by mortgage for part of the price, both instruments being placed in escrow, and not delivered and recorded for seven weeks. Two days before the recording the purchaser made a deed to defendant to secure a loan. After the purchase-money notes were due, plaintiff placed them with a brokerage firm to collect or to renew, and the latter subsequently took a new note from the purchaser for the full amount due, running at a higher rate of interest than

the previous notes, and made payable to one of the brokerage firm as agent for plaintiff, and this, with a mortgage on the same land to secure it, was the next day transferred to plaintiff. The brokers who took the new note obtained an abstract of the title of the land subsequent to the old mortgage, and this showed a clear title, the abstractor having overlooked the deed to defendant. Relying on this abstract, and in ignorance of defendant's deed, plaintiff canceled his original mortgage. *Held* that, the mortgage having been discharged by mistake without negligence, and without affecting defendant's rights, the lien created by it should be restored.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by J. W. Kern against the A. P. Hotaling Company to have the cancellation of a mortgage set aside, to have same reinstated and foreclosed and declared a prior lien to that of defendant. From a decree in accordance with the prayer, defendant appeals. Affirmed.

Joseph Simon, for appellant. J. B. Cleland, for respondent.

WOLVERTON, J. This case arises out of the following state of facts: During the summer of 1890 the plaintiff negotiated with the defendant Frank Sperling, who was then the agent of the New York Life Insurance Company, for insurance on his life to the amount of \$50,000. Plaintiff at the same time sold to Sperling block 18 in Waverly tract, in Multnomah county, in consideration of the first payment of premium on said insurance, amounting to \$2,665, and a sum additional thereto of \$3,835. On September 13, 1890, plaintiff executed and acknowledged a deed to Sperling to said block 18, and three days thereafter Sperling executed and acknowledged a mortgage to plaintiff upon the same property to secure the payment of said sum of \$3,835. Two notes were given for the amount, bearing date as of June 24, 1890,—one for the sum of \$2,665, payable in one year, and the other for \$1,170, in two years from date,—both bearing interest at 8 per cent. per annum, and copies thereof incorporated in the mortgage. It being necessary to procure the insurance policy from New York before the negotiations could be finally closed, the deed, mortgage, and notes were deposited with Charles Hirschtel and Thomas Connell in escrow to be held by them until the policy could be obtained. On October 30, 1890, the policy having in the meantime been secured, the papers were delivered to the respective parties entitled thereto, and the deed and mortgage duly recorded in the office of the recorder of conveyances for Multnomah county. The reason for dating the notes as of June 24, 1890, was that the first payment of premium was made payable on that date, and additional premiums were payable annually thereafter. On October 28, 1890, the defendant, the A. P. Hotaling Company, loaned to Sperling \$5,000 payable one day after date, and took as security therefor a deed of general warranty from Sperling to the same prop-

erty. This deed was recorded May 16, 1892. Plaintiff collected two years' interest on Sperling's notes, but, being unable to make further collection, took the notes to Lent & McGrew, real-estate agents and brokers, some time prior to May 22, 1893, and instructed them to collect what they could, and, if they could not collect the principal, to get the interest and taxes, and to renew the notes, giving an extension of one year, with interest payable quarterly at the rate of 10 per cent. per annum. In obedience to this instruction, Lent & McGrew collected the interest and taxes to May 22, 1893, and upon that day procured a new note from Sperling for the full amount of the principal, aggregating \$3,850, payable to T. S. McDaniel, a member of their firm, in one year, with interest at 10 per cent. per annum, payable quarterly as instructed. To secure the payment of this note, Sperling and wife gave McDaniel a mortgage upon said block 18. On the same day or the next the note and mortgage were indorsed "without recourse" to plaintiff by McDaniel, and on May 23, 1893, plaintiff caused the mortgage to be recorded. On May 27, 1893, plaintiff canceled of record Sperling's said mortgage of September 16, 1890. The note and mortgage were executed to McDaniel, instead of plaintiff, as a matter of convenience in transacting the business in hand, and McDaniel never had any pecuniary or other interest therein. Before taking the new note, Lent & McGrew required Sperling to furnish them with an abstract of title to the premises subsequent to the date of the old mortgage. This Sperling did, showing a clear title, with the exception of some taxes. The abstractor having overlooked the deed to the A. P. Hotaling Company, and relying upon this abstract, the new mortgage was accepted and recorded, and the old one canceled, in ignorance of the A. P. Hotaling Company's deed. Early in June, 1893, plaintiff discovered the condition of the record, and, after vainly endeavoring for some time to obtain a settlement, on June 22d brought this suit to have the cancellation of the old mortgage set aside and revoked upon the ground that it was made through inadvertence and mistake; also to have said old mortgage reinstated, and the same foreclosed, and declared a prior and superior lien to that of defendant, the A. P. Hotaling Company. The decree of the court below being in accordance with the prayer of the complaint, the A. P. Hotaling Company appeals.

There is no essential dispute as to the facts in the case, and the only question is as to whether, under this statement, the plaintiff is entitled to the relief demanded. "When a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity, and given its original priority as a lien." Jones, *Mortg.* § 971. This is the doctrine of many cases. In *Young v. Shauer* (Iowa) 35 N. W. 629, the defendants

John H. Shauer and Sarah B. Shauer were the owners in common of a parcel of land which they mortgaged to Young to secure the payment of \$400 money borrowed. Thereafter Witmer Bros. recovered judgment against John H. Shauer, who subsequently conveyed his interest to Sarah B. The latter then applied to Young for an additional loan of \$200, and to secure time on the old loan of \$400 executed her note for \$600, and to secure the same executed a new mortgage upon the premises, which Young accepted, and canceled the old mortgage, in ignorance of the Witmer Bros. judgment. The court held that the new mortgage, to the amount of the old, was to be regarded as a mere renewal, and that Young was entitled to have such amount declared as a lien superior to the Witmer Bros. judgment; citing *Bruse v. Nelson*, 35 Iowa, 157, as in point, and as decisive of the case. The holding of the latter case is, in effect, that if A., holding a mortgage on the premises of C., in ignorance of a mortgage subsequently executed by C. thereon release his mortgage, and take a new one, equity will, as against C. or his assignee with notice, restore the lien of the first mortgage. In this case an additional loan of \$131 was obtained, but the court declared the lien to be superior to the extent of the original indebtedness to the mortgage subsequently executed. *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923, was a case where in plaintiff brought suit as administrator of Dietrich Thole, deceased, to foreclose a certain mortgage, and to have it declared a lien superior to the lien of defendants. It appears that on May 5, 1877, Dieling and wife executed to Thole a mortgage on certain premises to secure the payment of \$2,000 in accordance with the conditions of a promissory note payable three years after date, bearing 10 per cent. interest. The mortgage was recorded July 9, 1877. On May 5, 1881, the debt not having been paid, Dieling executed a new note to Thole in renewal of the old loan for the same amount, payable three years after date, with 8 per cent. interest for two years and 7 per cent. for the third, and executed a new mortgage to secure the same. The old note and mortgage were surrendered to Dieling, but the new mortgage was not recorded by Thole until December 21, 1881, nor was the old mortgage satisfied until that date. On September 8, 1881, Dieling borrowed of Reynolds \$2,000, and also of Benj. V. Quackenbush \$1,100, through one Livingston Quackenbush, who was their agent, and executed a mortgage to each of said parties to secure their respective loans, which were recorded September 20, 1881. At the time of obtaining these loans, Dieling exhibited to the agent the first note and mortgage to Thole, and told him that the mortgage note and debt had been paid, and the agent, relying upon the statement,

made the loans. Presumptively, Thole had no notice of the execution and record of these mortgages when he canceled the old mortgage of record. The court say: "They [Reynolds and Quackenbush] acquired their rights before the discharge of the record of the Thole mortgage, and not upon the faith of that discharge. They are not, therefore, in position to insist that they are injured by annulling that discharge. When a prior mortgage has been, by fraud or mistake, discharged of record, a subsequent mortgagee, who became such anterior to such discharge, cannot claim to be injured by setting aside the release and restoring the mortgagee to his rights. * * * It is a familiar rule that if a holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, equity will, in the absence of some special disqualifying fact, restore the lien of the first mortgage, and give it its original priority. * * * The fact that the mortgage was released in ignorance of the existence of the intervening lien is deemed such a mistake of fact as to entitle the party to relief, and this although such intervening lien was of record at the time." It was accordingly held that Thole's mortgage was a superior lien to those of Reynolds and Quackenbush. In support of this doctrine, see, also, *Robinson v. Sampson*, 23 Me. 388; *Cobb v. Dyer*, 69 Me. 494; *Barnes v. Mott*, 64 N. Y. 397; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *West's Appeal*, 88 Pa. St. 341; *French v. De Bow*, 38 Mich. 709; *Stimpson v. Pease*, 53 Iowa, 572, 5 N. W. 760; *Jones, Mortg.* § 966, 971. It is clearly deducible from these authorities that the fact of the new note executed for the aggregate amount of the two former notes bearing interest at an increased rate, and the further fact that the note and mortgage were made payable to McDaniel, instead of Kern, could have no significance where it is manifest that it was the intention of the parties that the new note and mortgage should operate as a continuance of the old indebtedness, and not as a payment or discharge thereof. In *Pearce v. Buell*, 22 Or. 33, 29 Pac. 78, a case in point, *Bean, J.*, says: "In such a case a court of equity will look through the form to the substance, and keep alive the original security, if it can be done without injury to third parties. No rule is better settled than if the holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, although such lien be of record, equity will, in the absence of the intervening rights of third parties, restore the lien of the first mortgage and give it its original priority." It is also settled that the acceptance of a note

is not payment of an account, nor is the acceptance of one note in renewal of another payment thereof, unless it is so expressly agreed between the parties. *Black v. Sippy*, 15 Or. 576, 16 Pac. 418. See, also, *Geib v. Reynolds*, supra. And nothing short of actual payment of the debt or an express release will operate to discharge the mortgage. *Pearce v. Buell*, supra; *Jones, Mortg.* § 924. That plaintiff canceled his old mortgage by mistake, and in ignorance of the A. P. Hotelling Company's deed, there is no doubt. Nor was he guilty of negligence in any degree in not discovering it of record, as he required an abstract of the record before he would consent to the renewal and a postponement of the time of payment. The abstract showing the record clear, *Lent & McGrew*, the agents of plaintiff, renewed the note and mortgage, granting an extension of time of payment, through the instrumentality of *McDaniel*, one of their firm. There was no agreement or understanding that the new note and mortgage should be accepted in payment of or in discharge of the old notes, nor was it so intended or understood by the parties, and consequently there was no payment or discharge of the old indebtedness. The deed under which the rights of the defendant, the A. P. Hotelling Company, accrued was executed October 28, 1890, two days prior to the recording of plaintiff's old mortgage. Indeed, Kern's deed to *Sperling* had not been delivered or recorded at the time, and hence he had no interest which he could then convey or mortgage, and the company's deed could only take effect upon an after-acquired title. Plaintiff had no knowledge of the Hotelling Company's equity when he delivered the deed to *Sperling*, and he accepted the mortgage in return in good faith for value. This is not disputed. *Sperling's* title being thus incumbered with plaintiff's mortgage, the A. P. Hotelling Company therefore acquired its equity subject to such incumbrance. This being the condition of the company's lien prior to the execution of the new mortgage and the cancellation of the old, it has acquired no new rights by reason of the fact that the old mortgage was, through mistake and in ignorance of its equity, canceled of record, nor in reliance upon such cancellation. The maxim that where the equities are equal the law will prevail can have no application because the equities are unequal by reason of the fact that the plaintiff possesses a prior and superior equity. A lien discharged by mistake is in contemplation of equity still in existence. *French v. De Bow*, supra. And the A. P. Hotelling Company has acquired no additional equity in reliance upon the mistake of plaintiff. Hence plaintiff's superior equity will prevail.

It was also contended by appellant that the equities of plaintiff and the A. P. Ho-

taling Company were acquired concurrently, and that, such being the case, the land should be adjudged as a common fund for the indemnity of both parties, under the authority of *Fleschner v. Sumpter*, 12 Or. 166, 6 Pac. 506. While, in a sense, the equities of these parties became effective at the same time, simply because of the peculiar circumstances under which the respective deeds and the mortgage were delivered, yet we have seen that the plaintiff took a superior equity, which has not been surrendered or impaired through his mistake or inadvertence, and, no disadvantage accruing to the company through such mistake, there was no error in granting the relief demanded by plaintiff, and the decree of the court below will therefore be affirmed.

(16 Mont. 148)

PEARSON v. HARPER.

(Supreme Court of Montana. May 6, 1895.)

REVIEW ON APPEAL.

A verdict will not be disturbed on appeal where there was substantial conflict in the evidence.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by H. G. Pearson against Joseph H. Harper for services rendered. From a judgment for plaintiff, defendant appeals. Affirmed.

Corbett & Wellcome, for appellant. L. J. Hamilton, for respondent.

DE WITT, J. This is an action for \$67.50, as compensation for services alleged to have been rendered by plaintiff to defendant. The suit was commenced in a justice's court, where there was a verdict for plaintiff for the full amount claimed. On appeal to the district court there was also a verdict for plaintiff for the same amount. Defendant appeals to this court. He assigns that the verdict was against the evidence. Defendant was city engineer of the city of Butte. Plaintiff worked during the months of May, June, July, and August. There was a dispute in the testimony as to whether the plaintiff was working for defendant or the city of Butte. The city council directed that one of the city engineer's assistants be laid off on September 1st. Plaintiff testified that he worked during the first week in September in the place of another of the engineer's assistants, and that for this work he was paid by that assistant. He testified that he worked personally for Mr. Harper during the balance of the month. Indeed, his testimony was that he was always working for Mr. Harper personally. This action is for his services alleged to be rendered during the last three weeks in September, for which he was not paid. The defendant's contention was that plaintiff was in the employ of the city only, while plaintiff contended that

he was in the employ of Mr. Harper at all times, and that he continued his services during the last three weeks of September for Mr. Harper, and was not notified by him to quit. We have read all of the testimony of the case, and, while we are not satisfied that we should have found as did the jury, still there was a substantial conflict in the testimony, and sufficient evidence for the plaintiff to forbid our setting aside a verdict twice found by a jury, and affirmed by the district court when it denied the motion for a new trial. The judgment is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 108)

HOPKINS v. CITY OF BUTTE.

(Supreme Court of Montana. April 29, 1895.)

RECOVERY OF TAXES PAID—DURESS.

1. Taxes under a special assessment paid, under protest and an expressed intention to sue to recover it back, before the penalty for non-payment became due, there being no actual seizure or immediate danger of actual seizure of the property, cannot be recovered back in an action of assumpsit, on the ground that the payment was compulsory.

2. One who pays taxes, under protest, under a special assessment for sewers, where the assessment was not set aside, and the sewers were built, and the general power of the city to make such assessment under valid ordinances was not disputed, cannot recover them back.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Olivia W. Hopkins against the city of Butte to recover taxes paid. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff sues to recover from the defendant \$1,028.50, paid July 28, 1891, by her to the defendant, on a special assessment for sewer tax. Appellant in her complaint sets up that, when she paid the tax, she protested against the payment, and claimed that the tax was illegally levied and void, and that the payment thereof was compulsory. She pleads that no resolution or ordinance of the city council was ever passed authorizing the building of the sewers for which the property was assessed, and that the special assessment was illegal and void, in that the city of Butte does not possess the power and authority to levy any special assessment for sewer tax upon any property, for the reason that the city has never established, by ordinance or otherwise, any general system of city sewerage, or any sewerage districts in said city, or any portion thereof, which it is required to do before it can levy and collect any special assessment for sewer purposes; and that, if she had not paid the said tax, the pretended assessment would have been certified by the city clerk to the county clerk, who would have added a penalty, and the county treasurer would have sold the land upon which the tax was claimed to be a lien, and, in order to pre-

vent these things, she paid the money. The answer denies that there was any compulsory payment, as alleged, and avers proceedings had by the city council of Butte, ordering the construction of the sewers for which the special assessment was levied, and sets up that the city of Butte has the authority to levy such special assessments; denies that the property of the plaintiff would have been sold, as alleged, but avers that plaintiff paid the tax before the same had been advertised as delinquent, and that it was paid without fear or compulsion. There was a trial to the court. The plaintiff introduced the special assessment notice informing her that there was due from her to the city of Butte \$1,028.50 on a special tax, in accordance with the resolution passed by the city council on the 1st day of July, 1891, and that, unless the tax was paid within the time provided, 5 per cent. thereof would be added thereto as a penalty for delinquency. The plaintiff testified that when she paid the money to the city treasurer she objected to the payment, and said that she should pay it under protest, and would further protest the matter afterwards; that she wanted to get away from the city, and was advised to pay it under protest, but that at that time she did not have time to attend to the protest of the matter. The money was paid before the penalty became due; that is, before August 1st. "The treasurer did not tell me that my property was seized, or in his possession, at that time. It was not advertised for sale. I do not know that he said he would sell the property. I paid the tax according to the notice I received about the penalty, and I paid it under protest. Mr. Jacobs accepted the money under protest. He made no threats. There were sewers built in front of my property." Plaintiff introduced an ordinance of the city of Butte for the establishment and maintenance of a sewer system in Butte City. By this ordinance the city was divided into three sewer districts, and authority to construct sewers is expressly assumed, and the real estate to be benefited by the sewers is to be assessed for the purpose of paying for said sewers. The method by which the assessment shall be made is set forth in the ordinance, and the payment of the special tax, if not made before August 1st after the levy, shall be enforced by certifying the resolution of the city council to the county clerk of Silver Bow county, with the certificate of the city treasurer attached, showing what taxes thereby levied remained unpaid; and the county clerk shall put the same, with 5 per cent. additional, upon the tax roll, in addition to and as part of all other city taxes to be collected, and to be paid to the city treasurer in the same manner as other tax money received by said county treasurer for the benefit of said city. At the conclusion of plaintiff's testimony, a motion for nonsuit was made, upon two grounds: First, that the evidence shows that the payment of the tax was voluntary, and

not under protest, mistake, or threat; second, that the claim, account, or demand had never been presented to, and added and allowed, or disallowed, by the city council of Butte, as required by law. The court sustained this motion, and from the order sustaining the motion, and the judgment in favor of defendant, the plaintiff appeals.

Corbett & Wellcome, for appellant. John W. Cotter, for respondent.

HUNT, J. (after stating the facts). Several points are raised by the defendant's motion for a nonsuit, but we prefer to confine our opinion to a single question presented,—whether an action of assumpsit can be maintained to recover money paid for taxes upon a special tax assessment, where such payment has been made before the penalty for nonpayment is assessed or due, but where one who has made such payment notified the treasurer of the city, at the time of the payment, that she paid under protest, and that she intended to sue to recover back. We pass upon this question, because, by the record, the appellant is forced into the contention that the payment by her to the city treasurer of Butte was an involuntary one. She does not set forth in her complaint that the penalty had become due upon the taxes levied upon her property, nor that there was any actual seizure, or any urgent or immediate danger of a seizure, of her real estate by the proper authorities, nor that the property was advertised, or about to be advertised, for sale, nor that any act was immediately threatened or about to be done by which she would be deprived of the enjoyment of her real estate, but relies upon a probability that, in the usual legal course of affairs, if she should become delinquent, the city treasurer of Butte would proceed to make out a delinquent assessment list, and certify the same to the county clerk of Silver Bow county, who would add the penalty prescribed, and certify the same to the treasurer of Silver Bow county, whose duty under the law it would ultimately be to proceed to sell the property for the payment of the taxes due. The common-law rule which, in the absence of statute, must govern all demands similar to that made by a municipality for taxes, of one of its inhabitants whose property has been assessed, is that where a party pays an illegal demand, with a full knowledge of all the facts which rendered such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent the immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back; and the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary. *Railroad Co. v. Commissioners*, 98 U. S. 541; *Little v. Bowers*, 134 U. S. 547, 10

Sup. Ct. 620. And the test of whether or not money paid for the payment of taxes was a payment under duress, so as to make it an involuntary payment, "must, in general, consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party accepting or receiving the payment, over the person or property of another, from which the latter has no other means, or reasonable means, of immediate relief, except by making payment." 2 Dill. Mun. Corp. § 843. It cannot be successfully argued that Mrs. Hopkins paid the tax which she now seeks to recover for the purpose of immediate relief. Indeed, the contrary appears, for she herself stated that she wanted to go away from Butte, and, while she thought the tax was unjust and illegal, of her own free will she paid the amount of it, merely stating, in effect, that it was paid under protest, and that she intended to sue to recover it back. The assessment does not appear to have ever been set aside by any legal proceedings, and it is admitted that the improvements for which the levy was made were built in front of the property assessed. She knew, presumably, that the city treasurer could not sell her property, and could not even do as much as assess the penalty in case the tax was not paid. All these facts clearly show, at law, an unwilling, but none the less voluntary, payment, as contradistinguished from a compulsory payment. Such a payment does not entitle her to the relief she asks. *Cooley, Tax'n*, § 811; *First Nat. Bank v. Mayor, etc.*, 68 Ga. 120; *Rogers v. Inhabitants of Greenbush*, 58 Me. 392; *Conkling v. City of Springfield* (Ill. Sup.) 24 N. E. 67; *Bowman v. Boyd*, 21 Nev. 251, 30 Pac. 823; *Richardson v. City of Denver*, 17 Colo. 398, 30 Pac. 333; *Swift v. City of Poughkeepsie*, 37 N. Y. 511.

The constitutionality of the law under which the assessments were levied was not assailed. It is only claimed that the city of Butte, by reason of a failure to pass an ordinance dividing the city into sewer districts, had not taken the steps necessary to authorize it to levy any special sewer assessments. There was a resolution and ordinance passed, however, in which sewer districts were created. The ordinances may have been defective, and the assessments even irregularly made, but the general power of the city to make sewer assessments under valid ordinances is not disputed. The case, therefore, is not one where authority to levy the tax was wholly wanting, and must be distinguished from decisions which uphold the right to recover back taxes where the levy of the tax is on its face invalid, and where protest on the ground of illegality was made at the time of payment. *Shoup v. Wills*, 2 Idaho, 108, 6 Pac. 124; *Gillette v. Hartford*, 31 Conn. 351; *Newman v. Supervisors*, 45 N. Y. 676. It is also to be distinguished from the opinion of Chief Justice Chase in *Erskine v. Van Arsdale*, 15 Wall.

75, in that payment was made in that case to release property from detention, and the protest against payment (as in other cases involving the payment of revenues to release property) saved the rights which grew out of that fact, while in the case at bar there was no levy at all, and no right to make a levy was conferred upon the treasurer of the city, to whom payment was made. Nor can *Whitney v. City of Port Huron* (Mich.) 50 N. W. 316, control under the conditions of fact here existing. In that case the plaintiff sued to recover taxes paid by her, under protest, on a special paving assessment. Payment was made under protest, and to protect the property from being sold, and on account of the taxes being illegal. The city treasurer had advertised the plaintiff's property for sale, and she had the right to presume that he would proceed with the sale. The case was thereby brought within the rule of immediate and urgent necessity of paying the tax to prevent seizure. And it was held that a payment made under such a threat was an involuntary one. Under the great weight of authority and reason, the law looks with disfavor upon suits to recover back taxes where dissatisfaction and unwillingness to pay, rather than compulsion, to prevent the immediate execution of a levy or seizure, are the causes which prompt the protest. The judgment is affirmed.

PEMBERTON, C. J., and De WITT, J., concur.

(16 Mont. 138)

STATE v. VINEYARD.

(Supreme Court of Montana. May 6, 1895.)

FORGERY—EVIDENCE.

1. In a prosecution for forgery, it appeared that defendant and one H. T. Swenson worked together under a mining lease,—all ore being, by agreement, shipped in the latter's name,—and that defendant, having delivered ore in the name of "H. J. Swanson," received a check payable to such name, which he presented to a third party for payment, permitting himself to be identified as the payee; that, prior to cashing the check, defendant asked S. what his initials were, and, on being told "H. T.," said that by mistake he had given the initials as "H. J.," but S. replied that it did not matter, as he (S.) could get the check cashed. *Held* sufficient to sustain a conviction.

2. It is forgery to sign a check of apparent legal efficiency in an assumed or fictitious name, if done with intent to defraud the payor.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Phillip P. Vineyard was convicted of forgery, and appeals. Affirmed.

Miles Cavanaugh and L. O. Campbell, for appellant. Henri J. Haskell and Ella L. Knowles, for the State.

HUNT, J. Phillip P. Vineyard, the appellant, was convicted of the crime of forgery, and sentenced to one year in the state's prison. From the judgment of conviction he appeals.

The information under which he was tried charges that said Vineyard "did willfully and unlawfully and feloniously and falsely and fraudulently, forge, utter, pass, and publish, as true and genuine, to one John Stromberg and one Jerry Mullins, a copartnership doing business under the firm name and style of Mullins & Stromberg, in Butte City, in said county and state, a certain writing on paper and check for the payment of money, and instrument in writing, of the tenor, purport, and effect following, to wit: 'Butte, Montana, Jan. 24, 1895. No. 1,152. Butte Sampling Works. H. C. Carney, C. H. Hand. State Savings Bank: Pay to H. J. Swanson or order \$85 ⁸³/₁₀₀ (eighty-five and ⁸³/₁₀₀ dollars). [Signed] Butte Sampling Works. H. C. Carney, Manager. [Indorsed] H. J. Swanson. Mullin & Stromberg. First National Bank. Paid Jan. 28, 1895. Paying Teller, Butte, Montana,'—with intent in him, the said defendant, thereby, and in the manner and form aforesaid, to willfully and unlawfully and feloniously, and falsely and fraudulently, cheat and defraud the said John Stromberg and the said Jerry Mullins (Mullins and Stromberg, as aforesaid) of the said sum of eighty-five and 83/100ths dollars, contrary," etc.

In the argument of the case, appellant's counsel urged the insufficiency of the evidence to justify a conviction; and stated that he relied upon that assignment principally. It appears that since November or December, 1894, defendant and one H. T. Swenson, and two others, worked together under a mining lease. It was agreed in writing that shipments of ore be in the name of H. T. Swenson. On January 24, 1895, defendant went to Swenson, and asked him his initials. Swenson said, "H. T." Defendant told Swenson that he had delivered "that ore" (referring to a shipment) at the Butte Sampling Works, but believed he made a mistake in Swenson's initials, and put them "H. J.," as he had forgotten the correct initials. Swenson told him it was no matter, as he could get the check cashed. The next day the defendant said he had had the check cashed, and that it had been made out to H. J. Swanson. Defendant had no authority from Swenson to sign the check for him. Swenson never signed the same himself, and never received the money on the check. Defendant always called Swenson "Swanson." The ore was left at the sampling works by Vineyard in the name of H. J. Swanson. Appellant called the attention of Dayton, one of his colessees, to the "mistake" he had made, whereupon Dayton told him it would make no difference, as Swenson could get the same cashed. The next day there was some talk of a settlement, but it amounted to nothing more than a claim of appellant for money due him by his colessees. The check was presented by defendant to Stromberg, of the firm of Mullin & Stromberg. Stromberg, not knowing defendant, asked one Swan, who was with defend-

ant when the check was presented, "Do you know this gentleman?" To which Swan replied, "Yes, sir." Thereupon defendant took a pen, and indorsed the check "H. J. Swanson." No explanation was made of the real identity of the accused to Stromberg, and Stromberg says he understood at the time that the man whose name defendant indorsed was the payee of the check, or "H. J. Swanson," otherwise he would not have cashed it. The check was cashed by the First National Bank of Butte, for Mullin & Stromberg. They took it to the State Savings Bank, where payment was refused. The defendant testified that he had given the name of H. J. Swanson to the sampling works in order to avoid trouble, in the way of attachments, if he used his own name; that the next day after he had cashed the check the several lessees had figured on their expenses, and the others were in debt to defendant; that Swenson declined to pay anything, and threatened to arrest defendant for forgery unless defendant surrendered half the money; that he knew "H. J. Swanson" was not Swenson's name, but he did not intend to ship the ore in Swenson's name; that he had no particular reason for not shipping the ore in accordance with the agreement, still he did not ship in Swenson's name, but considered he was entitled to the money. "I didn't write Mr. Swenson's name on that check, therefore could commit no crime of forgery," testified defendant; and "I don't know that Mr. Swenson was the man that the money was intended for. * * * I wanted to avoid my creditors, and the name [H. J. Swanson] was just an assumed, fictitious name, without particular thought of the similarity between it and that of my partner." Defendant denied the interview with Swenson as to his initials, but admitted that when he presented the check to Stromberg the latter asked Swan "if that was the man, and Swan said I was." Defendant denied that the agreement to ship was still in force. Swenson, in rebuttal, said it was. From all these material facts, supplemented by others of minor importance, the jury were justified in finding that the defendant knew that the check was not intended for him, but for Swenson, and was so intended under the terms of the agreement between defendant and his colessees. We are convinced, too, by the evidence, that, when defendant and Swan procured the money on the check, defendant's purpose was to have Stromberg cash it, as if doing so for the payee, Swenson or Swanson, and that he willfully meant to mislead and did deceive Stromberg into the belief that he (Vineyard) was the person to whose order the check was drawn. His silence when Stromberg asked for identification, and when Swan said he knew him, is, by itself, almost enough to convict him, for it is inexplicable with the actions of an honest man under similar circumstances. If a man goes to a stranger with a check made out to another, permits

himself to be identified as the real payee, and secures the amount of the check as an accommodation, after making a fictitious or forged indorsement thereon, we unhesitatingly say that his intent is prima facie criminal, and to hold otherwise, under the facts of this case, is contrary to all logical processes of reasoning by evidential induction, and to indulge in metaphysical abstractions wholly unwarranted by the testimony in the record. The evidence convinces us that the defendant meant to and did personate Swenson, and fraudulently, with intent to impose on another, wrote the name "Swanson" on the check. Thus was a forgery committed, within the legal definitions of the crime.

The defendant says that "Swanson" was a fictitious name. But, unfortunately for him, it is forgery to sign a money order or check of apparent legal efficiency in an assumed name, if the name was assumed to defraud the person to whom the order or check was given; or it may be forgery to sign the name of a nonexistent person, if under such circumstances as are likely to defraud. Whart. Cr. Law, §§ 659, 660; Bish. Cr. Law, § 587. The check was apparently sufficient upon its face to prejudice the rights of another person, if falsely made, or passed with a fraudulent purpose. It was well calculated to deceive men of business capacity, and did deceive Stromberg. The cunning of defendant, in misspelling Swenson's name, tends to show some deliberation in the method of the offense; but the similitude between "Swenson" and "Swanson" was close enough to be submitted to the jury, and it was for them to say whether, under all the facts and circumstances, the forgery was adapted, under the rules of law, to carry out the intended fraudulent purpose. Bish. Cr. Law, §§ 583, 592; *Thompson v. State*, 49 Ala. 16; *U. S. v. Mitchell*, 1 Baldw. 366, Fed. Cas. No. 15,787; *State v. Givens*, 5 Ala. 749; *State v. Hahn*, 38 La. Ann. 169; *Peete v. State*, 2 Lea, 513; *State v. Covington*, 94 N. C. 913; *State v. Bauman*, 52 Iowa, 68.

Certain errors are assigned in the refusal to give several instructions offered by the defendant upon the degree of certainty necessary to exist in the minds of the jury before they could convict. But the court fully charged upon the presumption of innocence, and told the jury that they must be satisfied by the evidence of the defendant's guilt, beyond a reasonable doubt, in order to convict, and explained what a reasonable doubt was, by the approved definition of this court in *Territory v. McAndrews*, 3 Mont. 158. The whole ground of the burden of proof was covered. The instructions, as a whole, were full and clear, not only in stating the legal elements of the crime charged, but in elaborating the need of proof of an intent to defraud, as a material part of the state's case, in order to justify a verdict of guilty. The verdict was in accord with the evidence, and

the assignments made are not well founded. The judgment is affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(16 Mont. 135)

**FIRST NAT. BANK OF MISSOULA v.
BAILEY, Treasurer.**

(Supreme Court of Montana. May 6, 1895.)

TAXATION—ASSESSMENT.

Act Concerning Revenue (Laws 1891, p. 75, § 5) requires the assessor to assess property "at its full cash value." *Held*, where a bank returned a list of its property as of a certain value, and claimed an unauthorized reduction of one-third of its alleged value, the return of the whole amount by the assessor is not an increase of the assessment.

On rehearing. Denied.

For former report, see 39 Pac. 83.

Marshall & Corbett, for appellant. Henry J. Haskell, Atty. Gen., J. M. Dixon, and J. G. Denny, for respondent.

PEMBERTON, C. J. Counsel, in their able argument and brief in support of the petition for a rehearing in this case, contend that the assessor changed or increased the assessment list returned by appellant without notice, and that such action on the part of the assessor was void, as to such increase in the assessment; and further that, notwithstanding this contention was not relied on in the court below or in this court on the original hearing, said contention may be presented on this petition for rehearing, as it is germane to the issues presented by the pleadings. The list of property returned to the assessor is as follows:

Lots 6 and 7, block 1, Old Town-site addition	\$ 1,000 00
Lot 19, block 21, Higgins addition	2,000 00
Improvements on same.....	2,000 00
78x118 feet, corner Front street and Higgins avenue.....	10,000 00
Improvements on same.....	40,000 00
Capital stock, 1,500 shares.....	150,000 00
Surplus and undivided profits....	820,000 00
	\$525,000 00
Less real estate and improvements	55,000 00
	\$470,000 00
Less one-third	156,660 00
	\$313,340 00

From an examination of this list, we think it clearly appears that the appellant fixed the real value of its property listed and returned to the assessor at \$470,000, and not at \$313,340, as claimed now for the first time. The appellant claimed, it is true, a deduction of one-third the value thereof, amounting to \$156,660, as shown by said list. But did the claiming this deduction for assessment purposes change in any way the value of said property? The appellant was claiming something the law does not warrant, and something the law does not authorize the assessor to grant. The law requires the as-

essor to assess property "at its full cash value." Act Concerning Revenue (Laws 1891, p. 75, § 5). The assessor did not change, alter, or increase in any way whatever appellant's assessment list. It must be conceded that, when appellant returned its assessment list, it did not fix any fancy value upon its property, and then deduct one-third therefrom, in order to arrive at its full cash value. People dealing with assessors rarely put a greater value than the cash value on their property. The assessor did not increase the assessment of appellant. He assessed it in accordance with the list returned by the appellant. He did decline to assess it at one-third less than its cash value, as returned, and as claimed by appellant. But by so doing he did not change or increase the assessment. In doing so he performed his duty, and was under no obligation to give the appellant notice that he had assessed its property in the only manner permitted by the law. We are further of opinion that the contention insisted upon in support of the petition for a rehearing is not developed by any facts set forth in the pleadings. The complaint alleges the value of the property to be \$470,000, without any suggestion that it was of less value. There is not an intimation in the complaint that the assessor, in assessing the property, changed or increased the value thereof, as returned in the list of appellant. Nothing of the kind was claimed or suggested by the original briefs or arguments in the case. The assessor assessed the property at its cash value, as shown by the list returned by appellant, and ignored its unwarranted claim of a deduction of one-third of the value thereof for assessment purposes. It is true, the assessment list of the appellant is made part of the complaint as an exhibit, but it is nowhere contended or intimated that it was intended to show that the assessor had changed or increased the value of appellant's property, in assessing it, either with or without notice. The importance of this case, and the able brief and argument of counsel in support of the petition for rehearing, have led us to a careful consideration of the matters involved; and, after such consideration, we are of the opinion that the case was rightly determined, under the pleadings, on the original hearing, and that the conclusion therein reached should not be disturbed. The petition for a rehearing is denied.

DE WITT and HUNT, JJ., concur.

(16 Mont. 119)

STATE ex rel. HARTMAN et al. v. CADWELL.

(Supreme Court of Montana. May 6, 1895.)

DISBARMENT OF ATTORNEY — GROUNDS — ALTERATION OF DECREE — DEFRAUDING CLIENT — EVIDENCE.

1. On an issue, in disbarment proceedings, as to whether respondent changed a decree after it

was signed, the two opposing counsel in the cause in which the decree was rendered testified that there were no interlineations therein when it was presented to the court. Respondent denied this, and another attorney testified that he advised certain changes, which respondent interlined, and that respondent then went to the judge's office, and returned, saying that the decree was signed; but there was evidence that this witness stated, on learning that the decree was rendered in open court, that he could do nothing for defendant. Defendant retained the decree for two years, and only filed it in response to a peremptory order. *Held*, that a finding that respondent inserted the interlineation after the decree was signed was proper.

2. A client of respondent, in order to avoid costs in a criminal case against him, at respondent's suggestion made to him certain notes secured by a mortgage, and these notes, with the exception of one for \$600, were deposited with a bank by respondent. This client testified that when he asked for the notes respondent promised to return them when he got them from the bank, but that he thereafter failed to do so, and subsequently claimed that the \$600 note was given him for his services, and respondent so testified, though he had given to said client a receipt in full for his services at the time of the receipt of the notes. *Held*, that a finding that none of the notes were delivered to respondent in payment of his services was proper.

3. The fact that respondent in disbarment proceedings was enabled to defraud his client by reason of a corrupt scheme entered into by them to defraud the county, does not prevent the client from testifying as to such scheme.

4. Conviction of a crime is not a prerequisite to the disbarment of an attorney.

5. An attorney altering a decree, with a corrupt purpose, after it has been signed by the court, and also defrauding a client by negotiating notes intrusted to him by the client for safe-keeping, should be disbarred.

Disbarment proceedings on the relation of Charles S. Hartman and others against E. P. Cadwell.

Smith & Word and Walter S. Hartman, for relators. Blake & Penwell, for respondent. E. P. Cadwell, in pro. per.

PEMBERTON, C. J. This is a proceeding for the disbarment of the respondent, who is an attorney at law, regularly licensed heretofore by this court, and enrolled as a member of the bar in this state. The relators are all members of the bar, and comprise some of the most prominent attorneys in the state. They constitute nearly all the members of the local bar of Gallatin county. The respondent, as the records of this court show, was admitted to practice law in this state on the 16th day of February, 1891. He has acquired a considerable practice, and achieved a prominent position among the members of the profession. The respondent is charged with being guilty of malconduct in his profession as an attorney and counselor at law. It is also charged that he is a person whose general moral character is bad; and that he has been guilty of such fraudulent, deceitful, and immoral conduct and practices as to render him an unfit person to practice law in this state, or to be an attorney and counselor of this court. The specifications of malconduct and of bad moral character are very numerous. Upon the filing of

the pleadings in the case this court appointed E. C. Day, Esq., whose reputation for ability and integrity is second to no member of the bar of this state, referee, to take the testimony in the cause, and report the findings of fact to this court. This report has been made, in which the referee finds that some 17 of the charges are supported by the evidence. This court is now asked to adopt these findings, and enter the proper order and judgment in the case. The specifications of misconduct are too numerous to discuss seriatim, and to do so would be useless, and without profit. We shall therefore confine our treatment to a few specifications, which are gravest in their character.

Specification "D" is as follows: "That prior and up to the 28th day of June, A. D. 1893, the case of Barbara Splith vs. D. F. Grogan and J. P. Grogan, partners as D. F. Grogan & Bro., and Jesse H. Grogan, was pending in the Ninth judicial district court of the state of Montana, in and for the county of Gallatin, upon the cross-complaint and answer of the said Jesse H. Grogan, and the answer and reply thereto of the said Barbara Splith. That on or about the 27th day of June, the Honorable F. K. Armstrong, judge of said court, tried the same, a jury therein having been waived by the parties, and made certain findings of fact, and, pursuant to the practice in the said court, required the attorneys for the parties thereto to prepare a decree, and on or about the 29th day of June, A. D. 1893, the said E. P. Cadwell, defendant herein, being the attorney for the said Barbara Splith, plaintiff, and Messrs. Cockrill & Pierce, two of the relators herein, being the attorneys for the defendant Jesse H. Grogan, appeared in open court before the said judge, and the said E. P. Cadwell, having theretofore prepared a decree in said case, submitted the same in open court to the said Cockrill & Pierce, attorneys for the said Jesse H. Grogan, as aforesaid, and the said Cockrill & Pierce, having examined the said decree, and being satisfied therewith, agreed with the said Cadwell, in the presence of the said court, that the said decree was satisfactory, and the said E. P. Cadwell immediately handed the same to the said F. K. Armstrong, judge, as aforesaid, for his signature, and thereupon the judge signed the same as so agreed upon, and handed the same back to this defendant, E. P. Cadwell; a copy of which decree so agreed upon and so signed by the said court as aforesaid is attached hereto, and marked 'Exhibit A,' and made a part of this charge. And thereupon, after receiving said decree, so signed as aforesaid, the said E. P. Cadwell, without the knowledge and consent of the said Cockrill & Pierce, or the said court, or either of them, retained the said decree in his possession and control, and kept it there, and did not file the same with the clerk of the said district court for record, as by law provided, nor would he or did he file the said decree until October 28, A. D. 1893, upon which date, upon motion

of the said attorneys, Messrs. Cockrill & Pierce, the said judge entered a peremptory order to the said E. P. Cadwell, requiring him to file the said decree by four o'clock of said day. And your relators aver that prior to the filing of the said decree by said Cadwell, this defendant, and subsequent to the signing thereof, on the 29th day of June, A. D. 1893, as aforesaid, and while the same was in his possession, custody, and control, he, the said E. P. Cadwell, this defendant, without the knowledge or consent of the said Cockrill & Pierce, or either or both of them, or the said judge of the said court, made in the said decree such interlineations as to wholly change the tenor and effect thereof, and filed the same, under order of the court as aforesaid, with the clerk of the said district court, on the 28th day of October, A. D. 1893; and upon the same or following day, the said H. C. Cockrill, one of the relators herein, went to the office of the clerk of the said court, and found the decree, as interlined, nearly recorded by the said clerk, and, upon an examination thereof, discovered the said interlineations for the first time (a copy of the said decree, so interlined by the said E. P. Cadwell, as aforesaid, is filed herewith, attached hereto, marked 'Exhibit B,' and made a part of this charge); he, the said E. P. Cadwell, thereby intending to cheat and defraud the said Jesse H. Grogan of his right and interest in and to the real estate described in the said decree. That prior to the rendition of the said decree marked 'Exhibit A,' and attached hereto, there had been rendered in the said suit another decree in favor of Barbara Splith against the said D. F. Grogan and J. P. Grogan, under and by virtue of which decree the property mentioned in Exhibit A had been sold to the said E. P. Cadwell, by the sheriff of the said county, he, the said Cadwell, taking the sheriff's certificate of sale in his own name, notwithstanding that he was at that time the attorney for the said Barbara Splith. And at the time of the said interlineations the said E. P. Cadwell claimed to own all the right, title, and interest of the said Barbara Splith in and to the said certificate of sale of said real estate, and in and to the said decree in her favor, and also all the right, title, and interest of the said D. F. and J. P. Grogan in and to the said real estate, under the said certificate of sale, the time for redemption of which by the said D. F. and J. P. Grogan or by J. H. Grogan had fully expired before the said decree was filed by the said Cadwell, as interlined as aforesaid, but had not expired at the date of the rendition of the said decree, and had not expired until on or about the 22d day of September, A. D. 1893. That afterwards, some time in the month of September, 1893, the said E. P. Cadwell was discharged by the said Barbara Splith, and ceased to act as her said attorney in the said cause, or in any other action in the said court, and was fully paid by the said Barbara Splith for all serv-

ices by him heretofore rendered. That, notwithstanding such discharge and payment, the said E. P. Cadwell (this defendant) having received an intimation that proceedings were likely to be instituted against him for disbarment or otherwise, by reason of such interlineation in said decree, as shown by said Exhibit B, hereto attached, filed in the said court, on the 4th day of January, A. D. 1894, a written motion, as the attorney for the said Barbara Spieth, to 'affirm, vacate, or modify' the said decree, so as to make the same correspond to the 'findings of the court therein,' and gave notice of the said motion upon the motion book of said court."

The referee finds this charge sustained by the evidence. The decree of the court mentioned above is filed as an exhibit in the case, showing the interlineations the respondent is charged with making therein. The original decree was typewritten; the interlineations are made with a pen, and are confessedly in the handwriting of the respondent. By the original decree, J. H. Grogan, mentioned therein, was adjudged to have a prior mortgage and lien upon all the land mentioned therein, except 40 acres, as against all the other parties named in said decree. The words interlined in said decree by respondent are as follows: "That the defendant J. H. Grogan be, and he is hereby, barred and forever foreclosed from having or claiming to have any interest in said land;" and were so interlined as to refer to all the lands mentioned in said decree, and to change entirely the effect of said decree, as to the rights adjudged to J. H. Grogan. The testimony of T. M. Pierce and H. C. Cockrill, attorneys in the case, is clear and positive to the effect that said decree, before being signed by the court, was submitted to them by the respondent for inspection, and that said interlineations were not in it when signed. The respondent swears that they were in the decree when signed. C. G. Bradshaw, an attorney, also says that he suggested that the interlineations be made; and he says that upon his suggestion the respondent wrote them in the decree, and stepped into the judge's office adjoining that of respondent, or near by, and returned in a few moments, saying the judge had signed it. But W. L. Holloway swears that when Bradshaw made this statement to him in a conversation concerning the matter he told Bradshaw that the decree was signed by the judge in open court, and that Bradshaw then said: "If that is so, I can do Cadwell no good." W. G. Fleischhauer's testimony is to the same effect.

The respondent contends that said interlineations did not change the force or effect of the decree as to J. H. Grogan, or any one else. This may or may not be true. It is immaterial in this case. If the decree was not affected by these interlineations, why were respondent and Bradshaw so concerned about having them put in? Even if they did not affect the decree, and were not intend-

ed to affect it, what right had the respondent to alter the decree of the court after it was signed and ordered entered of record? If these interlineations were in the decree when signed, why did the respondent take it, and keep it in his possession, and refuse to deliver it to the clerk for record for months, and until the court by peremptory order required him to bring it into court, as shown by the undisputed evidence? And why, as shown by the evidence, did he object to delivering it for record, when compelled to bring it into court, saying it was prepared by him, and that, if the other side wanted a decree, let them draw or prepare it? Is such conduct without meaning? Do these actions of the respondent not only tend to show that the interlineations were made as charged, as to time, but that they were made for the corrupt purpose of defrauding J. H. Grogan, and advancing respondent's interest? We think the conclusion irresistible. The action of respondent in filing a motion to vacate or correct this decree, after he learned that steps were being taken to disbar him, tends strongly to show that he understood that these interlineations did affect the decree, and that he felt that his conduct would tend to show when they were made, as well as the corrupt purpose in making them.

Specification "H" is as follows: "Your relations are informed and believe, and therefore allege the fact to be true: That one Samuel Smith was charged in the district court of the Seventh judicial district of the state of Montana, in and for the county of Yellowstone, on the 15th day of October, 1891, with assault with intent to commit murder, and the said E. P. Cadwell was employed by the said Smith as attorney to defend him on said charge. That the said case was tried on a change of venue to the Ninth judicial district court of the state of Montana, in and for Gallatin county, in the latter court, and the said Smith was convicted, and sentenced to imprisonment in the penitentiary for one year; and, after such conviction, at the suggestion of the said Cadwell, for the purpose of covering up the property of him, the said Smith, to prevent the collection of the costs in the said case, the said Smith executed to the said Cadwell, this defendant, a mortgage of all the real estate of the said Smith in Yellowstone county, to secure notes amounting to \$2,600, it being agreed by and between the said Cadwell and his said client, Smith, that the mortgage and notes were to be afterward surrendered by him, the said Cadwell, to the said Smith, when the object of their execution, to wit, the defeat of the collection of the costs in the said case, had been accomplished; said notes and mortgage being executed and delivered without any consideration, except as aforesaid, and the said Smith having paid him, the said Cadwell, this defendant, his fee for the said defense, in full, in cash. That afterwards the said Cadwell, this defendant, returned to the said Smith all of

the said notes, except one for \$600, which said note he, the said Cadwell, sold and transferred to Barbara Splith, she at that time being a client of him, the said Cadwell; he, the said Cadwell, being her attorney. She, the said Barbara Splith, having no knowledge whatsoever of the circumstances attending the execution of the said note, and by which the said Cadwell had come into possession thereof." The referee finds this charge established by the evidence.

The mortgage and notes mentioned in the above charge, as well as the written contract between respondent and Smith, and respondent's receipt to Smith, are all filed as exhibits in the case. Smith's testimony is positive as to every allegation in the charge. The respondent contends, and so swears, that the several notes mentioned in the mortgage, including the \$600 one, were given for services rendered and to be rendered by him for Smith. Let us examine the evidence. The receipt given by respondent to Smith, of the same date as that of the notes and mortgage, was a receipt in full to that date. Smith says in his evidence: That while he was in jail at Bozeman, Judge L. A. Luce and respondent called to see him. They were his attorneys. That as they were leaving the jail he asked them if any thing could be done to save his ranch from being taken for the costs of his case by the county. That Luce said he thought not. That, as Luce stepped out of the jail door, respondent told him that as soon as he was out on bail he could arrange it for him; that nothing could be done until then. That he got bail, and went home to Billings. That respondent came to Billings, and met him. Told him to come to his room at the hotel, and he would fix the matter. That he went with him to his room. That there the notes, mortgage, receipt, and contract were all drawn by respondent. That respondent said the contract was necessary to show consideration for the notes and mortgage. That, being in a hurry, he signed the notes and mortgage, and took the receipt, and went away, leaving all the notes and the mortgage with respondent, who agreed to put them all in an envelope, and place them in the bank, with an indorsement on the envelope that the papers were not to be taken out except on the order of both himself and respondent. That he supposed respondent would deposit the papers as agreed. That the only reason for making the notes and mortgage to respondent was to defeat the county in any attempt it might make to collect its costs of Smith in the criminal case against him. That there was no other consideration. That he owed respondent nothing whatsoever. That the whole arrangement was made and entered into on the suggestion of respondent. That it was respondent's scheme to beat the county. That he did not see respondent again until after he was released from the

penitentiary. That on his way from Deer Lodge to Billings he stopped off at Bozeman, and saw the respondent. He then demanded of respondent an order on the bank for these notes and mortgage, and that respondent release the mortgage as per agreement. That respondent gave him an order for the papers, but said he could not release the mortgage without having it present. That he told respondent he would send it up to him when he got it out of the bank, so he could prepare the release. Nothing was said by respondent then to Smith about the \$600 note and mortgage not being in the bank with the other notes. That when he got the papers from the bank the mortgage and \$600 note were not among them; only the two \$250 notes and the \$1,500 note being in the envelope. These three notes were given at the same time the \$600 note was, and were all mentioned in and secured by the mortgage. That he at once wrote respondent, telling him that the mortgage was not among the papers in the bank, nor was the \$600 note. That respondent replied to this letter, saying he had the mortgage, and would release it when Smith paid the \$600 note. This was his first intimation that respondent claimed the \$600 note, and would not release the mortgage until it was paid. Suit has been begun by Mrs. Splith to foreclose this mortgage, and to recover payment of Smith of this \$600 note. Now let us look at this charge as disclosed by the uncontradicted evidence. When Smith called on respondent, on his way home from prison, to get these papers, he was, according to respondent's theory, still his client, for respondent contends that these notes and mortgage were all given for service rendered and to be rendered after Smith's release. Was it not, then, a duty respondent owed to Smith, his client, to deal fairly with him, and tell him the truth about these notes and mortgage? Respondent knew then that he had the \$600 note and mortgage in his possession. He knew that they were not in the bank at Billings. He knew that he had never placed them there, as he had agreed with his client to do. He knew that he had sold this note, and assigned the mortgage to his other client, Mrs. Splith. He knew also that in so doing he had deceived Mrs. Splith. He had sold this note and assigned this mortgage to her without ever telling her about the circumstances under which they were executed. When Mrs. Splith gave respondent the money, which he applied on the sale to her of this note, she, according to her testimony, supposed she was making a loan of that amount to the man who owned the ranch in Yellowstone county, as the respondent, as her attorney, had advised the loan, telling her the ranch was worth \$2,000, and was good security for the same. There is no evidence that she supposed she was buying this note of respondent. She, it appears, is a German lady, of

little English education, and left her money matters almost entirely to the management of respondent. Another thing: If respondent had any claim whatever to the \$600 note, why did he not have the same claim to the other notes? If all these notes were given for services rendered and to be rendered, why did respondent ever consent to have them placed in an envelope, and deposited in the bank, and not to be taken out except on the order of both himself and Smith? If the notes belonged to respondent, what right had Smith to say they should be put in the bank, and remain there until he consented to their withdrawal? These things, we think, strongly support the evidence of Smith that the only object and consideration contemplated in the execution of these papers was to defeat the county in the collection of its costs, as charged. These circumstances also tend to show that the respondent assigned this note and mortgage to Mrs. Spleth, knowing her to be without knowledge of the circumstances attending their execution, because he knew they were unavailing and valueless to him, and that the collection thereof could only be enforced by an innocent holder. If so, he was, beyond question, guilty of malconduct in his profession as an attorney and counselor at law. He thereby defrauded one client and deceived another.

It is not without interest to note here the objections of respondent to the testimony of Smith. He says Smith ought not to be permitted to testify, because he thereby seeks to impeach the validity of this note in the hands of Mrs. Spleth, who is an innocent holder thereof. It is true that Mrs. Spleth is an innocent holder of the note, and respondent's objection would be of greater force if this were a suit by her against Smith thereon. But it is clear from the evidence that she would not have been the holder of said note at all if the respondent had not purposely and corruptly, as we think, withheld from her the facts and circumstances attending its execution when he sold it to her. He says also that Smith ought not to be heard to testify as to the corrupt scheme entered into with respondent to defeat the claim of the county for costs, because such scheme was not such a one as could succeed under the law; that under the law such scheme was nugatory. But this scheme, while it did not and could not defeat the county's right to recover costs against Smith, did succeed, it appears, in defrauding Smith of the note for \$600. Why did not respondent think of this when he induced Smith to enter into this fraudulent scheme? He knew that it was worthless then, as well as at any time afterwards. It does seem that Smith's unfortunate condition at the time of entering into this arrangement was such as to appeal to any well-paid, honest lawyer for genuine sympathy and fair treatment. Such objections

would be ridiculous but for the wickedness they show. To what subterfuges does iniquity resort when uncloaked and brought to bay? While the respondent denies the object of entering into this scheme to defeat the county, he does not deny or attempt to disprove any of the facts and circumstances shown by the evidence, as detailed herein, in relation to the matter, or the transfer by him of said note and mortgage to his client, Mrs. Spleth. We think the finding by the referee that the two charges above treated are supported and established by the evidence should be approved and adopted by this court.

It is contended by respondent that he ought not to be disbarred in this proceeding, because it is not shown that he has committed or been convicted of any crime. This contention proceeds upon the theory that this is a criminal proceeding. In *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569,—a leading and exhaustive case on this subject,—it is held that "the proceeding is in its nature civil"; that "the proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them." In this case it is further said, as to the necessity of a criminal prosecution or conviction as a prerequisite to bringing this proceeding: "Cases may occur in which such requirement would result in allowing persons to practice as attorneys who ought, on every ground of propriety and respect for the administration of the law, to be excluded from such practice. A criminal prosecution may fail by the absence of a witness, or by reason of a flaw in the indictment, or some irregularity in the proceedings; and in such cases, even in England, the proceeding to strike from the roll may be had. But other causes may operate to shield a gross offender from a conviction of crime, however clear and notorious his guilt may be,—a prevailing popular excitement, powerful influences brought to bear on the public mind or on the mind of the jury; and many other causes which might be suggested,—and yet, all the time, the offender may be so covered with guilt, perhaps glorying in it, that it would be a disgrace to the court to be obliged to receive him as one of its officers, clothed with all the prestige of its confidence and authority. It seems to us that the circumstances of the case, and not any iron rule on the subject, must determine whether and when it is proper to dispense with a preliminary conviction." In *re Treadwell* (Cal.) 7 Pac. 724,—a disbarment proceeding,—it is said; "In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him, for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and

counselor in the courts under the license which has been granted to him, and not for the purpose of adjudging whether he is guilty of a commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar an attorney. If an attorney be found by a court guilty of acts indicating professional moral depravity, the court can, without previous conviction of a criminal offense, prevent the repetition of such official acts by taking away the license under which they have been committed. This it will do, not only in the interest of justice and of the public, but of the legal profession, which, like the court itself, ought to be free from all suspicion. It is indispensable that an attorney be trustworthy." In *State v. Winton* (Or.) 5 Pac. 337, it is said: "Legal knowledge and skill are not the only requisite of attorneys, but they must be conjoined with that ancient requirement of the law, integrity of character. Before admission to his office, as regulated by the Code, he must prove by evidence satisfactory to the court that he is a person of good, moral character, and show by an examination in open court that he possesses the requisite learning and ability. * * *

Upon an order being entered reciting these facts, he receives his certificate of admission, and becomes entitled to practice in all the courts of this state. The order of admission is the judgment of the court that he possesses these qualifications, and is fit to be intrusted with the responsible duties of his office. It, in effect, certifies to the community that he is competent to advise in legal matters, or to conduct legal proceedings, and is of such 'good, moral character' as will be a pledge to those dealing with him professionally of fidelity and honesty to their interests. And to this is added the sanction of his official oath to be faithful, upright, and honest in all duties which may devolve upon him as an attorney. These duties often comprise grave responsibilities, and interests of the highest conceivable character; life, liberty, reputation, and property are often intrusted to his care. It is indispensable that he be trustworthy, and of unswerving integrity of character in his official relations. As prerequisite to his admission, they must be enduring and distinctive traits of his character while he exercises the high prerogative of his office. A lapse from them, upon a proper showing, in his official conduct, is fatal to his right to be an attorney. Justice to the court, protection to the public, and the honor of his profession alike inexorably demand that he act with fidelity and honesty to the interests intrusted to his care. Whenever, therefore, it is made to appear to the satisfaction of the court that an attorney has been guilty

of conduct or acts committed inside or outside of his professional employment, which show him utterly unfit to practice law and to participate in the official ministrations of justice, the court will exercise its summary powers, and disbar him." See, also, *Weeks*, Attys. at Law, § 80, and authorities cited.

We think the great weight of authority is to the effect that a charge or conviction of crime is not a prerequisite to the proceeding for the disbarment of an attorney. The question presented by this proceeding is not whether the respondent is guilty of a crime of which he has been or ought to be convicted, but whether, under all the facts of the case, he is a fit person to be permitted to practice as an attorney and counselor at law in this state. We think that an attorney who will take a decree of court into his possession, and surreptitiously change and alter it, with the corrupt purpose and intent to defeat the rights of the parties thereto, and to advance his own interest, is not, and cannot be said to be, a fit person to practice and assist in the ministrations of law and justice in this state. We think a person who, by one corrupt scheme or transaction, and in the consummation thereof, will willfully defraud one client and deceive another, is not entitled to use the license of this court to carry on such nefarious practices as an attorney and counselor at law in this state.

The respondent also contends that he ought not to be found guilty under charge "H," because, he says, the only witness against him is Smith, who is a pardoned convict. It is true that Smith is in this condition, but nearly all the facts and circumstances detailed in the evidence of Smith are corroborated. The respondent only disputes his testimony as to the purpose of the scheme entered into by them. Smith is not otherwise contradicted. The offense of which he was convicted does not necessarily degrade him, or detract from his credibility as a truthful man. No attempt was made to impeach his testimony, whereas throughout this whole case the evidence of the respondent is contradicted by other witnesses. His whole defense depends upon his own testimony and that of one C. G. Bradshaw. Bradshaw seems to have been the intimate friend, and sometimes the adviser, of respondent. And, besides, the general reputation of both respondent and Bradshaw for truth and veracity is shown by the evidence to be bad. Respondent, after some 18 of his neighbors testified that his reputation in this regard is bad, attempted to defend his good name by offering proof in rebuttal. But we think he did not succeed. Bradshaw makes no such attempt. We therefore find nothing in this contention to authorize us to interfere with the finding of the referee.

There are a number of charges involving the misconduct and bad moral character and want of truth and veracity on the part of respondent as an attorney and counselor at

law, but the conclusions reached above render it unnecessary to treat them.

As noted in the statement of this case, the relators constitute nearly all the local bar of Gallatin county, of which they and respondent are all members. Numbered among them are some of the most prominent lawyers of the state, whose high characters and reputations for integrity preclude the idea that in prosecuting this proceeding they have been actuated by jealousy or malice or other impure motives. There is nothing in the case to authorize the belief that they have been controlled by aught else than a desire to protect the courts, the profession, and the public from the scandals and wrongs resulting from permitting an unfit person acting as an officer of this court and participating in the ministration of the law in this state. A careful consideration of the whole case forces us reluctantly to the conclusion that the respondent is an unfit person to practice as an attorney and counselor at law in this state, and that our duty to the courts, the profession, and the public requires at our hands a judgment that he be disbarred. It is therefore the judgment of this court that the license as an attorney of E. P. Cadwell, respondent, is revoked, and that his name be stricken from the roll of attorneys of this court, and that he is debarred from practicing in any of the courts of this state, or from exercising any of the privileges of an attorney or counselor at law.

DE WITT and HUNT, JJ., concur.

(16 Mont. 110)

AUTHIER v. BENNETT BROS. CO.

(Supreme Court of Montana. May 6, 1895.)

LIBEL—GOOD CHARACTER—RECORD ON APPEAL.

1. Where, in an action for libel, defendant denied the publication, and also pleaded justification, the mere fact that plaintiff's reputation was shown to be good did not warrant a verdict in his favor.

2. The record on appeal should contain an orderly, chronological statement of the case, and it is the duty of the trial judge to see that the same is correct, both in substance and form, before settling it.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by C. H. Authier against the Bennett Brothers Company for libel. From an order granting plaintiff a new trial, defendant appeals. Reversed.

This is an appeal from an order granting a new trial. The action was for libel. The libel declared upon was the alleged false and malicious publication in a merchant's protective association of the following:

"Copyrighted by Andrews and Olds. (Form 1.)

"Report of Delinquent Accounts.

"To R. A. Bell, Agent: The following report of delinquent accounts is this day made

to you by article III. of the Merchants' Protective Contract, viz.:

Name of Delinquent Debtor.	Occupation.	Residence.	When Account Closed.	Amount of Delinquent Account.
C. H. Authier.	Butcher.	Helena.	June, '87.	\$168.65.

"By Bennett Bros. Company, Butte."

In the answer the defendant denied the publication as alleged in the complaint, and also pleaded a justification. The case was tried on these pleadings. Furthermore, the plaintiff set up in his complaint "that, at the time of the commission of the wrongs by the defendant hereinafter mentioned, he (the plaintiff) was, and always had been reputed to be, an honest man, and was so accepted among his neighbors and the inhabitants and business men of the city of Helena and state of Montana, and elsewhere." The defendant, in its answer, denies "that, at the times mentioned in plaintiff's complaint, plaintiff was, or always had been reputed to be, an honest man, or was so accepted among his neighbors or the inhabitants or the business men of the city of Helena or the state of Montana." The verdict of the jury was for the defendant. Plaintiff's motion for new trial was granted. From this order defendant appeals. The specification of error upon which the motion was granted is as follows: "The plaintiff specifies as error that there being absolutely no evidence contradicting the material allegations of plaintiff's complaint, except the witness Kipp, whose testimony was immaterial as showing what took place in Idaho, where plaintiff never lived, and numerous witnesses in Butte, where he did live, testifying to his good character, and it being absolutely essential that the defendant should establish by the preponderance of the evidence that the plaintiff's character was bad as charged in the libel, and substantial damages having been proven by the bare fact of such a false publication without proof of special damages, plaintiff was entitled to a verdict, and is now entitled to a new trial."

F. T. McBride and Geo. Haldorn, for appellant. F. E. Stranahan and H. R. Davies, for respondent.

DE WITT, J. (after stating the facts). We are of opinion that, even if the specification of error is true, it is not sufficient upon which to grant a new trial. We may assume, as the specification states, that it was proven, without substantial conflict of testimony, that the plaintiff's character was good; and by the word "character" we suppose counsel means reputation. There is some difference in the authorities upon the question of proving the plaintiff's general reputation. It is said in *Odgers on Libel and Slander*: "The plaintiff cannot give evidence of general good character in aggravation of damages merely, unless such character is put in issue on the pleadings, or has been

attacked by the cross-examination of the plaintiff's witnesses; for till then the plaintiff's character is presumed good." Page 310. "One way, but a very dangerous one, of minimizing the damages, is to show that the plaintiff's previous character was so notoriously bad that it could not be impaired by any fresh accusation, even though undeserved. The gist of the action is the injury done to the plaintiff's reputation; and, if the plaintiff had no reputation to be injured, surely he cannot be entitled to more than nominal damages. Hence the fact that the plaintiff had a general bad character before the date of the libel or slander may be given in evidence in mitigation of damages." Page 320. "There has been a great conflict of opinion as to the admissibility of evidence of the plaintiff's general bad character, and of rumors prejudicial to his reputation; but the law on the point has now been finally settled by the decision in *Scott v. Sampson*, 8 Q. B. Div. 491." Page 321. This is an English edition of an English work, and English authorities only are referred to. In *Townsend on Slander and Libel* we find the following: "It is a much vexed question whether, in an action for slander or libel, the plaintiff may, in aggravation of the damage he has sustained, introduce evidence of his good reputation prior to the publication complained of." Page 645. "The plea of not guilty put in issue the general character [reputation] of the plaintiff, and therefore upon a plea of not guilty, only, the defendant might give in evidence in mitigation the general bad character [reputation] of the plaintiff before and at the time of the publication complained of. Certainly, a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence. This principle, so much discussed at an early day, and for a time left unsettled, has since been so well established by authority as not now to be open for discussion;" citing numerous authorities. Page 669. "It has been held in some cases that the defendant may, in mitigation of damages, prove that, prior to the publication complained of, a general report or suspicion existed that the plaintiff had committed the act charged. The decisions to the contrary are quite numerous." Page 678. In *Newell on Defamation, Slander and Libel* we find it stated: "Proof of the bad character of the plaintiff at and before the time of the alleged slander is admissible in mitigation of exemplary as well as compensatory damages." Page 890. See, also, division 3, p. 823, § 1, and cases cited. It has been held that if a justification is pleaded, and testimony offered tending to prove it, testimony of plaintiff's reputation is not competent. *Miles v. Van Horn*, 17 Ind. 245; *Matthews v. Huntley*, 9 N. H. 146; *Severance v. Hilton*, 24 N. H. 147; *Chubb v. Gsell*, 34 Pa. St. 114. It has also been held

that, if justification is pleaded, the plaintiff may show his good reputation in aggravation of damages. *Harding v. Brooks*, 5 Pick. 244; *Byrket v. Monohon*, 7 Blackf. 83; *Smith v. Lovelace*, 1 Duv. (Ky.) 215; *Downey v. Dillon*, 52 Ind. 442; *Moyer v. Moyer*, 49 Pa. St. 210. It has also been held that the defendant may show the bad character of plaintiff in mitigation of damages. *Moyer v. Moyer*, 49 Pa. St. 210. Upon these points, see, also, the text writers above cited.

It is not necessary in this case for us to determine what view we would take as to pleading or proving the plaintiff's good or bad reputation in aggravation or mitigation of damages. We cite the above authorities simply for the purpose of showing that the question of the plaintiff's reputation has been held to be a circumstance in aggravation or mitigation of damages. But the specification in this case assumes a position which is not sustainable, to wit, that the plaintiff's good reputation is a complete and perfect cause of action, if joined to the averment that the alleged libel was published; that is to say, if an alleged libel is pleaded to have been published against a person of good reputation, the cause of action is complete, and there is no defense. The untenableness of the position is apparent. In the case at bar the defendant denies the publication of the alleged libel as set out in the complaint, and also pleads justification. The case was tried upon these pleadings. No objections were made to them, if any existed. For all that appears by the specification, the defendant made out its defense independent of the reputation of the plaintiff. Therefore the bare fact that plaintiff's reputation was shown to have been good could not alone be a cause for granting a new trial.

The case is remanded, with directions to deny the motion for a new trial, and to enter judgment upon the verdict for defendant for costs.

We cannot leave this case without animadverting upon the record which was filed. The statement on motion for new trial commences as follows: "The case being regularly called, the plaintiff introduced." Here the language breaks off abruptly. Instead of it appearing what the plaintiff introduced, the next page of the record is entitled: "Amendments Proposed by Defendants to Plaintiff's Proposed Statement on Motion for New Trial." "Amend by striking out from said proposed statement, beginning at line 11, pages 1 and 2 thereof, and substitute therefor pages 1 to 73, as follows, inclusive." But the statement, as proposed, is difficult to identify. There is nothing to indicate what or where line 11, page 1, is. The record says: "Substitute pages 1 to 73, as follows." Probably this indicates those pages in the proposed amendments, but that paging is not carried into this record, and there is no way by which we can ascertain what they were. Commencing on the next page of the record,

there follow 81 pages of testimony, frequently by question and answer. Then the record states that the plaintiff rested, and defendants moved for a nonsuit, which motion it appears was overruled. On the next page of the record appear more amendments. The language is as follows: "Amend by striking from said proposed statement pages 3, 4, and 5 thereof, and substituting therefor the following pages 74 to 123." Again, this paging does not appear. On the next page of the record appears: "S. L. Davis, recalled on behalf of defendant." The record at this point seems to break into some matter which should appear somewhere else, but there is no showing as to what that matter is. Then follows a considerable amount of testimony introduced by the plaintiff. Finally, the record reaches a point where we find the following: "The foregoing amendments are correct, and are allowed without approval of form, and made part of the statement, and are ordered inserted therein. John J. McHatton, Judge." But these amendments were not inserted in the statement, for immediately following the signature of the judge comes the language: "The plaintiff, to disprove the allegations of the proof of the libel of defendant, introduced the following witnesses, who testified as follows." Then is inserted testimony of a number of witnesses for plaintiff in rebuttal. The instructions are next inserted, and the motion for a new trial, and the specification of errors. After all this the court certifies that the above statement is correct, and the same is allowed. This record is much like that in *Becker v. Commissioners*, 10 Mont. 87, 24 Pac. 700, in which case we said: "The engrosser, instead of constructing a perfect work, has simply piled up the material in a disorderly mass, as it came to his hand. That this is not an adherence to chronological order does not require extended discussion." See, also, *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333, and cases there collected; *Barger v. Halford*, 10 Mont. 57, 24 Pac. 609; *Railroad Co. v. Warren*, 6 Mont. 275, 12 Pac. 641; *Fant v. Tandy*, 7 Mont. 443, 17 Pac. 560; *Sherman v. Higgins*, 7 Mont. 479, 17 Pac. 561; *Raymond v. Thexton*, 7 Mont. 299, 17 Pac. 258; *Rodonl v. Lytle*, 13 Mont. 124, 32 Pac. 491. In allowing the amendments in the case at bar, the judge made the same note as he did in the case last cited, namely, that he settled the same "without approval of form." But it is the duty of the district judge, if the statement is incorrect in substance or form, to require it to be made correct in both such respects before settling it. To settle a statement does not mean for the district judge to attach his approval to an incongruous mass of material, and leave it to the appellate court to decipher the matter which was before the district court. If the statement is not prepared as required by the law and practice and rules of court, it is the duty of the district judge to withhold his settlement. To do so is, as remarked in *Sherman v. Hig-*

gins, 7 Mont. 482, 17 Pac. 561, "the proper practice, and we hope to see it universally adopted by the judges of the trial courts." As said in *Newell v. Meyendorff*, 9 Mont. 264, 23 Pac. 333: "The matter is not presented in that orderly, systematic, chronological method that presents to the court an intelligent view of the case at a reading. When we do arrive at the gist of the matter, it is after such labor as caused the learned compiler of the Institutes of Justinian to say, in the dedication of that work: "Et opus desperatum, quasi per medium profundum euntes coelesti favore adimplevimus.""

It seems to be a severe course to strike out an appellant's record when he appears to have an appeal which should be sustained. Moreover, in this case the district judge was as much at fault in settling the statement as was counsel in preparing it. The record has been in this court for 18 months, and no motion made to strike it out, and no oral argument made by the respondent on the hearing. We concluded to examine the case on its merits, but our doing so in this case is not a precedent for a further exercise of our patience in this respect in the future. The fact is that, since the views were expressed in the cases above cited, records have been much improved, and we have mercifully hesitated to suddenly make an example of the appellant herein. Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

(54 Kan. 190)

CUNKLE v. INTERSTATE RY. CO.

(Supreme Court of Kansas. Nov. 11, 1903.)

RAILROAD COMPANIES—CONSOLIDATION—REVIVOR OF ACTION.

In an action against a railroad company, judgment was given in its favor, when the plaintiff instituted a proceeding for review in the supreme court. After that time the defendant and other railroad companies were consolidated under a new name, and the defendant company ceased to exist. The consolidated company succeeded to the property, powers, and privileges, as well as the obligations and liabilities, of the defendant company. No motion was made to substitute the successor, or to revive the proceeding in its name, until more than a year after the defendant company had become defunct, and the successor refused its consent to such revivor. *Held*, that no revivor could then be had in the name of the successor, and that the proceeding in error must be dismissed.

(Syllabus by the Court.)

Error from district court, Greenwood county.

Action by L. J. Cunkle against the Interstate Railway Company. There was judgment for defendant, and plaintiff brought error. Heard on motion to dismiss. Dismissed.

C. N. Sterry, for plaintiff in error. B. P. Waggener and David Kelso, for defendant in error.

JOHNSON, J. This was an action to recover an award made in a condemnation proceeding for a right of way through the land of L. J. Cunkle for the Interstate Railroad Company. The commissioners who were duly appointed made an award of \$406.25 for the land taken and the damages done, and this amount the railroad company deposited with the county treasurer, after which time the company took possession of the land so set apart, and built a railroad over it for a distance of 325 feet. Cunkle appealed from the award, and in the district court it was increased to \$1,727.50. The company was unwilling to pay this sum for the right of way, and it was announced that the award would not be paid, nor the right of way used, and later the track was taken up and built elsewhere. Afterwards, upon an order of the district court, the money which was deposited with the county treasurer to pay the first award was withdrawn by the company, and no part of the award made in the district court has ever been paid. The present proceeding was then begun, and the court to which it was submitted found that the company had abandoned the land set apart for its right of way, and that Cunkle was not entitled to recover the award. The plaintiff excepted to the rulings and judgment of the district court, and the case was brought here for review on June 10, 1890. On July 3d of the same year the defendant company was consolidated with the St. Louis & Emporia Railroad Company, under the name of the Interstate Railway Company, and on January 10, 1891, in pursuance of statute, the Interstate Railway Company was consolidated with 11 other railroad companies, and the name of the new company was the Kansas & Colorado Pacific Railway Company. Under the agreement of consolidation, it was provided that the consolidated company should own and control the properties and privileges of the constituent companies, and should be subject to all of the obligations and liabilities to the state which belonged to or rested upon either of the companies making the consolidation. The defendant moves to dismiss the proceeding in this court, contending that, under the authority of *Railway Co. v. Smith*, 40 Kan. 192, 19 Pac. 636, the defendant company had, by its consolidation with the other companies, ceased to exist as a corporation, and that no legal proceeding could be taken against it. At the same time the plaintiff moves to substitute the Kansas & Colorado Pacific Railway Company as the successor of the defendant in error. The new or consolidated company succeeds to the obligations and liabilities of the defendant company, as well as to its property, privileges, and powers. *Railroad Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108; *Berry v. Railroad Co.*, 52 Kan. 759, 774, 34 Pac. 805, and 36 Pac. 724. The fact that the defendant has become defunct does not of itself cancel its obligations, nor defeat the

plaintiff in maintaining an action for the recovery of any valid claim which he has against it, providing action is seasonably taken. The action of *Railway Co. v. Smith*, supra, holds that when a railroad company is consolidated with another under a new name it ceases to exist, and that any proceedings before consolidation cannot afterwards be continued or carried on in the name of the defunct corporation. It does not decide that the new consolidation destroys an existing right of action, or that it necessarily defeats a pending proceeding. Indeed, it is plainly intimated that a proceeding upon the death of the defendant can thereafter be continued only in the name of the successor in interest of such defunct party.

It is conceded that the defendant company is dead, and, further, that its successor is the Kansas & Colorado Pacific Railway Company. The Code authorizes the revivor and continuance of an action or proceeding against the representative or successor in interest of the party that has ceased to exist, and provides how and when it may be done. Civ. Code, §§ 40, 425-435. There is no other or different method of substituting a successor of a dead party as defendant, and reviving the action in the name of such successor, than is prescribed in the last sections named, and which may be found in article 19 of the Civil Code. They provide that such a substitution or revivor may be made by the order of the court or judge, but they further provide that such an order cannot be made without the consent of the successor, unless it is done within one year from the time it could have been first made. Civ. Code, § 433. This is a positive requirement of the statute, and hence the motion of the plaintiff comes too late. More than three years elapsed after the consolidation was effected before the application to substitute was made, and the successor of the defendant appears, and expressly declines to give its consent to the substitution or revivor. The proceeding in error must, therefore, be dismissed. All the justices concurring.

(4 Ariz. 327)

ADAMS et al. v. DIRECTORS OF INSANE ASYLUM.

(Supreme Court of Arizona. May 6, 1895.)

DE FACTO OFFICERS—COMPENSATION.

Where the directors of the territorial insane asylum had appointed a resident superintendent, and he had qualified, and was acting as such, and later a new board of directors had appointed another to the same position, he not being in the territory from the time of his appointment until the 19th day of June, 1890, when it was adjudged that the appointing power lay in the hands of the governor, the former resident superintendent is entitled to the salary of the office for the entire time he filled the same, the later appointed man being neither a *de jure* nor *de facto* officer.

Appeal from district court, Maricopa county; before Justice A. C. Baker.

Action by G. N. Adams and Isaac Titus, Jr., executors of the estate of I. S. Titus, deceased, against directors of the insane asylum of Arizona territory, for salary as resident physician and superintendent. From a judgment for plaintiffs, defendants appeal. Affirmed.

Francis J. Heney, Atty. Gen., for appellants. Alexander & Stilwell, for appellees.

BETHUNE, J. On the 19th day of May, 1888, I. S. Titus was appointed by the board of directors of the insane asylum of this territory the resident physician and superintendent thereof, and performed the duties of said office from the 1st day of June, 1888, when he qualified, until the 19th day of June, 1890, when it was adjudged by the district court of the Second judicial district of this territory, in and for the county of Maricopa, that said Titus was not legally entitled to hold said office, on the ground that the governor of the territory alone had power to appoint a person thereto; but on the 1st day of October, 1889, a new board appointed L. C. Toney as the resident physician and superintendent, who, as the record shows, was not within the territory from that time until June 19, 1890. The board of directors refused to pay Titus any of the salary from the 1st of October, 1889, to June 19, 1890, notwithstanding he performed the duties of the office in the absence of Toney, but did pay it to Toney by its warrant on the treasurer of the territory. Titus in his lifetime brought this action to compel the board of directors to draw its warrant on the treasurer of the territory for the sum claimed by him as salary from October 1, 1889, to June 19, 1890, and, dying pending the litigation, his executors, appellees, were substituted as plaintiffs, and judgment was rendered in their favor in the court below, from which judgment defendants appeal to this court. There is no dispute as to the facts in the case, but appellants contend that, payment having been made to Toney, Titus, being only a de facto officer, cannot recover from the territory or the board the amount claimed to be due him. This would certainly be true had Toney been a de jure officer, but, he being neither a de jure nor a de facto officer, the payment made to him was without any reason or warrant of authority whatever, and could not affect Titus' right. The case of Behan v. Board of Prison Com'rs (Ariz.) 31 Pac. 521, is almost on all fours with this case, in principle. As said in that case: "Prior to the bringing of the suit in the district court by the attorney general against Behan, it had been the practice that the superintendent should be appointed by the board of prison commissioners, and the legality of that practice, up to the time of the judgment of ouster against Behan, seems to have been unquestioned." In that case, as in this, there was no de jure officer,

and Behan, having performed the duties as superintendent under the appointment of the board of prison commissioners (who it was afterwards adjudged had no power to appoint), was awarded the salary attached to that office. Following the principle of that case, we think the judgment in this case should be affirmed, and it is so ordered.

HAWKINS and ROUSE, JJ., concur.

(11 Wash. 601.)

DOUTHITT et al. v. MacCULSKY et al.
(Supreme Court of Washington. April 15, 1895.)
MECHANIC'S LIEN — ON COMMUNITY PROPERTY — FORECLOSURE JUDGMENT—BINDING EFFECT ON WIFE.

1. Under Laws 1893, c. 60, § 10, p. 115, providing that depositions and other evidence on file shall be appropriately referred to in the proposed bill or statement, and, when it is certified, shall, if the judge so direct, be attached to and become a part of the bill, it is immaterial whether exhibits are attached by counsel before the certificate is made, or attached by the judge, if they are appropriately referred to in the copy of the bill served on respondents' counsel.

2. In a suit to foreclose a lien upon community property, the wife of the owner is a necessary party defendant.

3. The husband may contract for the erection of buildings on the community real estate, so as to subject it to mechanic's liens therefor.

4. A lien notice which describes the husband as the "reputed owner" is not invalid, where it appears on the trial of the foreclosure suit, in which husband and wife are joined, that the property was in fact owned by the community, though this was unknown to claimant at the time he filed his notice.

5. Several actions which were brought to foreclose mechanics' liens on community property, in some of which the wife was not made a party, but concerning which she had full knowledge, were consolidated and tried together, the wife participating in the trial, and a single decree was rendered foreclosing all the liens. *Held*, that the proceedings being in rem, and the wife not having appealed from the decree, she was bound thereby, though not technically a party to each of the actions.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Nellie Douthitt and another against A. E. MacCulsky and others to perpetually enjoin the enforcement of a decree foreclosing mechanics' liens. From a judgment for plaintiffs, defendants appeal. Reversed.

Carr & Preston, for appellants MacCulsky, Hanford, and Harrington. Fishback, Sapp & Ferry, for appellants Hughes and Albright. Smith & Littell and Jenner, Legg & Williams, for appellants T. F. Clark and John C. Grayson. Elder & Hardin, for appellants Charles and Keeler. Thompson, Edsen & Humphries, for respondents.

GORDON, J. Respondents have filed a motion in this court to strike the statement of facts from the record, because the copy of the statement served on counsel for respondents did not contain any of the exhibits or written evidence introduced upon the trial; but there-

after the same were, over the objections of the respondents, attached to the original statement, and certified by the court. Section 10, c. 60, p. 115, Laws 1893, relating to the settling and certifying of statements of facts, provides: "Depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof." The copy of the statement served in this cause made appropriate reference to the exhibits, etc. The judge who presided below has properly certified the statement, including such exhibits, and we deem it immaterial whether the same were attached by counsel before the certificate was made or attached by the judge. We think in either case the certificate is conclusive. The motion to strike is therefore denied.

On the 3d day of July, 1889, Charles McDonald and Elizabeth McDonald, husband and wife, were the owners of lot 6 in block 8 of Boren's addition to Seattle, and on that day leased the same to respondent D. William Douthitt, for a term of 15 years. At that time, and for some years prior thereto, and at all times since, said D. William Douthitt and his co-respondent, Nellie Douthitt, were and are husband and wife. Said lease was duly filed in the office of the auditor of King county, and thereafter the husband entered into a contract in writing with W. D. Farris, H. L. Wyatt, and W. C. Stetson for the erection of a four-story brick building upon said lot, said contractors to furnish all materials and labor therefor. The building was erected in pursuance of said contract, but it appears that the contractors neglected to pay for a large amount of material furnished by different firms and corporations, for use, and which were actually used, in the erection and construction of said building; that thereafter, and some time during the year 1891, these appellants, together with several other persons so furnishing material, having filed their lien notices, brought their several suits in the superior court for said county for the purpose of foreclosing the same. In all of said suits said contractors and respondent D. William Douthitt were made parties defendant, and in three of them respondent Nellie Douthitt was also joined as a party defendant, and joined with her husband in answering. In none of the suits brought by these appellants, however, was she made a party, and the lien notices filed by these appellants, respectively, named the respondent D. William Douthitt as the "reputed owner" of the premises upon which said liens were claimed, and like allegations touching the ownership of the leasehold and the building were made in their respective complaints. In each of said causes respondent D. William Douthitt appeared and answered, and in his answer failed to deny said

allegations of ownership. In the foreclosure suit brought by appellants Clark, Harris, and Grayson, partners as Clark, Harris & Co., the Star Paint Company filed a complaint in intervention, in which complaint it was alleged that D. William Douthitt and his said wife were the owners of the building and the premises, and setting up a claim of lien thereon. The respondents answered the intervening complaint of the Star Paint Company, in which answer they alleged affirmatively that D. William Douthitt entered into a contract in writing with said Farris, Wyatt, and Stetson for the construction of said building, and that he had fully paid the contract price. In two of the other suits brought for the purpose of foreclosing liens upon said premises, the respective complaints alleged that the premises were owned by respondents, D. William and Nellie Douthitt, and respondent Nellie Douthitt was joined as a party defendant therein. * Thereafter, on October 17, 1891, pursuant to an order of the court, all of said causes therein pending (brought, as hereinbefore stated, for the purpose of foreclosing liens upon said premises, being seven in all) were consolidated; and on the 2d day of November, 1891, the same were brought on for trial. Upon the trial, the court, among other things, found that the premises were leased to respondent, "D. William Douthitt; that he is still the lessee * * * and the owner of said term of years; that upon said premises the said D. William Douthitt, lessee, erected a four-story brick building, now standing thereon, and of which said Douthitt is the owner." On November 20, 1891, the court rendered its decree, establishing and foreclosing all of said liens excepting one only (which was not claimed by any of the parties appellant), said decree establishing said liens "upon all the interest of the said defendants, D. William Douthitt and Nellie Douthitt, his wife," in and to said premises, and directing "that said building, the said leasehold interest, and the term of years in said lot of land be sold [thereunder] * * *; that the defendants, D. William Douthitt and Nellie Douthitt, and each of them, be forever foreclosed of all interest, estate, claim, lien, and equity of redemption in said described building and said described land, from and after the date of the confirmation of such sale, excepting only such equity of redemption as is allowed by law for property sold under decree of foreclosure of mortgage." Respondent D. William Douthitt appealed from said decree to this court, and his appeal was dismissed. *Clark-Harris Co. v. Douthitt*, 4 Wash. 465, 30 Pac. 744; *Id.*, 5 Wash. 96, 31 Pac. 422. In July, 1893, the respondents, Nellie Douthitt and D. William Douthitt, brought this action in the superior court of King county to perpetually enjoin the enforcement of said decree so rendered in such consolidated cause, in so far as said decree orders a sale of the property to satisfy said liens. They based

their claim to relief on the alleged fact that Nellie Douthitt was not a party to nor bound by the former decree. The trial court granted the injunction, and the appellants here (defendants below), appeal therefrom.

Many questions of an interesting nature have been very ably discussed by learned counsel in presenting this appeal, but the conclusion which we have reached upon one of them disposes of the cause, and relieves us of the necessity of considering any other. Respondents contend that the building and the leasehold interest are community property, and that in a suit to foreclose a lien upon community property the wife is a necessary party defendant; and this court has so decided in *Manufacturing Co. v. Miller*, 3 Wash. St. 480, 28 Pac. 1035. Upon the part of appellants it is contended: First, that the consolidated cause was one action, and the respondents, as parties to that cause, are bound by the decree; second, that respondent Nellie Douthitt, while not technically a party to each of the causes so consolidated, was, nevertheless, actually represented on the trial of the consolidated cause by counsel, and participated in the trial, and defended against the liens which were being asserted; that she had actual knowledge of the proceedings, and did not appeal from the decree.

The proceedings to foreclose the liens were, so far as respondents are concerned, strictly in rem. No personal claim was made against the respondents, or either of them. As regards the ownership of the property upon which the liens were sought to be enforced, it could make no possible difference whether it was the property of the "community" or the separate property of one of the spouses. In either case it would be subject to the lien arising for materials furnished or labor performed. Nor do we think the fact that the lien notices described the husband as being the "reputed owner" of the property could operate to defeat the liens, where it developed upon the trial of the action to foreclose that it was in fact the property of the "community." In other words, we hold that a lien notice which describes the husband as the "reputed owner" of the premises is not invalid where it appears, upon the trial in a foreclosure suit, in which both husband and wife are joined, that the property was in fact owned by the community, but that such fact was not known to the claimant at the time of the filing of his lien notice; and this holding in no wise conflicts with the conclusion reached in *Sagmeister v. Foss*, 4 Wash. 320, 30 Pac. 80, 744. This court has held that the husband is empowered to contract for the erection of buildings on the community real estate, and thus subject it to mechanics' liens. *Manufacturing Co. v. Miller*, supra.

The respondent Nellie Douthitt was a party defendant in some of the actions brought to foreclose liens upon these premises, and said actions were consolidated with the causes

instituted by these appellants, and there was but one decree entered in such consolidated cause. The ownership of the property was one of the questions submitted upon the trial of such consolidated cause for a judicial determination. The court expressly found that it was the property of the respondent D. William Douthitt, and we think such finding is conclusive and binding upon her and the community composed of herself and the said D. William Douthitt. It was their right, and they had the opportunity, to make every possible defense which existed against the enforcement of the liens. The wife was a party to the decree. It was her right, either separately or by joining with her husband, to appeal from said decree. She, however, elected not to do so, and the same has become final and binding upon her, as well as upon all other parties to the same. While, as has been said, the respondent Nellie Douthitt was not a party to some of the foreclosure suits, yet she knew of their pendency, and the objects sought to be attained therein. She also participated in the trial of the consolidated case, and knew of the decree and of her right to appeal. Under such circumstances, we think that she, as well as her husband, is conclusively bound by the decree. The sole object of the several suits being to subject this property to the lien claims, each of the members of the community became directly interested in the result of said action. There was an identity of interest existing between them, so far as the property of the community was affected by the suits. The wife participated in the trial, at least as to some of the issues submitted for determination; and with full knowledge of the other issues and of their possible results, and with actual knowledge of what was decreed in the premises, she remained silent when she should have spoken, and cannot now be heard. "It is contrary to the policy of the law to allow the same question to be separately litigated by every person interested in it." *Albert v. Hamilton* (Md.) 25 Atl. 341.

Admitting the general rule to be that no one can be conclusively bound by a judgment or decree unless he be a party to the suit or be in privity with the party, we think this rule does not require a person to become a technical party to the record in order to be bound and concluded by the result of the suit. If he be interested in the subject-matter of the suit, and exercise the right of participating in the defense, he cannot afterwards be heard to contend that he is not bound and concluded by the judgment and decree to the same extent that he would have been if made a technical party to the proceeding. "The law requires that there shall be an end of litigation; and, where a party has had a full and fair opportunity presented of making all the defenses at his command to an asserted right or claim, it is quite immaterial that he has elected to appear and defend in the name of another, who is a party of record, rather

than cause himself to be made a codefendant in the proceeding." *Parr v. State* (Md.) 17 Atl. 1020. And this, we think, is applicable to the present case. The respondent Nellie Douthitt, in addition to being an actual party defendant in some of the foreclosure suits, had full knowledge of the existence of the others being prosecuted against this property; also of the fact that her husband had actually appeared in them, and that counsel paid from the common fund was in charge of said litigation. She permitted the litigation to proceed in the way that it did proceed, understanding its nature and its possible results. A just appreciation of her relation to the community, the identity of her interest in the property with that of her husband, and her knowledge of the pending litigation, alike required her to make such resistance to the foreclosure suits as the law and the facts warranted or would permit her to make; and, failing so to do, she must abide the consequences of such failure. In *Bachelder v. Brown* (Mich.) 11 N. W. 200, the court, speaking through Cooley, J., say: "It is true the general rule is that judgments bind only parties and their privies; 'but it is equally true that those are held to be parties who have a right to control the proceedings, to make defense, to adduce and cross-examine the witnesses, and to appeal from the decision if any appeal lies.' * * * Courts will look beyond the nominal party, and treat as the real party him whose interests are involved in the issue, and who conducts and controls the action or defense, and will hold him concluded by any judgment that may be rendered." In *Anderson v. Watts*, 11 Sup. Ct. 449, suit to foreclose a mortgage was brought against the wife alone, and the husband joined in the answer. The supreme court of the United States, in an opinion by Fuller, C. J., say: "Mr. Davis appears to have been a necessary party; and although the plaintiffs did not originally, or by amendment after answer, make him in terms a party to their bill, * * * yet the effect of what was done was such as bound him by the decree; and we think, upon this record, he must be held to have become such. A person who has not been named as defendant to a bill may appear at the hearing, with the consent of all the parties to the cause; and in this instance the objection of want of consent cannot be taken." The rule and the reason for it are most admirably stated by Mr. Greenleaf, in volume 1 of his work on Evidence (sections 522, 523): "Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true,—that by proceedings to which he was not a stranger he may well be held bound. Un-

der the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But, to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the same proceedings. We have already seen that the term 'privity' denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with him in interest; and, wherever this identity is found to exist, all are alike concluded." The proposition here laid down is fully sustained by the authorities. *Albert v. Hamilton*, supra; *City of Chicago v. Robbins*, 2 Black, 418; *Robbins v. City of Chicago*, 4 Wall. 657; *Bachelder v. Brown*, supra; *Parr v. The State*, supra; *Hurd v. McClellan* (Colo. App.) 29 Pac. 181.

Having neglected to perfect an appeal, and after waiting until the statute has run against new suits to enforce the liens, the respondents seek the interposition of equity to relieve them from the consequence of their own neglect, and the judgment appealed from presents the somewhat novel and anomalous spectacle of equity enjoining its own decree. The judgment and decree of the lower court must be reversed, and the cause remanded, with instructions to dismiss the action.

HOYT, C. J., and ANDERS and SCOTT, JJ., concur.

(11 Wash. 565)

BRODECK et al. v. FARNUM et al.

(Supreme Court of Washington. April 8, 1895.)

BUILDING CONTRACT—ACTION FOR BREACH—RELEASE OF JOINT CONTRACTOR—EFFECT—SET-OFF—JOINT AND SEVERAL CLAIMS.

1. The making of payments on a building contract without objection, after the time specified for the completion of the work, is a waiver of any claim for damages, except as against the unpaid balance, for failure to finish the work within the stipulated period.

2. Where no date is specified for the completion of a building, the contractors are entitled to a reasonable time therefor.

3. Defendants contracted to erect a building for plaintiffs, but before it was finished a portion thereof fell, and work was suspended, it being disputed which of the parties was at fault. Subsequently, S., one of the defendants, made a new contract to complete the structure. Held, that the question of doubtful liability was sufficient consideration for the new contract, and upon the fulfillment thereof by S. he was entitled to recover the balance of the contract price.

4. Where several persons, who have jointly entered into a building contract, withdraw, and one of them makes a new contract to complete the work, he is thereby released from liability under the former agreement; and, since the release of one joint obligor releases all, the prior contract is terminated.

5. One who is sued jointly with others for breach of a building contract, may off-set individually, and for the defendants jointly, a claim for a balance due on the contract price.

Appeal from superior court, King county; R. Osborn, Judge.

Action by G. Brodeck and another against George W. Farnum and others for breach of contract. From a judgment for plaintiffs, defendant W. C. Stetson appeals. Reversed.

Wiley & Bostwick, for appellant. Will H. Thompson, E. P. Edsen, and John E. Humphries, for respondents.

SCOTT, J. This was an action for damages for breach of a contract entered into between the plaintiffs and the defendants for the erection of a building. The claim for damages is based upon the following grounds, in substance: (1) That the building was not completed within the time contracted for, whereby the plaintiffs lost certain rents; (2) that by the terms of the contract said building was to be constructed so that the first floor should be upon a level with the sidewalk, according to the established grade, and that it was not so constructed, but was erected so that the first floor was a foot or more higher than it should have been; (3) that the building was not constructed according to the plans and specifications, in that certain posts were placed therein, and was constructed of inferior materials, and that the work was defective, whereby it was rendered of much less value than it otherwise would have been. The defendant Farnum made no answer. The defendant Reitze answered, denying certain matters alleged in the complaint, and averring that Farnum was the principal contractor, and that himself and Stetson were sureties, and that plaintiffs had knowledge thereof; that during the progress of the construction of the building one of the walls fell, without the fault of the defendants, and because of the negligence and fault of the plaintiffs in failing to provide a suitable and sufficient foundation for said wall; and that thereupon said plaintiffs entered into a new contract with the defendant Stetson, and extended the time for the completion of the building, whereby the defendant Stetson was to construct the same, and that Stetson did complete the building in accordance with such contract. Defendant Stetson answered, denying certain matters alleged in the complaint, and setting up several affirmative defenses, wherein it was, in substance, alleged that it was the duty of plaintiffs to provide the foundation for said building, and that the defendants entered upon the construction of the building accord-

ing to the contract, but that the foundation therefor provided by the plaintiffs was insufficient and insecure; that, after the building was partly constructed, a portion of it fell, which was wholly due to the fault of the plaintiffs; and that he thereafter succeeded to all the right, title, and interest of his codefendants Farnum and Reitze in and to said contract, with the knowledge and consent of the plaintiffs, and entered into a contract with the plaintiffs to make the necessary repairs and complete the building, the time therefor being extended; and that he thereafter proceeded to and did construct the building in accordance with the contract and certain agreed alterations; and alleging that the posts aforesaid were put in said building, and the lower floor raised, in accordance with the plaintiffs' directions. He also set up a counterclaim for certain extras furnished, and for the balance of the contract price due for the erection of the building. The plaintiffs replied, denying the affirmative matters pleaded. Verdict and judgment were rendered for plaintiffs upon the trial, and defendant Stetson appealed therefrom.

Some of the questions presented are complicated, owing to the contradictory character of the proof, and its insufficiency in some particulars, and it is difficult to determine all of them definitely. But we may perhaps indicate our views sufficiently for the guidance of the lower court in the further disposition of the cause. The first point raised by appellant is that the court should have granted his motion for a nonsuit. It appears that after the expiration of the time fixed for the completion of the building in the original contract, and while appellant, Stetson, was engaged in the construction of the same, the plaintiffs made several payments to him thereon, in all amounting to the sum of \$9,480; and it is contended—accepting the plaintiffs' view of the case, and conceding there was no second contract with Stetson—that this was a waiver of the time fixed for the completion of the building in the original contract; and, furthermore, that these payments were made with full knowledge that the building was being constructed above the grade; and that, having made these payments, the plaintiffs could not maintain an action for damages. As to this question, however, there was some proof to show that defective materials had been used in the construction of the building, and we are not satisfied from the proofs that the plaintiffs knew that such materials were defective, and were not such as were called for by the contract. Consequently the motion for a nonsuit was properly overruled.

In connection with this same matter it is contended that the court erred in overruling the motion of appellant to exclude from the consideration of the jury all evidence as to loss of rent accruing between July 1, 1890, and September 9, 1890, the first date being the time fixed in the original contract for the

completion of the building, and the last date being the time when the last payment was made by the plaintiffs to Stetson. We think this point is well taken, for, if no contract had been entered into with Stetson for the completion of the building after the falling of a portion of it, and conceding that Stetson was continuing the work under the original contract, the making of these payments with full knowledge of the facts was a waiver of all claims for damages, except as against the balance remaining unpaid, for a failure to complete the building by the time specified, up certainly to the date of the last payment, and the plaintiffs could not maintain an action therefor. *Henricus v. Englert* (Sup.) 17 N. Y. Supp. 235-237. Evidence in support of appellant's counterclaim was excluded by the court. We are of the opinion, also, that the waiver of time may have gone further than this, which we shall hereafter consider.

It is further contended that the court erred in overruling appellant's motion to withdraw from the consideration of the jury the evidence of damage in consequence of the building being above the grade, the grounds for said motion being that it appeared from the evidence of the plaintiffs that with full knowledge of the fact they had voluntarily paid more money to the contractors than they now claim to be damaged by reason of the building being above the grade; and it further appeared by the testimony of the plaintiffs that it was their duty to provide the foundation for the building, and they undertook to do so. The building was being erected upon tide lands, and the foundation was in part composed of piles driven into the ground. The plaintiffs procured this to be done, and had the piles sawed off and capped, and left in condition for the building to be erected upon; and, if the foundation they had thus prepared was too high, it was their fault, and not the fault of the defendants. The evidence of damage in this particular was therefore inadmissible.

It is next contended that the court erred in excluding from the jury all evidence offered by appellant, Stetson, under his counterclaim. The respondents urge that this evidence was incompetent, and that the written contract entered into by the defendants must govern. But this does not seem to us as well founded. It was a disputed question as to whether the fall of a portion of the building was occasioned by the defective foundation provided by the plaintiffs, or whether it was due to defective material used in the construction of the building, or a failure to properly construct it. It appears that, after a part of the building fell, Farnum abandoned the work, and, while this matter as to which of the parties was responsible for the fall of the building was in dispute, and after work thereon had been suspended, appellant, Stetson, claims that he entered into a new contract with the plaintiffs to proceed with the

construction of the building, as alleged by him. The parties could lawfully make this second contract, notwithstanding the prior written agreement. The question of disputed or doubtful liability aforesaid was a sufficient consideration therefor; and, if it was made, and appellant, Stetson, complied therewith, it constituted a good defense against the action brought by the plaintiffs, and also authorized him to recover for the balance of the contract price, if he completed the building in accordance with such subsequent contract; and the proof therefore should have been admitted. The original contract price for the building was \$25,787. It is admitted that there was paid to Farnum, before the falling of a part of the building, \$9,654.80, and this, with the amount paid to Stetson as aforesaid, while he was proceeding with the construction of it, amounted to \$19,134.80, leaving a balance of \$6,652.20 upon the original contract price; and, in addition to this, Stetson claimed \$4,407.61 for extras. If this second contract was entered into, the plaintiffs could, of course, maintain no action for damages for a failure to complete the building within the time specified by the original contract, nor for such further time as was reasonably necessary therefor. It is not claimed that any date was specified in the later contract by which the building should have been completed, consequently the appellant had a reasonable time. When the last payment was made, the plaintiffs knew that the building was not completed. They knew, also, that more or less time would be required therefor. There is no evidence to show how much time was necessary for the completion of the building after September 9th. Of course, this would depend upon the number of men employed upon the work, etc. If the plaintiffs knew the manner in which the building was progressing at the time the last payment was made, and the probable time that would be required to complete the same in accordance with the work as it was then being done, and made no objection thereto, these payments amounted to a waiver of any claim or right to maintain an action for damages for a failure to complete the building within such time as would be required to complete it as the work was then progressing, even if the second contract was not entered into. The making of these payments was, in effect at least, a consent to confine their claim for all known damages to the balance remaining unpaid. If the second contract was not entered into, appellant, Stetson, had a right to proceed with the construction of the building under the original contract, and the plaintiffs could not have maintained any action for damages for failure to complete it prior to the time of their last payment upon September 9th, nor for such further time as was necessary for its completion; but might offset their claim for damages in this respect against an action for the balance due for the construction of the building.

It is contended that the court erred in refusing to permit appellant to amend his answer by alleging further that Farnum was the principal contractor, and that Reitze and Stetson were his sureties. It is claimed that the sureties would have a right, upon the failure of the principal contractor, to go ahead and complete the building, and be subrogated his rights. Regardless of this question of suretyship it mattered not to the plaintiffs who constructed the building. They only had a right to have it constructed according to the terms of the contract or the subsequent agreed alterations, if there were any. Any one of the defendants might have proceeded with the construction of the building in case the others abandoned it, or refused to proceed therewith; and, if the second contract with Stetson was not entered into, the defendants jointly had a claim against the plaintiffs for the balance of the contract price, less whatever damages the plaintiffs were entitled to offset against it. By the terms of the original contract the defendants were jointly bound to the plaintiffs as principals, and the respondents insist that they must be held accordingly. The parties are all in court, and, without passing upon the question as to whether it was an abuse of discretion in refusing to permit the amendment at the time it was offered, we think now, as the case must go back for a retrial, that the parties should be permitted to amend their pleadings, and that appellant, Stetson, should have the privilege of amending his answer; and, in addition to the counterclaim set up by him, founded upon the second contract he claims he entered into with the plaintiffs, he also should be allowed to set up a counterclaim upon the part of all the defendants under the original contract. The amendment offered was substantially this, and, although the several defenses would have been somewhat inconsistent, they were permissible under our Code practice.

As to the right of one defendant to plead an individual claim against the plaintiffs to offset a claim by them against the defendants jointly, which was one of the contested questions upon the argument of the case, if the second contract was entered into between the plaintiffs and Stetson, he was thereby released from any previous liability under the former contract; and, as the release of one joint debtor was a release of all of them, the prior contract was thereby terminated. Consequently, the claim of the plaintiffs could only be maintained against Stetson individually, and the claim for the balance remaining unpaid was Stetson's individual claim. It is true, in this view of the case Reitze and Farnum were improperly joined as defendants by the plaintiffs; but Stetson was not responsible for this, and should not be deprived of his rights thereby. Upon the other hand, if the contract was not entered into, then the claim of plaintiffs was a joint one against all of the defendants; and any one of them, against an action for

damages for a breach of the contract, could plead the joint claim of all for the balance remaining unpaid. It could make no difference as to this whether one or more of the defendants defaulted; the other defendant could not be deprived of his right to avail himself of this defense and counterclaim. *Mott v. Mott*, 5 Vt. 111. A payment to one of these defendants would be sufficient to protect plaintiffs. The following sections of the Code, it seems to us, determine this controversy in favor of appellant:

"Sec. 194. The answer of the defendant must contain,—(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition."

"Sec. 195. The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. (3) The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in such a manner that they may be intelligibly distinguished."

"Sec. 407. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

The right to plead the counterclaim carried with it the right to recover a judgment for the balance, if any, over and above the damages sustained by the plaintiffs. A counterclaim may involve something more than a mere defense to the plaintiff's action. There are many authorities sustaining the proposition that one defendant may plead his individual claim against all of the plaintiffs in a case where the plaintiffs have sued several defendants upon a joint obligation. It seems that under these provisions of the Code a defendant may also join matters by way of counterclaim that he could not unite in an action if brought by him as plaintiff, and, if so, the statutes aforesaid confer a greater right upon him in this particular where he is sued than he would have if he brought suit. It may be also that, if he should bring suit upon

his individual claim, the defendants in such action could not offset a joint claim against him and other persons; although there are some authorities holding the contrary. But it is unnecessary to decide these matters in this action. In support of the right of a defendant to plead an individual claim against the plaintiffs, where he is sued jointly with others, and of the appellant's contention in this respect, we cite the following: *Powell v. Hogue*, 8 B. Mon. 443; *Leach v. Lambeth*, 14 Ark. 668; *Kent v. Rogers*, 24 Mo. 309; *Stewart v. Coulter*, 12 Serg. & R. 252; *Childerston v. Hammon*, 9 Serg. & R. 68; *Miller v. Kreiter*, 76 Pa. St. 78; *Montz v. Morris*, 89 Pa. St. 392; *Ashley v. Willard*, 2 Tyler, 391; *Parsons v. Nash*, 8 How. Prac. 454; *Neal v. Lea*, 64 N. C. 678; *Rush v. Thompson*, 112 Ind. 158, 13 N. E. 665; *Sloan v. McDowell*, 71 N. C. 356; *Lewis v. Clarkin*, 24 Cal. 399; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198; *Stedeker v. Bernard*, 102 N. Y. 327, 6 N. E. 791; *Pom. Rem.* subject "Counterclaim."

The matters in controversy between these parties have gotten into a peculiar tangle. The issues, however, are, or can only be, substantially as follows: The plaintiffs may maintain an action for a violation of the contract in using defective materials or for defective workmanship, and for a failure, if any, to complete the building within a reasonable or necessary time, as aforesaid, after September 9th, the date of their last payment. Appellant, Stetson, individually and for the defendants jointly, may maintain a claim against the plaintiffs for the balance of the contract price remaining unpaid, and for extras furnished. As against this, the plaintiffs may offset their damages for a failure to complete the building within the time specified in the original contract, if the second contract was not entered into, and for a failure to complete the building within a reasonable time thereafter in case the second contract was entered into, and also any claims they may have for defective materials or workmanship. If the second contract was not entered into, then the question as to who was responsible for the falling of a portion of the building and consequent delay of the work and additional expense in the way of repairs becomes material. If it was due to the defective foundation, the plaintiffs were responsible for it; if it was due to defective materials or workmanship in the erection of the building, which were not in accordance with the contract, the defendants were responsible for it; and this is one of the issues to be determined. It seems the second contract was substantially the same as the first, except as to an extension of time, but of this we are not entirely certain from our examination of the testimony. The judgment must be reversed, and the cause will be remanded, with instructions to allow the parties to amend their pleadings accordingly.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

v.40P.no.3—13

(6 Colo. App. 140)

BREENE v. BOOTH.

(Court of Appeals of Colorado. April 8, 1895.)

RECORD OF JUDGMENT—AMENDMENT—LACHES.

1. Where a judgment was rendered against a partnership, but erroneously entered by the clerk upon the judgment record as against one of the partners alone, the error is ministerial and not judicial, and can be corrected.

2. The right of the court to correct the record entry of a judgment, and cause it to express the judgment actually rendered, is not lost by delay, unless the rights of the adverse party or of third parties would be prejudiced thereby.

3. The record entry of a judgment may be corrected by any satisfactory evidence.

Error to district court, Lake county.

Action by W. T. Booth against Peter W. Breene and George W. Purviance, copartners under the firm name of George W. Purviance & Co. From a corrected judgment against the copartnership, defendant Breene appeals. Affirmed.

Breene v. Booth (Colo. App.) 33 Pac. 1007, discussed and explained.

Geo. Q. Richmond and John A. Ewing, for plaintiff in error. A. W. Stone and A. T. Gunnell, for defendant in error.

THOMSON, J. This suit was brought by the defendant in error against the plaintiff in error and George W. Purviance, as copartners doing business under the firm name of George W. Purviance & Co., upon an indebtedness of the firm to the plaintiff. The cause was tried, and judgment for the amount entered against the defendant Breene alone. From the judgment as thus entered, Breene appealed to this court. Pending the appeal, and on the 25th day of July, 1892,—something more than seven months after the entry of the judgment,—and at a subsequent term, the trial court, upon application of the plaintiff, and upon a showing made that the judgment actually rendered was against both defendants, but that it was erroneously entered by the clerk upon the judgment record as being against Breene alone, amended the record by giving judgment against the copartnership, to be recorded as of the date of the original entry. A transcript of this proceeding and judgment was then filed in this court. We declined to consider it as part of the record of the case, or to review the judgment which it contained, and reversed the judgment as originally entered. *Breene v. Booth*, 3 Colo. App. 470, 33 Pac. 1007. Upon motion of the plaintiff, the court below ordered execution issued upon the corrected judgment. Exception was taken to the ruling, and this judgment is now before us for review on writ of error.

A portion of the argument of counsel for plaintiff in error is based upon the assumption that the error in the judgment entry, as made, was that of the court, and that the action taken upon July 25th was, therefore, an attempt to correct a judicial error. If the assumption were correct, the conclusion which counsel has reached would necessarily follow.

An error of the court in the rendition of a judgment cannot be corrected summarily by an order *nunc pro tunc*; nor can it be corrected at all by the court which rendered it, except during the time when the court has control of its record for that purpose. But it conclusively appears from the record that the error in the entry of the judgment was not judicial, but ministerial. The judgment which the court rendered was against the copartnership, but the clerk erroneously recorded it as being against Breene. Some question is made as to the evidence upon which the court made the correction. The evidence is not in the record. The motion refers to an entry in the judge's docket. The English rule, followed in some of our states, is that a judgment cannot be corrected except upon record evidence, and that notes of the judge upon his docket are not part of the record, and therefore not evidence for the purpose. But in others it is held that the correction may be made upon any satisfactory evidence, and it has been so decided in this state. *Doane v. Glenn*, 1 Colo. 454. We must assume that the evidence upon which the court ordered the *nunc pro tunc* entry was sufficient. The right of a court to have its judgments entered as they are given, and where, through clerical misprision, the entries are inaccurately made, to have them corrected so as to express the truth, is too well established to require a citation of authorities. The judgment of the court is that which it pronounces. The record entry is not itself the judgment, but rather the evidence of the judgment, or its embodiment in visible and permanent form; and the court, in virtue of the same authority by which it pronounces its judgment, can cause the record to express it as it was given, or change an inaccurate record into a true one. And it is immaterial in what the inaccuracy consists, or how far the entry may deviate from the judgment rendered. In this case, in correcting the erroneous entry so as to express its true judgment, the court simply exercised a power inherent in its constitution, and which it was its duty to exercise, provided there were no extrinsic reasons why it should not be exercised.

It is claimed that the delay, in the nature of laches, of the plaintiff in applying for the correction of his judgment, divested the court of its authority to make the amendment. We must disagree with counsel. The court's control of its records for the purpose of making them exact cannot be lost by mere delay in its exercise, although perhaps reasons might exist why it would be its duty to refuse to exercise it. It is incumbent upon the party in whose favor a judgment is rendered to see that it is properly entered; and if, during the period of an undue delay in causing an erroneous entry to be corrected, rights have become vested under it, or substantial rights of the adverse party have been lost, justice may require the refusal of the amend-

ment. See *Rogers v. Rogers*, 1 Paige, 187. In this case, if, between the time of the original entry and that of the correction, the partnership and Purviance had both become insolvent, so that a burden was cast upon Breene alone, which, if the plaintiff had been diligent in causing the proper record to be made, would have been borne by the partnership, or divided with Purviance, a different question would be presented. But nothing of this kind appears. It is claimed, however, that by reason of the delay Breene lost his statutory right to appeal; that the judgment could not be appealed from at first, because there was no record of it upon which to base an appeal; and that when it was finally made a matter of record, the entry being *nunc pro tunc*, and relating back to the first date, it was too late to appeal. Whatever force there might otherwise be in this argument, there is one answer to it, which disposes of it so far as the case before us is concerned, and that is that the amendment was not resisted. The plaintiff in error does not claim that it was, and from the silence of the record we must presume that it was made with Breene's acquiescence. He is therefore not in a position to urge this objection here.

Apparently counsel have misinterpreted our decision in *Breene v. Booth*, *supra*, and it seems also to have been misapprehended in another quarter, where there is less excuse for the misapprehension. The question of the court's control over its own records was not in that case. The question was whether, after an appeal had been perfected from the judgment as it was recorded, the filing of the supplemental transcript authorized us to review the judgment as it was rendered, and we held that it did not. Authority is abundant that corrections by the trial court, after appeal, of clerical errors in its records, may be brought into the appellate court, and there treated as part of the record of the case; but to warrant this where the correction goes to the judgment the character and legal effect of the judgment upon the record must not be so changed that it cannot be considered as embraced in the appeal. We have no authority to review any judgment unless it is here by appeal or writ of error. Certain proceedings preliminary to an appeal are prescribed, which are jurisdictional. An appeal from the judgment rendered must be prayed within a specified time after its rendition, and an appeal bond must be given, conditioned for the payment of that judgment if it shall be affirmed and for the due prosecution of the appeal. Without compliance with these requirements, there is no appeal. The judgment against the copartnership was not appealed from. The appeal was from the apparent judgment which the record showed against Breene alone, and which, until corrected, must be taken to be the judgment of the court. It was from this that the appeal was prayed, and the appeal bond recited this judgment. A judgment against a copartner-

ship and a judgment against an individual are materially different. The manner of their enforcement is different, and the rights of parties under them are different; so essentially different that a judgment given against an individual partner when it should be against the firm is erroneous, and will be reversed for that sole reason. *Dessauer v. Kopplin*, 3 Colo. App. 115, 32 Pac. 182, and cases cited. An appeal by an individual from a judgment against him alone is not and cannot be tortured into an appeal from a judgment against a copartnership. In illustration of our position, we will suppose that at the trial it was found that Breene and Purviance were not partners, and, the indebtedness having been contracted by Purviance, judgment was rendered only against him, but by a misunderstanding of the clerk it was entered against Breene, and not against Purviance. Breene, finding this judgment upon the record, appealed from it. After he had perfected his appeal, the plaintiff, in the proper proceeding for the purpose, had the record amended so as to show the true judgment rendered, namely, a judgment against Purviance only, and filed a supplemental transcript of the later proceeding in this court, asking us to pass upon the judgment as amended. By what authority could we have considered this transcript as part of the record of Breene's appeal? From what source would we derive jurisdiction to review a judgment called to our attention in this way, and not before us either by appeal or writ of error? It is not in the law that such authority can be found, and to assume jurisdiction under those conditions would be usurpation. The case supposed and the real case do not differ in principle. While there may be no limit to the power of a court to make proper corrections of its record, a judgment as originally entered may be so radically changed that it cannot be considered as the judgment appealed from, and must be brought here by an independent proceeding, before we have authority to review it; and until the amended judgment is brought to our attention in such way that we can judicially notice it, we must assume the record from which the appeal is taken to be the only judgment in the case. The foregoing is a digression, for which our justification is a construction, deemed by us unwarranted, which seems to have been placed upon our former decision. There is nothing in this record which would authorize us to reverse the judgment, and it will therefore be affirmed. Affirmed.

(6 Colo. App. 190)

TRAVELERS' INS. CO. v. REDFIELD et al.
(Court of Appeals of Colorado. April 8, 1895.)
SUIT TO CANCEL PURCHASE-MONEY NOTE—OFFER
TO DO EQUITY—TENDER OF DEED—SPECIFIC PERFORMANCE.

1. The right to object to the overruling of a demurrer to an answer is not waived by the filing

of a cross complaint, after the overruling, by permission of court given before the overruling.

2. Where one invests the payee of a note with the apparent title to it, and a trust deed securing it, an indorsee of the note and deed will take them unaffected by any private agreement between the payee and maker.

3. Each answer is a separate defense, complete within itself, and must be tested by its own allegations.

4. Plaintiff gave his note to an irrigation company in payment for water rights, and secured it by a trust deed of the land to which these rights were to attach. Plaintiff had, under a transfer from the company, undisturbed use of the rights for seven years; but at the time of the transfer the company was in the hands of a trustee, and, this trustee having failed to complete the conveyance by executing a release of the rights, plaintiff sued to cancel the note and the trust deed. Held, that defendant having, in his answer, tendered a sufficient deed of the water rights, plaintiff was bound to accept it, and there could be no cancellation of the note.

5. Where there is no question of fraud, and a party can obtain the full benefits of a contract by its enforcement, the contract will not be rescinded or canceled at his suit.

6. In an action to cancel a purchase-money note on the ground of defendant's noncompliance with the contract of sale, tender of a deed of the property by defendant admits a cause of action for specific performance.

7. Where it appears that the maker of a note given in payment of water rights to attach to land, a trust deed on which was given to secure the note, has had undisturbed use of the water rights from the time the contract was made, a period of seven years, the complaint, to entitle him to a decree of cancellation of the note and the trust deed, must contain an offer to account or pay for the use he has had of the water rights.

Error to district court, Arapahoe county.

Action by George S. Redfield and others against the Travelers' Insurance Company for the cancellation and rescission of a contract. From a judgment for plaintiffs, defendant brings error. Reversed.

Charles H. Toll, David V. Burns, and W. R. Barbour, for plaintiff in error. Willard Teller and J. P. Brockway, for defendants in error.

THOMSON, J. The allegations of the complaint are: That on October 20, 1884, plaintiff George S. Redfield and one Warner made their promissory note to one T. C. Henry for \$6,400, due five years from date, with interest payable semiannually, at 10 per cent. per annum, and secured it by a deed of trust upon certain land owned by them. That after the giving of the note the plaintiff purchased from Warner his interest in the real estate, and assumed the payment of the trust deed. That the sole consideration of the note was a title to eight water rights, to be secured to the makers by the Fort Morgan Irrigation Company and the defendant, the Travelers' Insurance Company, the water to be taken from the canal of the irrigation company, and used in the irrigation of their lands. That the irrigation company had contracted a bonded indebtedness of \$60,000, secured by deed of trust upon all of its property, executed to Gustavus F. Davis, vice president of the insurance company, as tri-

tee, and that this company was the owner of all the bonds so secured. That by a provision in the trust deed the irrigation company was authorized to sell water rights, and the trustee might issue to the purchaser a release of those purchased by him from the lien of the trust deed. That Henry was the agent of the insurance company, and, while he was the nominal payee of the note, the insurance company was the real party in interest, and was the principal in the transaction. That the note was made payable to him, and was by him indorsed to it, at its request. That it agreed, in consideration of the making of the note, to cause the trustee to release the water rights to be obtained from the irrigation company from the lien of the trust deed. That the irrigation company duly conveyed these rights to the plaintiff and Warner; but, having made default in the payment of its bonds, all of its property, including the eight water rights so conveyed, was sold under the deed of trust made by it, the insurance company being the purchaser at the sale. That the latter company then caused to be incorporated the Ft. Morgan Land & Canal Company, and caused the property purchased by it, including the plaintiff's water rights, to be conveyed to the new company. That afterwards, in settlement of a dispute which had arisen concerning water rights purchased, an agreement was entered into between the parties to the dispute, by which, in so far as it affected the rights of the plaintiff, the canal company and the insurance company agreed to convey to the plaintiff his eight water rights by a good and sufficient conveyance. That on the day on which this agreement was made the canal company issued its bonds in the sum of \$120,000, with interest at 10 per cent., and secured them by a deed of trust to Davis upon all of this property, including the water rights contracted to the plaintiff, of which bonds the insurance company became the owner and holder. That the canal company, in turn, made default, its trust deed was foreclosed, and the insurance company again became the purchaser, the purchase including the water rights in question. That the insurance company thereupon caused to be incorporated the Ft. Morgan Land & Water Supply Company, and conveyed to it the property purchased, including these water rights, receiving in payment all the capital stock of the supply company, which stock the insurance company still owns and holds. That the insurance company never caused any release to be made to the plaintiff of the water rights conveyed by the irrigation company, and by reason of the sale of its property under its trust deed the conveyance made by it became a nullity. That no conveyance was ever made under the agreement of settlement with the canal company and the insurance company. That the insurance company had often promised to carry out its agreement with the plaintiff, but no conveyance of the water rights had

ever been made to him, although it was always within the power of the insurance company to cause the conveyance to be made, and that the plaintiff was still without title to these rights. That in fraud of plaintiff's rights, and for the purpose of defrauding him of his right and title to the water rights, and without giving him any consideration for the promissory note, the insurance company had advertised the land for sale under the trust deed, and was about to sell the same; and that the plaintiff was ready, able, and willing to pay the note and interest in full, if the insurance company would perform its agreements with him, and cause him to be invested with the title to his water rights. The prayer was for an injunction against the foreclosure of the trust deed, and for its cancellation, and that of the note which it secured.

The defendant's answer set forth two defenses. The first denied as follows: That T. C. Henry was the defendant's agent. That the defendant agreed to take the water in payment for water rights. That the note was made to Henry, or indorsed by him to it, at its request. That any part of the transaction was conducted with Henry as its agent. That the defendant was the principal in the transaction, in the sense that Henry was its agent. That the note was given in payment of water rights. That the consideration of the note was an agreement for the conveyance of water rights to the plaintiff and Warner by the defendant and the irrigation company free from the lien of the deed of trust. That the defendant failed to deliver to the plaintiff the release of Davis, trustee, to the water rights conveyed by the irrigation company, or that any part of the consideration of the note was an agreement to do so. That in the agreement of settlement there was a provision that the land and canal company and the defendant should convey the water rights to the plaintiff by a good and sufficient conveyance, or that the defendant ever promised to cause the water rights to be conveyed to the plaintiff. The second defense averred that the plaintiff and Warner first applied to T. C. Henry as their agent to procure for them a loan of \$6,400, offering to secure the loan by a trust deed upon their real estate, representing that they had a contract for eight water rights, the same being sufficient for the irrigation of the land offered as security, and that the money was wanted to pay for these water rights, and further offering two additional water rights as security for the loan. That Henry forwarded the application to the defendant, and requested it to make the loan, but for certain reasons the defendant hesitated to entertain the application. That the plaintiff and Warner then made the note payable to Henry, under some arrangement whereby he was to have the use of the money as a loan from them to him, and delivered the note to him. That on the 20th day of October, 1884, Henry presented the note secured

by the deed of trust to the defendant at its office in Hartford, Conn., and offered it as security for a loan from the defendant to him. That it accordingly loaned him an amount of money equal to the face value of the note, and he indorsed the note to it. That the note being payable to him, and he representing himself as its owner, and authorized to dispose of it as he might see fit, the defendant, knowing nothing to the contrary, dealt with him as the owner. That having afterwards learned that the land securing the note had no water rights belonging to it, for the sole purpose of making its security for the note good, and not in pursuance of any promise or agreement so to do, the defendant procured the irrigation company to convey to the plaintiff for the use of the land eight full water rights. That these water rights still attached to the land, and that he had, ever since their conveyance to him, been in their use and enjoyment without cost to him. That he had never offered to reconvey them, and that his title and possession had never been menaced or threatened in any way. The answer also avers that the defendant had procured the Ft. Morgan Land & Water Supply Company to execute to the plaintiff its release deed to the water rights claimed, which deed the defendant brought into court and tendered to the plaintiff. A demurrer to the second answer, on the ground of insufficiency, was sustained. No leave was taken to amend or plead further. Afterwards, pursuant to an order made by the court some time prior to the filing of the answer, the plaintiff filed a cross complaint, setting up the trust deed and note, and praying a decree of foreclosure.

Upon the assumption that the complaint is sufficient to authorize a decree of cancellation, the second answer states a good defense. If its averments are true, the defendant was an innocent holder of the note. It advanced the money to Mr. Henry on the faith of its ownership by him. Whatever agreement the makers had with Henry, they invested him with the apparent title to the note, and, if the defendant dealt with him in the belief that he owned it, it took the note unaffected by any agreement between him and the makers. The answer also alleges that the plaintiff had been in the free and undisturbed use and enjoyment of the water rights for which he claims the note was given ever since their conveyance to him by the irrigation company. As shown by the record, the time between the conveyance and the filing of the answer was nearly seven years. If this averment is true, there can be no decree for cancellation or rescission in this action, because the complaint contains no offer to account or pay for the use which the plaintiff has had of the water rights. He who asks equity must do equity. The plaintiff cannot repudiate his contract, and still retain the benefits which he has derived from it, and his desire to restore what he has received must appear in his complaint, or he has no standing in a court of equity.

The objections made in argument to this answer couple it with the first defense. Inconsistency between the two and redundancy are asserted. Neither of these is a ground of demurrer. The only ground for demurrer to an answer under the Code is insufficiency. Each answer is a separate defense, complete within itself, and must be tested by its own allegations. Vices other than insufficiency are reached by motion. As we have seen, this answer, considered by itself, contains averments which, if true, would defeat the action, and the demurrer was therefore improperly sustained.

But it is urged that, by subsequently filing its cross complaint, the defendant waived the error committed in sustaining the demurrer. We have no controversy with counsel's general statement of the rule invoked. A party against whom a demurrer is sustained, by pleading over, precludes himself from complaining of the ruling on the demurrer. The right to further plead in such case is given by section 74 of the Code, which provides that, after a demurrer is decided, the unsuccessful party may plead over, or amend upon such terms as may be just, and within a time to be fixed by the court or judge. Therefore, to authorize a party to plead or amend, there must be an order of the court prescribing the terms upon which the pleading may be filed or the amendment made, and fixing the time within which it shall be done, and the order comes after the ruling upon the demurrer. Upon the sustaining of this demurrer, no order relating to amendment or pleading was made, and none was asked. The cross complaint was filed in pursuance of an order made long prior to that time, and before the filing of any answer in the case. It is not in the nature of a defense to the action at all. It is an independent proceeding by the defendant against the plaintiff for affirmative relief upon the trust deed, and in which the defendant is the real plaintiff, and the plaintiff the real defendant. In equity practice a defendant could obtain relief of that kind only by filing a cross bill, and while, under our Code, such a bill passes under the general name of counterclaim, its characteristics and purposes are the same as under the practice in equity. It is not properly an answer. The decision upon the demurrer had nothing to do with the filing of the pleading in question. Under the order permitting it, it could have been filed if the demurrer had been overruled, or if there had been no demurrer. It was therefore not a pleading over, within the meaning of the Code, and by filing it the defendant waived no right of objection to the ruling upon the demurrer.

But there is another feature of the answer which requires attention. It contains a tender to the plaintiff of a release deed from the supply company to him for the eight water rights which he claims to have pur-

chased. He states in his complaint that the note was given in consideration of title to these water rights, and bases his claim to relief upon the refusal of the defendant to execute its agreement with him, by investing him with title. It also appears from the complaint that the supply company was the absolute owner of the property, and could convey a perfect title. This being the conceded fact, if it is true, as alleged in the answer, that the plaintiff has had the constant and unmolested use and enjoyment of that for which he contracted, he was bound to accept the deed, and there could be no cancellation. The policy of the law is to sustain contracts, not to destroy them; and, if the withholding of the title resulted in no injury to the plaintiff in the intermediate time, the execution to him of a sufficient deed before final decree, giving him all that he purchased, placed him in the exact situation contemplated when the contract was made, and disentitled him to the relief prayed. *Davidson v. Moss*, 5 How. (Miss.) 673; *Wickliffe v. Lee*, 6 B. Mon. 543; *Hunt v. McConnell*, 1 T. B. Mon. 219; *Evans v. Bolling*, 5 Ala. 550; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210; *Ayres v. Mitchell*, 3 Smedes & M. 683.

But we do not think that the allegations of the complaint are sufficient to sustain a decree of cancellation. It is not averred that the execution of the note and deed of trust was induced by any fraudulent representations or conduct on the part of the defendant. Nothing in the nature of mistake or accident is set forth. There is no allegation that, after the execution of the instruments, the defendant, by conveyance to an innocent purchaser or otherwise, put it out of its power to perform its contract. On the contrary, it is expressly and affirmatively stated that it was always within the power of the defendant to cause the water rights to be conveyed to the plaintiff. It is not alleged that he sustained any injury on account of his failure to receive his title, or that by reason of the defendant's acts, or refusal to act, he lost any remedy upon the contract. It is averred that the defendant was proceeding in fraud of the plaintiff's rights to sell the property without giving him his title, but it also appears that the sale had not been consummated, and that the way was still open before him to compel the performance of the agreement. So long as a party is able to obtain the full benefits of his contract by its enforcement, it will not be canceled or rescinded at his suit.

We think, however, that the bill contains sufficient averments to entitle the plaintiff to specific performance, and that upon the establishment of the case which it states the court would be authorized to grant relief of that kind, provided the necessary parties were before it. The title to the property is alleged to be in the Ft. Morgan Land

& Water Supply Company, which is not a party to this proceeding, and until it is made a party, and brought in, no adequate relief in this direction can be afforded. But the complaint, as it is, is answered by a tender of performance. The deed to which the plaintiff avers himself to be entitled is brought into court and offered to him. This obviates the necessity of a decree for performance. The contract should be adjudged performed, and the defendant, unless its money shall be paid, permitted to proceed to a foreclosure of its trust deed upon its cross complaint. The effect of the tender of the deed is to admit a cause of action in the plaintiff for specific performance, and the costs of the proceeding, down to the time of filing the answer, should therefore be adjudged against the defendant. The judgment is reversed and remanded, with instructions to the court below to conduct any further proceedings in the case in accordance with this opinion. Reversed.

(6 Colo. App. 146)

GLOBE SMELTING & REFINING CO. v. SPANN.

(Court of Appeals of Colorado. April 8, 1895.)

APPEAL—TIME OF TAKING—REVIEW—CREDIBILITY OF WITNESS.

1. Where a motion for a new trial is stricken from the files because the term had lapsed, and judgment is entered on the verdict *nunc pro tunc*, it is either error to enter judgment as of the lapsed term or to deny an appeal prayed for on the day judgment was entered, on the ground that the time had expired.

2. Plaintiff's was the only evidence of improper construction of an appliance from which he sustained slight injuries. The officers and other employees testified to its efficiency, and it was shown that it had been employed for a long time previous, was continued afterwards without change, and that the plaintiff, after his alleged injury, continued to use it without protest until his discharge, and that the accident happened otherwise than as alleged. *Held*, that a judgment for plaintiff would be reversed, though the evidence was conflicting.

3. In an action for personal injuries, defendant offered to prove in rebuttal, by an insurance agent and the books of the company, that certain scars claimed by the plaintiff to be the result of the injury were in fact caused prior thereto. *Held* admissible to affect the character and credibility of the witness.

Error to Arapahoe county court.

Action by Joseph D. Spann against the Globe Smelting & Refining Company for personal injuries. Plaintiff had judgment in justice's court, and also in county court, whence it was appealed. Defendant brings error. Reversed.

Defendant in error brought suit against the plaintiff before a justice of the peace. A trial was had, and from the judgment an appeal was taken to the county court, where a trial was had resulting in a judgment against the defendant for \$300. Defendant was engaged in smelting ores. Plaintiff was by it employed as a furnace man, and had charge of the furnace. Plaintiff alleged that on the

13th day of April, 1893, he received injuries by burning, through the misconstruction of the furnace appliances and negligence of the defendant in failing to remedy the alleged defects. It appears that the molten metal from the furnace discharged mechanically and automatically into a receptacle called a "matte separator." The matte, being heavier than the slag, remained at the bottom of the separator. When it was filled, the slag passed off mechanically at or near the top of the separator, through a spout. The matte contained the valuable metal from the ores. It was the duty of the furnace man to draw off the matte as often as it became necessary, through an orifice in the end of the separator or receptacle, which was of iron, lined with fire brick, and also at the orifice, protected by a fire brick upon the outside, fitted into the aperture. In the iron frame the opening was oval, oblong, 6 or 7 inches long perpendicularly, and an inch or more in width. There was an adjustable spout upon the outside, through which the matte discharged. The opening in the iron case was made the length designated, in order to allow the spout to be placed higher or lower, as demanded by circumstances. The orifice for the discharge of the molten metal from the interior was much smaller than that in the iron case; was made by drilling a hole through the fire-brick lining at a point corresponding with the spout. The discharge was regulated by and dependent upon the inner orifice, and not upon the one through the iron. In discharging molten material the inner orifice was opened by thrusting in a small steel bar, and closed by a mass of wet molded clay, upon the end of a bar, being pushed into the orifice. The claim of the plaintiff was that on the 13th day of April, 1893, while employed in charge of the furnace, he was burnt and injured by molten metal escaping through the orifice, and spouting over his person, by which he was burned upon the neck, left hand, and lower parts of the person. The charge and contention was that the inner orifice was oblong,—elongated,—by reason of which it was too large, and of improper shape, to be successfully stopped by the "dolly clay"; that the attention of the officer in charge was called to the fact; that he promised to have it rectified, and, relying upon the promise, he continued to work; that the company neglected to repair the alleged imperfection, and three days afterwards he received the injury. The basis of the action was the negligence of the company in failing to remedy the alleged imperfection. The case was tried to a jury, resulting in a verdict and judgment, from which this appeal was taken.

Charles H. Toll, for plaintiff in error. Talbot & Denison, for defendant in error.

REED, P. J. (after stating the facts). There are several errors assigned. The case was brought up on a writ of error. The ver-

dict was rendered August 28, 1893. On September 1st a motion was filed to set aside the verdict and for a new trial. On September 9th the motion came on for argument, after which plaintiff's attorneys moved to strike the motion from the files, because the July term had lapsed before the motion was filed. The motion was granted. On September 9th judgment nunc pro tunc was entered upon the verdict as of August 28th. On the same day defendant prayed an appeal, which was denied because the statutory time for praying an appeal had passed. If this practice were to prevail, in many instances the constitutional right to appeal would be taken away. By a well-settled rule of law no appeal can be taken from a verdict before judgment. This ruling would practically require an appeal before a final judgment was entered. If the time in which an appeal could be taken should lapse while the matter was in abeyance and under advisement, and the judgment should then be carried to an earlier date, common justice should require that the prayer for an appeal should be carried back, and also be entered nunc pro tunc within the limit of time; otherwise the party would be required to take an appeal in advance of judgment, or be deprived of the right of appeal. It may be urged that all rights could be protected by coming up by writ of error, but the two are not equally available nor equally inexpensive, and the right of appeal cannot be abrogated by the court, and a party compelled to resort to a writ of error, through the neglect of the court, and without fault of the party praying the appeal. It is apparent that the court erred either in entering judgment as of the lapsed term or in denying the appeal on the day judgment was entered.

A brief examination of the evidence is necessary to a proper understanding and solution to the case. The following facts appear to have been established and undisputed: That plaintiff went to work for defendant April 6th. On the 11th he "blew in" and took charge of a new furnace (No. 7). That on the 13th the accident occurred by which some quantity of molten metal was thrown over him, and he received at least trifling injury. The extent of the injury is nowhere satisfactorily shown. His own statement of his injuries was as follows, on direct examination: "The injury was inflicted three days afterwards. My hands were burnt all over the back and on the side. My hands and body were burnt. My clothes were burnt. The burns on my hands were between the fingers and on the back. I was burnt on my body down the breast and on the collar and on the legs. The burns were scattered. I was also burnt on the head and eyes. * * * I was burnt in the left eye,—you can see where it was burnt if you examine it,—and in the face and neck. * * * I had on an overshirt, undershirt, overpants,

underpants, and drawers, the value of which was \$12 or \$15. I bought \$2 or \$3 worth of medicines. Before I left the place I lost seven or eight days' time. I tried to work after I was hurt. My hands were both wrapped up and very sore. I couldn't sleep nights, because, when I would go to sleep, they would fall down, and I ought to hold them up to keep the blood from rushing up and injuring my hands. My hands kept hurting me, paining me, and I was confined to the house some time. Couldn't get out to get work. This lasted about five or six days. I left the defendant ultimately. I still suffered from my hands. Couldn't work. I was detained from work four or five weeks. I have now scars on my hands, neck, body, head, and legs in consequence of these injuries." On cross-examination: "I was burnt a little in the face; in my eye, too. My neck, I suppose, is my face. My face is burnt but slightly. The stuff couldn't rain down on me without striking some part of my face. I suppose, if you would examine my face, you would find a few little scars. I don't know where." "I was injured on April 13th. I think it was about 2 o'clock p. m. I went to work at 6 a. m., and quit at 6 p. m. The day after I was hurt, I began working at 6, the usual hour. I worked for three days, I think, after I was hurt, and then quit for seven or eight days. I quit on account of the injury to my hands. They kept getting worse. After the end of seven days, I went to work, and worked several days, and then quit, because I couldn't do the work they required with my hands in that condition. I was not discharged." "I bought some medicine (carbolic salve) at a drug store. I bought several bottles of anti-septic. It was about two or three weeks after the accident that I bought the medicines. When I was hurt I showed my wounds to Dr. Lemon, and he dressed them; gave me some salve for them. He dressed all the wounds except those on the body. He dressed those on my hands. I mean by that he didn't put the medicine on. He gave me a prescription, and told me where to get the medicine, and how to fix it. The matte separator and the orifice were in plain sight all the time in front of the furnace. It could have been repaired easily in an hour. I couldn't have done it unless they authorized me to do it." M. W. Iles, superintendent of defendant, testified: "I know the plaintiff. I was on the ground when he was using the separator. I did not know of his injury till after this case was brought. I know exactly the day he ceased to work for the company. He came and talked to me twelve hours after he left. He said Tom Drohan had fired him, and he thought unjustly; that he was working on one of the furnaces, and he thought he was doing his duty. I told him I would investigate, but, as long as Drohan was foreman, I, for the time, would have to sustain his action; that

I believed Drohan wouldn't discharge him unless for good cause. He said nothing whatever about any hurt or injuries or anything of that kind, nor about having any clothes injured. I did not know of the injury on the day it happened, nor until this suit was brought." Although he testified that he was not discharged and "quit ultimately" on account of his injuries, it is established beyond controversy by the foreman and several others that he continued at work until he was discharged the last of the month of April, and, as shown above, complained to the superintendent of his discharge by the foreman. Dr. L. E. Lemon testified: "When I first knew the plaintiff, he was employed by the Omaha & Grant Smelting and Refining Co., and frequently consulted me for sickness, slight injuries, slight burns, etc.; and on several occasions I have made out insurance papers for him, for which he has recovered indemnity from insurance companies in which he was insured at the time he was at work. I have treated him for burns prior to April last. Usually burns on the hands or feet. I don't remember the date in April, but some time after April 12th, and before May 1st, he consulted me at my office for a burn. As I remember it, the burns were on the hand, and a burn on the back of the neck. The burn on the hand was, I should say, of the area of the size of a nickel. That on the neck was not quite so large. I do not recollect that he complained of other injuries. I prescribed for the burn; wrote a prescription for ointment. I only remember his consulting me once for that burn."

That he received some slight injury is beyond question. That it was not of such character as to incapacitate him is clearly shown, and that he continued at work until discharged; also, that his claim for damages for injuries, or that he had received injuries, was not known to the officers of the company until this suit was brought. No suit could be maintained or damages recovered unless the fact of negligence upon the part of the company, as the proximate cause of the injury, was established. If the appliances were defective, and the fact known to those in charge, and there was a refusal to make them safe, the injured employé could recover damages; otherwise not. In this case the only evidence of improper construction and of danger from the matte separator came from the plaintiff. The officers and other employés testified to its efficiency and safety. It was also shown that the same devices had been employed for a long time previous, were continued afterwards without change, and that the plaintiff, after his alleged injury, continued to use them without protest or complaint until his discharge. He testified that, two or three days before he was injured, he complained to the superintendent of the misconstruction of the inner orifice, and the danger attending, and that

a change was promised. Mr. Tucker, to whom the complaint was alleged to have been made, testified that he had no recollection of plaintiff's calling attention to the matter, nor of promising to rectify it. It is obvious that neither plaintiff nor those in charge deemed the matter of any moment, as plaintiff continued work until discharged without further complaint, and no change was found necessary by the company. Walter, a furnace man, who was with him at the time of the alleged injury, testified that it was caused by the improper mixing of the clay used upon the "dolly bar" to stop the orifice; that it was too soft; that he called plaintiff's attention to it immediately before the injury, but his suggestion was disregarded. He also testified that the plaintiff continued to work "right along" until he (the witness) left.

It appears that upon the trial plaintiff was twice called to testify; that on both occasions he exhibited his hands and the scars upon them, and testified to their being the result of the injuries for which suit was brought. Counsel then learned from Dr. Lemon that several times plaintiff had applied to and received compensation from the Travellers' Insurance Company for previous injuries by burning. On cross-examination he was asked how many times he had previous to April 13th applied to the Travellers' Insurance Company for losses for accidents from burns on the back of his hands. Objected to, and objection sustained. Counsel then offered to show that witness had made several applications for damage of that kind, and had several payments for such damage, and the offer was rejected. Counsel caused a subpoena to be issued for E. P. Long, with the books of the insurance company, to prove the following facts, as stated in an affidavit of Samuel Lesem, the general agent of the company: "(1) That on July 13, 1886, defendant had been paid \$40 for injury by burning of his left hand and wrist. (2) September 9, 1886, had paid \$55 for burning left hand. (3) December 6, 1886, had paid \$55 for burning back of left hand. (4) January 30, 1890, had paid \$15.71 for burning back of right hand. (5) May 26, 1890, \$40 for burning left hand." The court held the evidence incompetent, and declined to wait until the witness arrived. The refusal was error. The fact of the payment and amounts paid could not be rebuttal; but after having made proof of his hands, and exhibited the scars, the fact that he had previously, four times, made proof of injury by burning of the same hand would certainly have rebutted the proof that the scars exhibited were the result of the last injury. It would also have gone to the character and credibility, and shown him to have been one of the most careless or unfortunate of men, or a fraud unworthy of credit. For either of these purposes the evidence was admissible, and counsel should have been allowed its introduction

and reasonable time to produce the witness.

No want of proper attention on the part of the company, nor negligence or want of proper appliances, was established. The whole case rested upon the evidence of the plaintiff. Of its character and credibility nothing need be said, but it is apparent that the injuries received were comparatively trifling, and, in view of his previous experience and the evidence of the surgeon and others, might be regarded as incidental to the employment. The verdict clearly appears to have been the result of bias or prejudice, and so unwarranted by the evidence, and so much in excess of the injury, as testified to by the plaintiff himself, and so regardless of the instructions of the court, that it should not have been the basis of a judgment. The facts and circumstances of the case are such as to take it out of the general rule that the court will not interfere with the finding of facts by a jury where the evidence is contradictory. It is clearly within the exception so often stated in the supreme court and in this court. The court erred in refusing the motion to set aside the verdict and grant a new trial. For reasons above given, the judgment of the district court will be reversed, and the cause remanded for a new trial. Reversed.

(11 Utah, 308)

ELLIOTT v. WHITMORE et al. (No. 409.)
(Supreme Court of Utah. April 27, 1895.)

APPEAL—REVERSAL—PROCEEDINGS BY COURT
BELOW.

It appearing on appeal from judgment that the lower court has set it aside and granted new trial, judgment will be reversed.

Appeal from district court, Third district; before Justice C. S. Zane.

Action by L. A. Scott Elliott against George C. Whitmore and another. Judgment for plaintiff. Defendants appeal. Reversed.

Brown & Henderson and E. D. Hoge, for appellants. C. S. Varian and Zane & Putnam, for respondent.

MERRITT, C. J. This is an appeal from the judgment, and has been heretofore argued and submitted. It now appears that the judgment has been set aside and a new trial granted in the court below. For this reason the judgment is reversed, and the cause remanded for a new trial.

SMITH, J., concurs.

(11 Utah, 309)

ELLIOTT v. WHITMORE et al. (No. 422.)
(Supreme Court of Utah. April 27, 1895.)

Appeal from district court, Third district; before Justice C. S. Zane.

Action by L. A. Scott Elliott against George C. Whitmore and another. From an order, defendants appeal. Reversed.

Brown & Henderson and E. D. Hoge, for appellants. C. S. Varian and Zane & Putnam, for respondent.

MERRITT, C. J. This was an appeal from an order confirming a report of W. P. Hardesty, a commissioner appointed under the judgment we have just reversed in No. 409. 40 Pac. 201. In our opinion the entire controversy should be remanded to the court below, in order that the new trial may proceed there. It is therefore ordered that the judgment and order appealed from be reversed, and remanded to the court below.

SMITH, J., concurs.

(11 Utah, 310)

GREGG v. GROESBECK et al.

(Supreme Court of Utah. April 27, 1895.)

NOTES—INDORSEMENT—PAROL EVIDENCE—REVIEW ON APPEAL.

1. R., who held a note for sale, with H.'s indorsement thereon in blank, promised the latter to erase his name before selling the note; and plaintiff, to whom the same was transferred, accepted it with knowledge of such agreement. By mistake the indorsement was not erased. *Held*, that these facts constituted a good defense to an action against H.

2. Parol evidence was admissible to show such agreement.

3. Though a pleading be stricken from the files it is still a part of the judgment roll, and error in so striking it out may be reviewed on appeal from the judgment roll alone.

Appeal from district court, Third district; before Justice S. A. Merritt.

Action by F. E. Gregg, doing business as F. E. Gregg & Co., against Hyrum Groesbeck and others. From a judgment for plaintiff, defendant Henry A. Ryan, who filed a separate answer, appeals. Reversed.

T. J. Anderson, for appellant. F. B. Stephens and B. X. Smith, for respondent.

KING, J. Hyrum Groesbeck and Nicholas H. Groesbeck executed their promissory note in favor of Henry A. Ryan and Alexander Wood. Plaintiff, in his complaint, alleges that he purchased said note, after its indorsement by the payees and P. H. Rasche, for a valuable consideration, and before maturity, and that said indorsement was a part of the consideration inducing the purchase. Defendant Ryan filed a separate answer, the other defendants having defaulted, in which he averred that the defendant Rasche sold and transferred said note to plaintiff, but prior thereto the defendant Ryan specially ordered and instructed him, in case he should sell or transfer said note, that at or before making such transfer he should erase Ryan's name from the back, as an indorser; that Rasche expressly promised and agreed that he would do so, and would not transfer the note with Ryan's indorsement thereon; that, at the time of the sale and transfer of the note to the plaintiff, he was expressly informed of the agreement between Ryan and Rasche, and the said instructions given by the former to the latter; that the plaintiff then purchased

and received said note understanding that the transfer was to be without recourse upon the defendant Ryan, and that the latter was not to be responsible as an indorser; and that the plaintiff purchased and took said note with this understanding and agreement. Defendant further avers that, owing to mistake and inadvertence of the plaintiff and Rasche, Ryan's name was not erased from the back of said note as was agreed and understood between them (plaintiff and Rasche). Plaintiff filed a motion to strike out the answer as sham, and for judgment on the pleadings, which was overruled. Afterwards he moved to set aside the order denying this motion, and for judgment on the pleadings, and upon this motion the court entered the following judgment: "It is therefore ordered and adjudged that the order of this court heretofore entered on the 17th day of February, 1894, overruling the plaintiff's motion for judgment on the pleadings, be set aside and vacated; that the answer of the defendant be stricken from the files as sham and frivolous. And it is further ordered and adjudged that the plaintiff do recover of the defendant Henry M. Ryan the sum of," etc.

The assignments of error relate to the action of the court in striking from the files defendant's answer, and present for determination the question of its sufficiency as a defense. Respondent insists that, conceding the truth of the averments therein contained, no facts constituting a defense were presented, and no proof would be admissible under it, for the reason that it would tend to vary the terms of the written instrument upon which suit was brought. Appellant's contention is that the rule forbidding parol evidence to contradict written instruments has no application to this case.

The answer is very ambiguous and uncertain, and is clearly demurrable. There is some doubt as to the meaning of various allegations. But a demurrer is very different from a motion to strike a pleading from the files, although the practice is too often indulged in to substitute the latter for the former. An answer which may be subject to demurrer may be invulnerable when assailed by a motion to strike out. Upon a motion of this character the court is to be guided by the statute, which declares that, "In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." 2 Comp. Laws, § 3238. Keeping in view this just statutory provision, let us ascertain what the answer means. In doing this it should be construed as a whole. Isolated sentences may convey an erroneous idea, and superfluous averments form no part of the pleading, and, upon a motion like that submitted in this case, may be

disregarded, though they seem to be at variance with the material and substantial allegations therein. The meaning and intention of the pleader are the paramount considerations in determining the sufficiency of a pleading. Even if the meaning be obscure, and the language expressing it dark and uncertain, the court ought not to strike an answer from the files, if, by fair interpretation, the meaning can be discovered, and the facts alleged present a defense. While there are superfluous allegations in defendant's answer, and others are obscure, we think that, applying a just and liberal interpretation, the meaning of the defendant is obvious. It was to defend upon the ground that defendant Rasche was Ryan's agent, and as such was instructed by his principal (Ryan) to erase or destroy the latter's indorsement of the note prior to the sale, and the further ground that the plaintiff knew of this agency, and the instructions given to the agent, and purchased the note without the indorsement of the defendant. This, we think, is fairly deducible from the answer. Respondent contends that it contains no averments of agency, and that the only construction of which it is susceptible is that Ryan was not to be responsible as an indorser, but that the note was sold and transferred by Rasche with the indorsement thereon, and with the intention that it should remain, but with the understanding that the plaintiff took it without recourse upon Ryan. And one portion of the answer warrants this construction. But a consideration of the preceding allegations, and the one which follows, separated only by a semicolon, reveals the true meaning of the pleader. It is true that the answer contains no direct allegation of Rasche's agency, but it avers that instructions were given him. Agency may be well pleaded without employing the word "agent." But it is doubtful whether the question of agency is involved in this case. If Rasche were acting entirely for himself in vending the note, he had a right to erase Ryan's name prior to the sale; and if he were acting for appellant, and was instructed to destroy the indorsement before disposing of the note, it was his duty to do so. Placing the interpretation upon the answer which we think, in view of the motion, it was entitled to, the question is, did it present any defense? With the general rule that indorsements in blank written on promissory notes constitute well-defined contracts, and parol evidence cannot be admitted to contradict, vary, or explain them, we fully concur. Respondent relies on the case of *Martin v. Cole*, 104 U. S. 30, in support of his position that no defense was stated by the answer. A broad distinction exists between that case and the one now under consideration. Martin sold and transferred, by indorsement in blank, the promissory note of one Webb to Cole, who sued Martin

on his indorsement. Martin alleged in his answer that at the time he indorsed the note to Cole there was an agreement that Martin should not be held liable on the indorsement, but that his name was written as an indorser solely to enable Cole to sue the maker in his own name, and that without such agreement he would not have signed his name on the back. Evidence in support of these averments was rejected. There can be no doubt of the correctness of this ruling. Martin intended to indorse the note, and transferred it intending that his name should be on the note. Under such circumstances the law closes his mouth, and forbids testimony of an oral contemporaneous agreement dehors the indorsement. But if his indorsement was there by mistake, or if, prior to the transfer of the note, he attempted to erase it, but failed, and disposed of the note under the belief that the erasure had been consummated, and the purchaser was cognizant of such facts, and took the note in view of them, an entirely different case would have been presented.

Respondent's counsel discuss the case at bar upon the hypothesis that appellant designed the note to be transferred accompanied by his indorsement, but with an agreement of nonliability as an indorser. If such had been the case their position would have been impregnable. If Ryan's instructions to Rasche were that the note should be sold with his name thereon as an indorser, but with the understanding that the indorsee should take it without recourse, then the case would come within the rule announced in *Martin v. Cole*, and he would have no standing in court. The question presented is not what the parties intended the indorsement to mean, or what they designed its legal effect to be, but whether, as between the appellant and respondent, the former's indorsement had any existence whatever; in other words, did the plaintiff purchase the note with the defendant's name thereon? If he did not purchase defendant's indorsement, he cannot recover, and the answer states a valid defense. And whether the failure to erase defendant's name resulted from fraud, or the negligence or mistake of Rasche, it is immaterial. So long as the note was in the defendant's possession or under his control, he had the right to destroy his indorsement. If he trusted his agent to erase it, and he omitted to do so, but transferred after fully advising the transferee of his instructions and the design of his principal, the purchaser takes the note without the indorsement, though the name appears thereon; and parol evidence is admissible, not to vary or contradict the indorsement, but to prove that there is no indorsement,—that the contract of indorsement was never consummated. A promissory note in the hands of the payee, or a holder with notice, may be shown by parol evidence to have been paid in full or in part.

The written contract is not varied or changed, but it is shown not to have an existence, or that it has been wholly or partially annulled or destroyed as a contract. While not directly in point, the case of *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, is in line with the views herein expressed. The court say: "In other words, according to the evidence offered and excluded, the written instrument upon which this suit is based was not, except in a named contingency, to become a contract or a promissory note, which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claims the benefit of it to enforce its stipulations." And in the case at bar parol evidence offered under the answer would prove that no contract of indorsement was ever concluded. It would destroy the prima facie evidence of the existence of an indorsement, but would not vary or contradict it, and would be of like character as evidence tending to show the "contingency never happened." * * * Evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." *Pym v. Campbell*, 6 El. & Bl. 370. Parol evidence is admissible to prove that an indorsement upon a promissory note is not a consummated contract, and to relieve the indorser, where the note had been converted by the plaintiff, after indorsement, and he had paid the indorsee, who was payee, the face of the same. *Haas v. Sackett* (Minn.) 41 N. W. 237. Suppose a principal should execute a bill of sale of an animal, leaving a blank for the vendee's name, and include therein a warranty, and place the instrument and animal in the hands of his agent to dispose of, and, prior to the sale, instructs his agent to erase from the instrument the portion containing the warranty, and to deliver the bill of sale to the purchaser of the animal, and the agent, before the sale, informs the vendee of his instructions, and they agree that the warranty shall be eliminated, but it is neglected, can it be contended that the principal would be liable on the warranty, and, if sued, could not produce parol evidence that it never was consummated as a contract between them,—in other words, to destroy it? Again, suppose the payee of a note, through mistake, should indorse it, and thereafter, in ignorance of the fact, sell it to a person who was likewise ignorant of the indorsement, and dealt with the payee, and purchased it, relying alone on the maker, and, upon discovering the indorsement, should bring suit against the indorser, could it be seriously contended that parol evidence offered to show the agreement between the parties, and the manner in which the name was placed upon the note, would be inadmissible? It is unnecessary to advert to

the well-settled rules permitting parol evidence, in cases of fraud, mistake, etc., as this case presents a different question. We are of the opinion that it was error to strike the defendant's answer from the files.

But respondent contends, even if the court erred, its action cannot be reviewed by this court, for the reason that the appeal was taken on the judgment roll alone, and "its proceedings under the several motions are not presented." It would be a work of supererogation, in view of the wealth of learning found in the decisions of California and other states having a procedure act similar to ours, and of the lucid provision of our Code, to discuss the province of bills of exception and statements on appeal. Of course, this appeal is to be determined solely upon the questions presented by the judgment roll. The Code of Civil Procedure provides "that the pleadings, a copy of the verdict of the jury or findings of the court or referee, all bills of exceptions taken and filed, and a copy of the order made on demurrer, or relating to a change of parties, and a copy of the judgment," shall constitute the judgment roll. 2 Comp. Laws, p. 300. And, though a pleading is stricken from the files, it is still a part of the judgment roll. *Abbott v. Douglass*, 28 Cal. 299. And an order of the court striking out any pleading or rendering judgment is "deemed to have been excepted to." 2 Comp. Laws, p. 291. In this case the judgment recites that the former order of the court was vacated, and that the defendant's answer was stricken from the files as sham and frivolous. The error complained of clearly appears in the judgment roll. In order to consider the alleged errors of the trial court, nothing need be brought into the record except that which is not supplied by the judgment roll. What was the necessity of a bill of exceptions? It would only duplicate the record already before the court. "The judgment roll itself is a record for appeal" (*Wetherbee v. Carroll*, 33 Cal. 553), and there is not only no necessity for further record, but it would be superfluous, and incumbering the record, to supply matters appearing in the roll. In the case of *Zelle v. Moritz*, 1 Utah, 285, a demurrer to the answer had been sustained, and judgment rendered for the plaintiff. The appeal was taken upon the judgment roll. The court say: "The judgment roll in this case discloses the action taken by the court on the demurrer. The recitals in it bring before us all the facts necessary to enable the court to determine whether there was error or not; that is, the sufficiency of the answer. They accomplished all that could be accomplished by a statement." Errors in pleading can be received on appeal from the judgment upon the judgment roll. *Putnam v. Lamphier*, 36 Cal. 158; *Jones v. City of Petaluma*, Id. 232; *Smith v. Lawrence*, 38 Cal. 28. In the case last cited a demurrer to the complaint was sustained, and no exception taken. Upon appeal the

court say, "Neither a bill of exceptions nor a statement is required where the record already presents the question of law and the decision of the court." The case of *Abbott v. Douglass*, supra, cited by respondent's counsel, sustains the view we have announced. After witnesses had testified for plaintiff and defendants, the court "ordered that the answer of C. D. Douglass * * * be * * * stricken out, and that thereupon the default of said Douglass be entered, and the plaintiff have judgment against said defendant for the sum of," etc. The appeal was taken from the judgment, and none of the grounds for striking out the answer were disclosed by the judgment roll. The court held, however, that the recitals in the judgment sufficiently indicated the errors complained of, and considered the case fully upon the merits of the pleadings, and held, among other things, that the answer was not sham and frivolous, and reversed the case. The many cases collected in the respondent's brief, and relied on to vindicate his contention as to the abortiveness of the appeal, are clearly distinguishable from the case under consideration. The judgment of the lower court is reversed, and the cause remanded, with directions that the defendant's answer be reinstated.

BARTCH and SMITH, JJ., concur.

(11 Utah, 324)

WARNOCK v. DE WITT.

(Supreme Court of Utah. April 27, 1895.)

LOCATION OF MINING CLAIM—SUFFICIENCY.

1. A locator of a quartz mining claim, who has allowed his location to lapse and become subject to relocation, under Rev. St. U. S. § 2324, providing for the relocation of claims on which the required annual amount of work has not been done, has the right to make a new location, covering the same ground.

2. A mining claim marked by a discovery monument, on which was placed the notice of location, and by a stake at each of three of the corners of the claim, and a monument at the center of each end line, leaving one corner of the claim unmarked, was sufficiently marked, under Rev. St. U. S. § 2324, providing that such a claim shall be "distinctly marked so that its boundaries can be readily traced."

Appeal from district court, Second district; before Justice George W. Bartch.

Action by Robert Warnock against Reuben De Witt. Judgment for defendant, and plaintiff appeals. Affirmed.

Booth, Lee & Gray, for appellant. Williams, Van Cott & Sutherland and S. R. Thurman, for respondent.

SMITH, J. Without going into a statement of the facts, we may say that the record presents two questions for our determination on this appeal, and no more. They are: First. Can the locator of a quartz mining claim, who has allowed his location to lapse by a failure to perform the necessary

work, make a relocation, or new location, covering the same ground? Second. Does the evidence show that the location made by Miles Durkee on January 1, 1887, was sufficiently marked upon the ground to render it a valid location? Plaintiff claims under a location made January 17, 1887.

The first question arises wholly upon the construction of section 2324, Rev. St. U. S. This section, after providing that a certain amount of work shall be performed annually upon each mining location, provides: "Upon a failure to comply with the foregoing conditions of annual expenditure the claim or mine upon which such failure occurred, shall be open to relocation in the same manner as if no location of the same had ever been made: provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

We have been referred to no decision of any court that has decided the question here presented. The right of a locator to make a new location upon mining ground, after his first location has lapsed, is recognized in the case of *Hunt v. Patchin*, 35 Fed. 816; and in *Copp*, U. S. Min. Dec. p. 300, it is declared that a prior locator has such right. See, also, 15 Am. & Eng. Enc. Law, p. 551. We fail to see any reason why such right should be denied. The fact that a prior locator, after his right has lapsed, may renew it by resuming work, would appear to be a favor or right granted to such prior locator, but, to give the proviso above quoted the effect claimed by appellant, would be to deny to such prior locator a substantial right allowed to strangers. In other words, such a construction, while it would allow to a prior locator the right to resume work, would destroy his right to make a new location. We do not think the proviso to the act should be construed to mean anything more than that a prior locator, in addition to the rights of a stranger, should also have the right to resume work, and thus relieve himself from the forfeiture incurred. This was the view taken by the court below, and we think it correct.

The second question is largely one of fact. There was proof tending to show that on the day that Durkee made his location, to wit, January 1, 1887, he and his assistant, in addition to the discovery monument, on which was placed the notice of location, erected a monument or stake at each of the three corners of the claim, and also placed a monument at the center of each end line. At the remaining corner no stake or monument was placed until the 17th of January, 1887, being the day on which plaintiff made the location under which he claims. The court below held that the claim was properly located and marked. So far as there was a conflict in the evidence, we cannot disturb the finding of the trial court. Its

opportunities for coming to a correct conclusion were certainly better than ours. Assuming, therefore, that three corners, the center of two end lines, and the point of discovery were appropriately marked, the question arises, is such marking, of necessity and as matter of law, insufficient? We think not. The statute is: "The location must be distinctly marked on the ground so that its boundaries can be readily traced." Rev. St. U. S. § 2324. It will be observed that the statute nowhere requires that the boundaries be marked. The requirement is that the location be marked so the boundaries can be traced. We think that where the notice of location gives the length and breadth of the claim from the discovery monument, and three corners are properly marked, and the centers of both end lines are also properly marked, there ought to be no difficulty in tracing the entire boundary, under ordinary circumstances. At any rate, there is nothing in this case to indicate that it could not be easily traced, unless it be inferred from the fact that there was a corner post missing. We are of the opinion that the court below properly concluded that the claim was sufficiently marked. We find no error in the record. The judgment in favor of defendant and the order denying a new trial are affirmed.

MERRITT, C. J., and KING, J., concur.

(11 Utah, 331)

PEAY v. SALT LAKE CITY et al.

(Supreme Court of Utah. April 27, 1895.)

PLEADING AND PROOF—VARIANCE—OVERFLOWING LANDS—PAROL EVIDENCE.

1. Under a complaint alleging that the defendants had wrongfully erected and maintained dams across the natural outlet of a lake, causing the waters of such lake to overflow and damage plaintiff's land, proof that such dams were erected under a license from plaintiff and others permitting defendants to raise the waters of the lake, by means of dams, to a certain height, and that they were so erected and maintained as to raise the waters to a greater height, thus causing the overflow and damage alleged, constituted a fatal variance.

2. Where the defendants held a license from plaintiff for the erection of certain dams across a river, a judgment against them for damages caused by improperly maintaining such dams, rendered under a complaint charging them with "wrongfully erecting and maintaining," etc., was erroneous, as violating the rights of the defendants under such license.

3. The fact that commissioners appointed by the parties to act as their agents relative to the construction of certain dams in a river had kept a record of their proceedings, which they were neither authorized nor required to keep, did not exclude parol evidence of such proceedings.

Appeal from district court, First district; before Justice H. W. Smith.

Action by George T. Peay against Salt Lake City, the Utah & Salt Lake Canal Company, the South Jordan Canal Company, the North Jordan Canal Company, and the Draper or East Jordan Canal Company. Judg-

ment for plaintiff, and defendants appeal. Reversed.

Richards & Richards, E. D. Hoge, J. G. Southerland, and Andrew Howatt, for appellants. M. M. Warner and Ira W. Kenward, for respondent.

BARTCH, J. The plaintiff brought this action to recover \$30,000 damages, which he claims he sustained by reason of the flooding of his land by the defendants. The jury returned a verdict in his favor, assessing damages at \$8,750, and the court rendered judgment for that amount and for costs of suit. A motion for a new trial, regularly made and argued, was denied, and thereupon the defendants appealed to this court, both from the judgment and from the order denying the motion for a new trial, assigning many errors, only a few of which it will be necessary to consider. As shown by the record, it is alleged in the complaint, substantially, that at the time of the commission of the grievances complained of, and at the time of the bringing of this suit, the plaintiff was the owner and in the possession of 1,617.50 acres of land, situate in Utah county, in this territory, and bordered on the west, southwest, and south by the waters of Utah Lake; that he, with his family, lived on and occupied the land; that the Jordan river is the natural outlet of Utah Lake; that on the 15th day of April, 1891, against the rights of the plaintiff, the defendants wrongfully and jointly erected, and ever since have "jointly maintained, numerous dams across the said Jordan river, near said lake, to a great height, and have thereby, during all of said time, caused the water in said lake to raise four feet and nine inches above its natural level, and wrongfully obstructed and stopped the natural flow and drainage" of the water of said lake through said river, and have thereby caused the water in said lake "to back up on plaintiff's said land, and flood and overflow and stand on the same, whereby 1,324.44 acres of hay grass and pasture growing thereon have been wholly destroyed, to the damage of the plaintiff in the sum of \$13,240"; that all the land, "by reason thereof, has ever since been, and now is, wet, swampy, and covered with water, alkali, and other salty substances, and is thereby rendered useless and valueless, to the damage of the plaintiff in the sum of \$13,240"; and that by reason of the premises aforesaid, the locality of said land has been made, and now is, dangerous to the health of himself and family, and their dwelling house, during all of said time, rendered uncomfortable for habitation, to his damage in the sum of \$3,520. It is also alleged that the defendants threaten and will continue to wrongfully maintain the dams across the river, unless restrained. The prayer is for judgment against the defendants for the sum of \$30,000, and for injunctive relief to forever prohibit them from so obstructing the natural drainage of the lake. It will be

noticed that the cause of action set out in the complaint is based on the tortious acts of the defendants. The plaintiff charges that they erected and maintained dams and obstructions across the outlet of the lake, and thereby prevented the natural flow of the water from the lake, and caused it to rise and damage his land. These acts of the defendants are characterized as wrongful and in violation of his rights. It must be conceded that this action is well founded, and if the defendants have wrongfully erected dams and obstructions in the river, as alleged in the complaint, and have thereby injured the plaintiff's land, there can be no question that they are liable to him in damages, for no person has a right to obstruct the natural flow of a stream, so as to cause injury to another, against his will; and, where a person is charged with the commission of acts of this character, he must either deny the truth of the charge, or, if he admit its truth, show his authority for the doing of the acts, in order to avoid liability. The defendants in this case, in their answer, specifically deny the allegations of the complaint relating to the wrongful erection of dams and obstructions across the Jordan river, and to maintaining them there wrongfully, to the damage of the plaintiff. In further answer to the complaint, they specifically set out the construction of various canals by them, through which the water of the Jordan river was diverted for purposes of irrigation, and set up a right, for such purposes, to erect and maintain dams in the river, derived from the plaintiff and numerous other parties owning land bordering on the lake. This right or grant was obtained for a valid consideration, was reduced to writing, and executed by the parties. It was fully set up in the answer, and was not controverted by the plaintiff. Nor was its validity questioned at all during the course of the trial. Under this grant, as between the parties thereto, the defendants are entitled to perpetually maintain dams in the river, and to raise the water of the lake to a height not exceeding 3 feet and $3\frac{1}{4}$ inches above low-water mark. The defendants denied that they had maintained dams wrongfully, but admitted that they had maintained them in accordance with the grant, but not in excess of it. The grant was properly set out in the answer to negative the allegations in the complaint that the defendants had wrongfully erected and maintained dams in the river. The issue thus raised was whether the defendants had wrongfully erected and maintained dams and obstructions in the river, and thereby damaged the plaintiff.

The first question raised in the record is whether the judgment in this case is in accordance with the issue raised in the pleadings. Counsel for the defendants insist that the plaintiff at the trial was permitted to recover by proving a case fundamentally different from that alleged in the complaint. The correctness of this position must be tested

by reference to the proceedings on the trial. An examination of the record shows that the first evidence which the plaintiff introduced in support of the allegations of his complaint was the grant set out in the answer of the defendants, and that thereafter all his testimony was introduced for the apparent purpose of establishing the fact that the dams were maintained at a greater height than 3 feet and $3\frac{1}{4}$ inches above low-water mark, and that the alleged damages proceeded from the fact that the dams were so maintained. It is manifest that the allegations of the complaint that the dams were wrongfully erected were abandoned, and yet it cannot be successfully contended that they were not material, for they constituted the foundation of the action. The cause of complaint was, not that the defendants had violated the conditions of the grant, or that they had raised the dams to a height exceeding 3 feet $3\frac{1}{4}$ inches, and thereby injured the plaintiff by flooding his land, but that they had wrongfully erected and maintained them, and wrongfully obstructed the drainage of the lake. If these allegations were true, then the acts of the defendants were in violation of the rights of the plaintiff ab initio, and they were liable to him for all damages caused by the wrongful construction of the dams, and he would be entitled to have them removed, and to have the water flow in its ancient channel, unobstructed by artificial means. This would be a much more far-reaching result than, and an entirely different one from, that caused by maintaining the dams at a greater height than that provided for in the grant. It is evident that at the trial the plaintiff proceeded on the theory that all that was necessary to entitle him to recover was to show that the defendants had committed a breach of the conditions of the grant, and the court, in effect, so charged the jury, for it appears that the jury were instructed to find the issues for the plaintiff if they found that the dams were maintained at a greater elevation than that specified in the grant, to the plaintiff's injury. The case was thus tried on the same theory as if it were an action for a breach of the conditions of the grant, while the complaint shows an entirely different cause of action. We think the law is well settled that a plaintiff cannot declare on one theory and recover on another. It is a well-established rule of evidence that the testimony offered must correspond with the allegations in the complaint, and not show an entirely different state of facts. *Degraw v. Elmore*, 50 N. Y. 1; *Hays v. Carr*, 83 Ind. 275; *Dan Hartog v. Tibbitts*, 1 Utah, 323; *Arnold v. Angell*, 62 N. Y. 508; *Dudley v. Scranton*, 57 N. Y. 424; *Neudecker v. Kohlberg*, 81 N. Y. 297; *McCord v. Scale*, 56 Cal. 262.

The judgment in this case cannot be affirmed, not only because the proof shows a different case than that set forth in the complaint, but because its affirmance would

manifestly jeopardize the rights of the defendants, as between the parties, secured to them by the terms of the grant, which was set up in the answer, put in evidence by the plaintiff, and treated by all parties at the trial as valid. If it were permitted to stand, it would, in effect, declare that the allegations of the complaint were true, and that those contained in the answer were untrue. This would be a finding by the court and jury, in accordance with the theory of the complaint, that the defendants had no right to erect dams in the river at all, or to obstruct in any way the natural flow of the water from the lake. It would be *res judicata*, not only that the defendants had no right to erect any dam in the Jordan river, but also that the construction of the dams already there was wrongful. This would be in direct conflict with the express terms of the grant, for therein the right to erect and maintain dams to a certain height, and to obstruct the natural flow of the water from the lake, is conferred; and it is also provided therein that such right shall be free from interference, and from liability for damages caused by flooding the land by means of dams and obstructions erected to the height of 3 feet and $3\frac{1}{2}$ inches above low-water mark, but not exceeding such height. Notwithstanding such conflict, the judgment would be conclusive of the issues raised by the complaint, and the defendants would thereafter be estopped from setting up, in any suit, the fact that this case had been tried on a different theory from that declared in the complaint. Parol evidence cannot be admitted to contradict the record and show the judgment was rendered on different issues than those appearing from the pleadings, or to show that a different subject was litigated upon the trial. The defendant can only be called upon to answer the material allegations of the complaint, and upon such allegations the issue is formed, and, when judgment is rendered thereon by a court of exclusive jurisdiction, it is conclusive between the parties, upon the same matters, unless set aside by a court of last resort. And such a judgment is final, not only as to the matter actually determined, but also as to every other matter which might have been litigated by the parties, as part of the subject in controversy, but which was omitted from the case through negligence, or inadvertence, or even accident. In such case the plea of *res judicata* applies, and the record, which shows only the issue, the verdict and judgment on that issue, cannot be controverted by extraneous evidence. The defendant is afterwards estopped from alleging anything which contradicts the record, and such estoppel extends to every allegation contained in the complaint and denied in the answer. In the case at bar, the finding of the issues generally for the plaintiff negatives the answer, and, in the absence of a reversal of the judgment, settles the matter in controversy, set up as a cause of action, as to all

future actions between the parties concerning the same matter. "It must be presumed from a general judgment that all the issues were decided in favor of the successful party." *Finch v. Hollinger*, 46 Iowa, 216. Whether this rule applies to the other parties to the grant, *quaere*. Herman, in his commentaries on the Law of Estoppel and *Res Judicata*, in volume 1, § 247, states the law relating to the estoppel of a judgment as follows: "The estoppel of a judgment extends beyond what appears on its face. It includes every allegation made by the plaintiff and denied by the defendant. It extends to every fact in issue between the parties that was adjudicated in the action; and, while it not only proves and establishes the case of the successful party, it denies and refutes that of the other." Black, in his treatise on the Law of Judgments, in volume 2, § 625, says: "Where the declaration in the first suit states a particular matter as the ground of action, and issue is taken thereon by the defendant, parol proof is not admissible to show that a different subject was litigated upon the trial." In *Outram v. Morewood*, 3 East, 346, where it was held that the defendants were estopped, in an action of trespass for digging coal out of a mine, from alleging title to it, because, in a previous case of trespass, they had set up the same title which was determined against them, Lord Ellenborough said: "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery itself, in an action of trespass, is only a bar to the future recovery of damages for the same injury, but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." In *Smith v. Town of Ontario*, 4 Fed. 386, the court said: "Whatever is merely matter of evidence becomes of no importance after the determination of the matter in issue." In *King v. Chase*, 15 N. H. 9, "matter in issue" was defined as "that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings." In *Cromwell v. County of Sac*, 94 U. S. 351, Mr. Justice Field, commenting upon the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, said: "It is a finality as to the claim or demand in controversy, concluding parties, and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." 1 Greenl. Ev. § 528; *Tayl. Ev.* § 1513; 1 *Whart. Ev.* § 783; *Campbell v. Butts*, 3 N. Y. 173; *Shepardson v. Cary*, 29 Wis. 34; *Henderson v. Henderson*, 3 Hare, 100; *Plate v. Railroad Co.*, 37

N. Y. 472; Hawley v. Simons, 102 Ill. 115; Underwood v. French, 6 Or. 67; Chapman v. Smith, 16 How. 130; 21 Am. & Eng. Enc. Law, 216. Applying the law, as declared by these authorities, to the case at bar, we conclude that the plaintiff was not entitled to recover, and that the judgment must be reversed—First, because, as disclosed by the record, the proof shows a different case from that declared in the complaint; and, second, because the judgment is in violation of the rights of the defendants secured to them by the grant set out in the answer.

The conclusion reached disposes of the case, but, as another trial may be had upon amended pleadings, if the parties should wish to amend, we think it important to pass on several other points raised in the briefs of counsel, as the same questions may again come up in case of a retrial.

The first of these is whether the court erred in excluding the testimony of several of the defendants' witnesses as to the action of certain commissioners appointed by the parties, under the terms of the grant, to carry into effect the provisions thereof. It appears that the evidence in question related to the practice of the commissioners in regard to permitting obstructions to be placed in the dams, without an express order from them, to raise the water in the lake. This was excluded on the ground that they had kept a record of their proceedings, and that such record was the best evidence. Under the terms of the contract, the commissioners were the agents of all parties to the grant, and under its terms they were neither required nor authorized to keep a record of their proceedings. They were simply required to carry the provisions thereof into effect. If, then, without requirement or authority, they kept a record, such record had simply the quality and effect of a memorandum, and while, under some circumstances, it might be admissible in evidence, its quality as evidence would not be such as to exclude parol testimony concerning the same matters. The mere fact that such a board keeps minutes, which may be evidence, does not exclude parol proof of what was done, when its object is to ascertain the practical construction which the parties to an instrument have given to such instrument. The construction which parties to a contract have themselves placed upon its terms by their conduct and actions, before any controversy arose, should be adopted by the court, if there is any ambiguity. 1 Whart. Ev. §§ 77, 238, 516; Smith v. Lawrence, 12 Mich. 431; Newell v. McLarney, 49 Mich. 232, 13 N. W. 529; Miles v. Bough, 3 Q. B. 845; Lathrop v. Bramhall, 64 N. Y. 365; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585. The evidence in question was manifestly offered for the purpose of showing the practical construction the parties to the grant or contract put upon the terms thereof; and for that purpose we think it was admissible, regardless of whether or not the

commissioners kept minutes of their proceedings.

We are also of the opinion, upon examination of the evidence as it appears in the record, that the court erred in charging the jury, as matter of law, that the plaintiff had shown title to all the land described in his complaint, except 10 acres. This question ought to have been submitted to the jury.

We do not deem it necessary to discuss the other question raised in the record, in view of the disposition made of those already considered. The judgment is reversed, and the cause remanded, with directions to the court below to grant a new trial, and permit the parties to amend their pleadings, should they desire to do so, and on such terms as may be just.

MERRITT, C. J., concurs.

(4 Ariz. 330)

UNITED STATES v. FALSHAW et al.

(Supreme Court of Arizona. May 8, 1895.)

TERRITORIAL COURTS—POWERS—ATTENDANCE OF WITNESSES.

Under Rev. St. U. S. § 1910, giving a territorial court the same jurisdiction in all cases arising under the United States constitution and laws as is vested in the United States circuit and district courts, and section 878, vesting jurisdiction "in a court of the United States" to order the attendance of witnesses in behalf of indigent defendants, the district court of a territory may make such an order.

Appeal from district court, Second judicial district; before Justice Owen T. Rouse.

Jake Falshaw, Leslie Webb, and Abe Winsor were indicted for robbery of the United States mail. At the trial an order was made that certain witnesses be subpoenaed for the defense at the expense of the United States, and from the order the United States appeal. Dismissed.

E. E. Ellinwood, U. S. Atty.

HAWKINS, J. On the trial of the cause in the district court, defendants, appellees, having been indicted for robbery of the United States mail, made application by affidavit, under section 878, Rev. St. U. S., asking that certain witnesses be subpoenaed for their defense at the expense of the United States, and that they be paid by said appellant such per diem for their attendance as the statutes of the United States provide to be paid witnesses subpoenaed on behalf of the United States. This application was allowed by the court, and from such order appellant undertakes to prosecute an appeal to this court.

The record does not disclose the result of the action. I do not think it necessary in this cause to go to any great extent into the question of the power and jurisdiction of the court trying these defendants. It may be said, however, that it is a territorial court, and in addition to its common-law powers,

and the jurisdiction conferred upon it by the territorial statute, it is given the same jurisdiction, by congress, in all cases arising under the constitution and the laws of the United States, as is vested in the circuit and district courts of the United States. Rev. St. § 1910. The case at bar is one arising under the laws of the United States. Section 878, Rev. St., vests jurisdiction in a "court of the United States" to make an order for the attendance of witnesses in behalf of indigent defendants. The territorial court trying these defendants (section 1910, Id.) had the same jurisdiction. The appellant has not been injured by the order. It was his duty to furnish means for the attendance of such witnesses. I do not think an appeal lies from such order. The appeal is dismissed.

BAKER, C. J., and BETHUNE, J., concur.

(16 Mont. 145)

STATE ex rel. EAVES et al. v. RICKARDS et al.

(Supreme Court of Montana. May 6, 1895.)

MANDAMUS TO STATE FURNISHING BOARD—PRINTING OF CODES—DISCRETION—CONTRACTS—INTEREST OF LEGISLATOR.

1. Under Act March 7, 1895, § 5, providing that the state furnishing board shall immediately contract for the publication and annotation of the Codes, contracting with the lowest responsible bidders therefor, the board has discretionary power, and mandamus does not lie to compel it to award a contract to a bidder who, although the lowest, is, in its judgment, not responsible.

2. Where the bidders were given a fair hearing, and the board used all reasonable means in its power to determine the ability of each to fulfill the contract, and it appeared relators had not the facilities therefor, the rejection of their bid was not an abuse of discretion.

3. The manager of a publishing company, who was paid a fixed salary, unaffected by the company's contracts, was, at the time of an award to his company of a contract for publishing by the state, a member of the legislature. *Held*, not a violation of Const. art. 5, § 30, providing that no member or officer of any department shall be in any way interested in any contract for supplies.

Application by the state of Montana, on the relation of Lucien Eaves and others, for a peremptory writ of mandamus against J. E. Rickards and others, constituting the state furnishing board, to compel the award of a contract. Dismissed.

The matter before us is a decision upon the return of an alternative writ of mandamus. The respondents, constituting the state furnishing board, let a contract to the Inter-mountain Publishing Company for printing, annotating, and binding the Codes which were adopted at the fourth session of the legislative assembly. The act of the legislature, approved March 7, 1895, as to the printing of the Codes, provided, among other things:

"Sec. 4. The said Codes, as compiled and codified by said commissioner, shall be annotated by the publisher thereof as fully and completely as Hill's Annotated Statutes and

Codes of the state of Washington, in so far as the reports of the supreme court of the state of California are contained, and shall contain full annotations of the Montana Reports to April 1, 1895. They shall be published in two royal octavo volumes, equal in size, quality of paper, press work and binding, and similar in respect to the type used, to said Hill's Codes.

"Sec. 5. The state furnishing board of the state of Montana are required to immediately contract for the publication and annotation of said Codes, as specified in this act, contracting with the lowest responsible bidder therefor, which contract must not exceed the sum of eight thousand five hundred and fifty-five dollars for the publication and annotation of one thousand sets, containing two thousand, three hundred pages, or less, and two and 25/100 dollars for each additional page.

"Sec. 6. The contract shall specify that one thousand sets shall be printed, published and delivered to the secretary of state, on or before the 30th day of June, 1895. That the type setting, printing and binding of said Codes shall all be done within the state of Montana. That the publisher shall keep on hand, and for sale, at price not to exceed ten dollars per set, a sufficient number of copies of said Codes to supply all demands for a period of not less than eight years. That the publisher shall also make and keep on hand a full and complete set of stereotype matrices of each and every page of type used in printing the Codes."

As to public printing, the constitution of the state provides as follows: "All stationery, printing, fuel and lights used in the legislative and other departments of government, shall be furnished, and the printing and binding and distribution of the laws, journals and department reports and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the legislative assembly, and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price, and under such regulations as may be prescribed by law. No member or officer of any department of the government shall be in any way interested in such contract; and all such contracts shall be subject to the approval of the governor and state treasurer." Article 5, § 30.

The application for the writ sets forth that on or about March 17, 1895, the state furnishing board caused to be published the following notice: "Proposals for Printing. Office State Furnishing Board, Helena, Montana. March 13, 1895. Notice is hereby given that the state furnishing board, in accordance with the provisions of an act entitled, 'An act to provide for the compilation, codification, publication, distribution and sale of the Code of Civil Procedure, Civil Code, Penal Code, and the Political Code,' approved March 7, 1895, will receive proposals for the printing, binding, publication, and annotation of the Politi-

ical, Civil, Penal Code, and the Code of Civil Procedure of the state of Montana, as codified by the code commissioners, in two royal octavo volumes, equal in size, quality of paper, presswork, and binding, and similar in all respects to the type used, to Hill's Annotated Statutes and Codes of the state of Washington, as fully and completely as Hill's Codes are annotated, in so far as the reports of the supreme court of the state of California are contained, and, as well, full annotations of the Montana Reports to April 1, 1895. All bids must be filed with the secretary of this board on or before April 4, 1895, and be indorsed 'Proposals for Printing Codes of Montana.' The Board reserve the right to reject any and all bids. J. E. Rickards, I. Rotwitt, H. J. Haskell, State Furnishing Board." The relators further state in their affidavit upon which they ask for the writ of mandamus that, in pursuance to said notice, they submitted to the board a bid for the annotating, printing, and binding of said Codes, in the sum of \$7,795, and \$2.25 per page for each page exceeding 2,300, and that they submitted another bid to annotate, print and bind, and deliver the required number of volumes for the sum of \$8,290; that each of said bids was below the maximum provided by law to be paid for said service, and also lower than that of any other bid submitted; that they offered to execute a good and sufficient bond in the sum of \$10,000, or in any other sum which the board might require. They allege, further, that they are experienced publishers, and responsible and capable artisans, engaged in devoting their services, skill, experience, and ability to their business; that they are financially able to procure the services of competent and skillful codifiers and annotators to aid them, and are competent and responsible for the faithful execution of the work in a skillful and workmanlike manner. They set forth, further, that other proposals or bids were filed; that the board examined the bids on April 4, 1895, and that the bid of the relators upon the first proposition submitted was \$760 less than that of the Intermountain Publishing Company, and, upon the second proposition submitted, \$265 less than the bid of said company. They further set out in their affidavit that the Intermountain Publishing Company is disqualified to contract for said work, because, as they are informed and believe, James H. Monteith is a member of said company as a stockholder and officer therein, and business manager thereof, actively and personally engaged in the management and promotion of the interests of said company, and as such is interested in the contract; and that the said James H. Monteith is now, and during all the times herein mentioned was, a member of the legislative department of the state, as representative from Silver Bow county, which legislature passed the act for said printing, binding, and annotating the Codes. Relators further set up that by virtue of the facts stated it was the duty of the state

furnishing board to award said contract to relators, and that they demanded that such action be taken by the board, but that, notwithstanding the facts set up, the board wrongfully, arbitrarily, and in disregard of the duty enjoined upon it, and contrary to the provisions of the constitution and laws, wrongfully resolved and pretended to award said contract to the Intermountain Publishing Company. Relators allege that they are beneficially interested by reason of their being bidders, as described, and being entitled to the award of said contract, and also by reason of their being citizens and taxpayers of the state. They prayed a writ commanding the board to award said contract to them. Upon this affidavit an alternative writ was issued, commanding the said board to convene and revoke the award of the contract to the Intermountain Publishing Company, and award the same to the relators, as the lowest responsible bidders, or to show cause on the 18th of April why they had not so done. The respondents filed a demurrer, and a motion to quash. Decision was reserved upon the questions raised by said motion and demurrer, and respondents were ordered to file their answer. The answer being filed, there appeared to be a denial of most of the material allegations of the affidavit, and it seemed that there were raised questions of fact essential to the determination of the matter. This court thereupon appointed a referee, and in the order appointing him defined the issues upon which he should take testimony.

The issues of fact, as set forth in the order of reference, were as follows: "(1) Was James H. Monteith, mentioned in the affidavit in this case, a stockholder of the Intermountain Publishing Company at the time of the awarding of the contract herein mentioned to the Intermountain Publishing Company, or at any other time mentioned in said affidavit? (2) Is the said James H. Monteith interested, or was he at the time of the letting of the contract interested, in any manner whatever, in the contract awarded as aforesaid to the said Intermountain Publishing Company? If so, how, and to what extent? (3) Did the relators, in making their alleged bid, offer to execute or deliver to said board a good and sufficient bond or undertaking, or any bond or undertaking, for the sum mentioned in the affidavit, or any sum, for the performance of the contract? (4) Did the state furnishing board, in awarding the contract in question, make inquiry as to whether the relators were financially able to procure the services of competent and skillful codifiers and annotators; and, if so, what inquiry did they make? (5) Did said board, in letting the said contract, make inquiry as to whether relators were competent or responsible for the performance of the contract in a skillful and workmanlike manner, according to the requirements of law; and, if so, what inquiry was made? (6) Did the board, in awarding the said contract, make inquiry as to whether the relators were

able to annotate the said Codes as fully and completely as Hill's Annotated Statutes and Codes of Washington are annotated, in so far as the reports of the state of California are contained; and, if so, what inquiry was made? (7) Did the said board, in awarding the said contract, make inquiry as to whether relators were capable, and could do or cause to be done the typesetting, printing, and binding of the said Codes within the state of Montana, or could have published the same as required by law; and, if so, what inquiry was made? (8) Did the state furnishing board, before awarding said contract, meet for the purpose of considering bids submitted to them, and what examination did they make of said bids? Did they hear relators, and other persons who had presented bids? What inquiry did they make as to the ability and qualification of said bidders to perform the said work? What inquiry did they make as to the responsibility of the several bidders financially and otherwise? Was the determination of the said board to award the contract to the Intermountain Publishing Company based upon the facts inquired into by them?"

The referee has filed a voluminous report. Counsel argued the law of the case fully upon the motion to quash and the demurrer, and have also discussed the questions of law and fact since the filing of the referee's report.

Wilbur F. Sanders and E. N. Harwood, for relators. Henri J. Haskell, Ella L. Knowles, Wm. Scallon, and E. S. Booth, for respondents.

DE WITT, J. (after stating the facts). As we have viewed this case from its inception, there seem to be only two main propositions for the decision of this court: (1) Had the state furnishing board, in awarding this contract, discretionary powers? This is the question of law in the case. (2) If the first proposition be answered in the affirmative, did the board wisely exercise such discretion, or did they, as alleged by the relators, exercise it "wrongfully, arbitrarily, and in disregard of duty"?

We will first address our attention to the question of law. It is true that the relators were the lowest bidders for this contract, and it is probably true that they offered to give a bond for the faithful execution of the same if it were awarded to them, and they allege that they were competent and skillful for the performance of the service. But does this conclude the state furnishing board? Is the offer of the lowest bid and the tendering of a bond sufficient to constitute one the lowest responsible bidder? The authorities do not so hold. The board must let the contract to the lowest responsible bidder. Responsibility includes judgment, skill, ability, capacity, and integrity, and it is the duty of the furnishing board to wisely and honestly determine this question of responsibility. It is

said in Merrill on Mandamus (section 117): "The law generally requires public officers who are charged with letting contracts for public work to accept the lowest bid therefor, and to make the contract accordingly. When such bidder has fully complied on his part with the requirements of the law, he may by the writ of mandamus compel the officer to make the contract with him. The writ has been considered appropriate in relation to a contract for constructing county buildings (*Boren v. Commissioners*, 21 Ohio St. 311; *State v. Board of Com'rs of Licking Co.*, 26 Ohio St. 531); for state printing (*State v. Barnes*, 35 Ohio St. 136; *State v. Printing Com'rs*, 18 Ohio St. 386; *American Clock Co. v. Com'rs of Licking Co.*, 31 Ohio St. 415); for articles to be purchased for use of the county for building a bridge (*People v. Buffalo Co.*, 4 Neb. 150); for repairing the Erie Canal (*People v. Contracting Board*, 46 Barb. 254). When the officer is allowed a discretion in the matter, the writ will be refused. *Id.*, 27 N. Y. 378. It has been refused because the officer could decline the bids if he deemed them to be excessive or disadvantageous to the state (*Id.*, 33 N. Y. 382); because the officer was only required to let the contract to the lowest bidder if he was responsible (*Hoole v. Kinkead*, 16 Nev. 217), or if he furnished adequate security (*People v. Fay*, 3 Lans. 398); because the contract was to be let to the lowest responsible bidder, and the contract in the case required, for its fulfillment, pecuniary ability, judgment, and skill (*Com. v. Mitchell*, 82 Pa. St. 343); and because in the advertisement the right to reject any and all bids was reserved (*Hanlin v. Independent Dist.*, 66 Iowa, 69, 23 N. W. 268)."

We quote, also, from the following authorities:

It is held in *Douglass v. Com.*, 108 Pa. St. 559, as follows: "In the act of assembly approved May 23, 1874 (P. L. 233), directing contracts for supplies to be awarded to the lowest responsible bidder, the word 'responsible' does not refer to pecuniary ability only. The act calls for an exercise of discretionary powers on the part of the city officers; and if they act in good faith, although erroneously or indiscreetly, mandamus will not lie to compel them to change their decision. They may be ordered by mandamus to proceed to do their duty of deciding and acting according to their best judgment, but the court will not direct them in what manner to decide." See, also, *Com. v. Mitchell*, 82 Pa. St. 343, as follows: "The word 'responsible' in the 6th section of the act of 23d of May, 1874, has a broader meaning than is involved in the pecuniary ability to make a good contract by security for its faithful performance, and where the term is applied to contracts requiring for their execution, not only pecuniary ability, but also judgment and skill, the statute imposes, not merely a ministerial duty upon the city authorities,

but also duties and powers which are deliberative and discretionary; and therefore, where these authorities have exercised a discretion, mandamus will not lie to compel them to modify their decision, even though their action was erroneous, in the absence of clear proof of fraud or bad faith."

It is said in *Kelly v. City of Chicago*, 62 Ill. 282, as follows: "The complainants have merely submitted a proposal to make a certain contract with the board. How do they found upon that a right to have the board make the contract with them? The notice for proposals expressly reserved the right to reject any bid. The charter did not make it the absolute duty of the board to let the contract to the lowest bidder. It provides that 'all contracts shall be awarded by said board to the lowest reliable and responsible bidder.' These qualities of being reliable and responsible, it is obvious, were of the utmost importance in the construction of a work of this magnitude. And the complainants must have been the possessors of these requisites, as well as being the lowest bidders, to make a case of duty on the part of the board to award the contract to them. It was for the board to determine whether the complainants were reliable and responsible. It exercised its judgment upon the question, and found they were not so, and for that reason awarded the contract to another bidder." See, also, the following from *Hoole v. Kinkad*, 16 Nev. 220: "Section 5 of the statute referred to provides that 'said board may adopt or reject any and all bids not deemed reasonable or satisfactory, but in determining bids for the same work or material, the lowest responsible bid shall be taken.' [Laws 1881, p. 59.] The provision that they shall take the lowest responsible bid is mandatory, and they had no power or authority to accept any other; but in ascertaining whether or not a bidder was responsible they were required to deliberate and decide, and in doing so they exercised judicial, not ministerial, functions. And, in deciding upon the responsibility of bidders, it was their duty to consider, not only their pecuniary ability to perform the contract, but it was their right and duty to inquire and ascertain which ones, in point of skill, ability, and integrity, would be most likely to do faithful, conscientious work, and fulfill the contract promptly, according to its letter and spirit. In *Com. v. Mitchell*, 82 Pa. St. 349, a case similar to this, and under a statute requiring a contract for stationery, etc., to be given to the 'lowest responsible bidder,' the court thus forcibly expresses itself: 'It is scarcely open to doubt but that the word under consideration ["responsible"], as used in the statute, means something more than pecuniary ability. In a contract such as the one in controversy the work must be promptly, faithfully, and well done. It must, or ought to be, conscientious work. To do such work requires prompt,

skillful, and faithful men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good, and even capable of bearing its duty for a time, which in the end may prove to be a total failure, and worse than useless. Granted, that from such a contractor pecuniary damages may be recovered by an action at law. That is, at best, but a last resort, that often produces more vexation than profit,—a mere patch upon a bad job; an exceedingly meager compensation, at best, for the delay and incalculable damage resulting to a great city from the want of a competent supply of water. The city requires honest work, not lawsuits. Were we to accept the interpretation insisted upon by the relators, the difference of a single dollar in a bid for the most important contract might determine the question in favor of some unskillful rogue, as against an upright and skillful mechanic. Again, we know that, as a rule, cheap work and cheap workmen are but convertible terms for poor work and poor workmen, and if the city, for the mere sake of cheapness, must put up with these, it is indeed in a most unfortunate position.' "

We take the following from the syllabus of *People v. Dorsheimer*, 55 How. Pr. 118: "It is provided by chapter 634 of Laws of 1875 (pages 809, 810) that all contracts for work to be done upon the new capitol shall be awarded to the lowest bona fide responsible bidder or bidders. Held, that the statute requires the successful bidder to be a responsible one,—that is, 'able to respond or to answer in accordance with what is expected or demanded,'—in addition to the giving of the bond for the faithful performance of the contract. He is not to be deemed a responsible bidder because he offers adequate security for the performance of the contract. Where the contracting board has passed upon the pecuniary responsibility of a bidder, and rejected his bid because their conclusion was unfavorable to him in that particular, the court will not interfere, so long as there has been no abuse of discretion." See, also, remarks of the supreme court of Massachusetts in the case of *Mayo v. Commissioners*, 141 Mass. 74, 6 N. E. 757: "We need not consider whether a private person can maintain a petition for a writ of mandamus to compel public officers to perform their duties, or to direct the manner in which they shall perform them. It is enough for the decision of this case that there has been on the part of the respondents no neglect to perform their duty, and no error in the manner in which they have performed it. County commissioners are not required by law to accept the lowest proposal for public works. The statute provides that all contracts for public works made by them shall, if exceeding \$300 in amount, be made in writing, after notice for proposals therefor has been published at

least three times in some newspaper published in the county, city, or town interested in the work. Pub St. c. 22, § 22. It does not provide that they shall accept the lowest proposal. It is clearly the intention of the legislature that the county commissioners, after inviting competition by public notice, shall have the authority to make such contract as in their judgment the interests of the county require. In the case at bar the commissioners fully complied with the statute. If, upon examining the various proposals, they were satisfied that Mayo, the lowest bidder, was an irresponsible person, unfit and incompetent to perform the work proposed, it was their right and duty to reject his proposal, and to make a contract with some other person, such as, in their judgment, was the most advantageous to the county."

Mr. High, in his work on Extraordinary Legal Remedies, after reviewing the Ohio decisions, says: "The better doctrine, however, as to all cases of this nature, and one which has the support of an almost uniform current of authority, is that the duties of officers intrusted with the letting of contracts for works of public improvement to the lowest bidder are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond control of the courts by mandamus. And the true theory of all statutes requiring the letting of such contracts to the lowest bidder is that they are designed for the benefit and protection of the public, rather than for that of the bidders, and that they confer no absolute right upon a bidder to enforce the letting of the contract by mandamus after it has already been awarded to another. In all such cases the spirit, rather than the strict letter, of the law requiring the work to be let to the lowest bidder, should be kept in view. And where the right of the officers to enter into the contract is itself somewhat doubtful mandamus will not lie. Nor does the mere issuing of proposals, by officers intrusted with letting contracts, inviting bids for the performance of the work, without binding themselves to award the contract to the lowest bidder, create such an obligation on the part of the officers as to entitle the lowest bidder to the aid of a mandamus to obtain the contract." See, also, *State v. McGrath*, 91 Mo. 386, 3 S. W. 846; *Flindley v. City of Pittsburgh*, 82 Pa. St. 351; *Madison v. Board*, 76 Md. 395, 25 Atl. 337; *State v. Scott*, 17 Neb. 686, 24 N. W. 337; *People v. Contracting Board*, 33 N. Y. 382; High, Extr. Rem. § 48; and also the exhaustive note upon the whole subject found in 26 L. R. A. 707.

We quote these authorities simply as to the law as it is applicable to the case at bar. There are some propositions discussed and decided in them which are not now before us, and upon which we do not express an opinion. We

are wholly satisfied, from the authorities, that the state furnishing board in this case had discretionary power. It is the intention of the law that the board shall determine who is the lowest responsible bidder.

Before leaving the law of the case, we observe that it is held by many authorities that bidders other than those to whom the contract is awarded, such as relators here, have no standing in court to compel by mandamus the letting of the contract to them. See part of the cases above cited, and 26 L. R. A. 707, and cases. It has also been urgently argued that the affidavit and writ in this case are insufficient, but these, and some other points raised in this case, we prefer to pass, and reserve an opinion thereupon, and to decide the case upon the merits of the facts as returned by the referee. It is a grave and serious matter if a state board, instead of fairly and honestly awarding a contract, act "wrongfully, arbitrarily, and in disregard of their duty," as charged in relators' affidavit, or act through favoritism and for the purpose of usurping state patronage for personal ends, as argued by relators' counsel. If such a wrongful course is taken by a state board, it appears that there is some method of reviewing it by a court. How such action by a board shall be reached by the court is not necessary to determine. The gravity of the charges against the board in this case has led us to pass all preliminary questions in the case, and to enter upon the merits of the facts.

Having determined the question of law, which we noted above as the first matter for consideration, we will now examine the facts, and endeavor to ascertain whether the board acted "wrongfully, arbitrarily, and in disregard of duty," or whether they fairly and honestly exercised the discretion vested in them. In a case which was relied upon by the relators it is said: "The learned counsel of appellant has directed most of his argument to this question. The argument against the writ is, in substance, that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal, before signing; and that if he has examined them, and become satisfied that they are not legal, the most that can be said is that he has committed an error in a matter confided to his discretion, and that the function of the writ is not to review such exercise of discretion. It must be acknowledged that this argument is exceedingly plausible. There are innumerable cases in which it is laid down that mandamus cannot issue to control discretion. The rule, which is undoubtedly correct when properly understood, has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any

particular way. These formulas undoubtedly express a truth, but they express it in an inaccurate and misleading manner; and, by reasoning from them as if literally and in all cases true, courts have sometimes been led into error, and have frequently been forced to call acts 'ministerial' which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases. Thus it is not accurate to say that the writ will not issue to control discretion; for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper. *Ex parte Bradley*, 7 Wall. 377; *State v. Lafayette Co. Court*, 41 Mo. 226; *Council of Village of Glencoe v. People*, 78 Ill. 389; *People v. Superior Court*, 10 Wend. 285; *Railroad Co. v. Stockton*, 51 Cal. 339; *Tapp. Mand. 14.*" Quoted from *Wood v. Strother*, 78 Cal. 545, 18 Pac. 768. Therefore, let us inquire whether there is a showing in this case of an abuse of discretion by the state furnishing board. After the advertisement for bids, the board met to examine the same; present, a full board. The meeting was commenced April 4th, and continued to April 5th. All the bids were opened by the board in the presence of the bidders. The bidders then discussed and explained their bids, and their capacity to perform the work. In the order of reference the referee was directed to ascertain what inquiry the board made upon the various points set out in the order of reference. The examination of the witnesses by the relators sought to develop as a fact that the board did not themselves ask questions of the different bidders, and therefore did not make inquiry. But the testimony is that the bidders talked and explained exhaustively. It is a matter of no consequence whether the board obtained their information and facts by asking questions themselves, or whether the information came from the persons who possessed the same voluntarily. In fact, one witness says that at one time the bidders all talked at once, and that the board had nothing to do but to listen. Mr. Ross, one of the relators, testified that he and his partner, Mr. Eaves, and Mr. Bond and Mr. Monteith, two other bidders, and others, were accorded a full hearing before the board, touching the merits of the several bids submitted, as well as the conditions under which the law required the Codes to be printed. The governor, president of the board, testified that Mr. Eaves, one of the relators, admitted that he had not as good a plant as some of the bidders, but always fell back on the argument that he could give a bond, which in itself should be a sufficient guaranty of their ability. The governor says that he had information that the relators were not a well-equipped firm, or capable of doing the work. He says he learned that it was a mechanical impossibility for one publishing house to get out the Codes by the 1st of July. He says that Mr. Monteith stated to the board that with the full equipment of the Intermountain Publishing Company it

would be a mechanical impossibility for their house to get the Codes out without assistance from some other printing house, and that they had entered into an arrangement with a capable printing establishment, and that with their help it would take all the time given by law to do the work. The governor says that he was satisfied by general information that the business and financial ability of the relators was not such as would guaranty the completion of the work. The governor says that he had no commercial reports as to the relators, but he said, "You know, we get our impression of these things as we get our impression of business men and firms generally." He says that the question of the financial responsibility of the relators was frequently expressed in his office while the matter was pending. He says his information was that the relators were one of the smallest printing firms in the state, and that he looked at that as he looked at any business proposition. He states that Mr. Eaves said that his firm could bind books, but they had no thorough bindery. The attorney general says that Mr. Monteith, of the Intermountain Publishing Company, and Mr. Eaves, of the relators, and Mr. Bond, of the Standard Publishing Company, made explanation of their bids, that the board listened, and that questions were propounded, and that the board had a full hearing. The board then adjourned until the next day, for the purpose of inquiring into the ability of the parties to perform the work. They then had before them Judge Wade, and questioned him as to making the annotations. The board heard all the bidders discuss their ability to perform the work, and the conversation was only about the merits of the different bidders. The board paid great attention to the question of the time in which the work could be gotten out, it being required by law that it should be completed by July 1st. The attorney general says the board considered two propositions: First, which of the bidders had the ability to perform the contract; and, second, as to the annotations to be used,—and that the bidders furnished the information and the evidence. Mr. Eaves himself says that Mr. Monteith fully explained his bid, and stated that the attorneys of the state desired the Deering annotations, which annotations the Intermountain Publishing Company proposed to give, while the relators proposed to give annotations by Judge Wade and others. Mr. Monteith, manager of the Intermountain Publishing Company, as a witness, testified before the referee that he had explained his bid, and how it was specific and unequivocal, while the others were ambiguous. He stated that he represented one of the largest printing establishments in the state, and that it would crowd them to complete the work if they entered upon it at once. Mr. Monteith says that the governor, as chairman of the board, stated that the board desired all the information they could get, and that they

were arriving at this information through the course of the conversation which they were having at that time. Mr. Monteith said that at the two meetings of the board the chairman stated that they were there for the purpose of hearing the bidders in relation to their bids. Mr. Monteith stated to the board that he had inquired as to the ability of Ross, Frank, and Eaves to perform the labor; that he was informed by printers of Helena that they were incompetent to perform the contract if awarded to them; that they had no stereotype plant; that they had no bindery, and that the capacity of their press was such that it was inadequate for performing the services; that their financial standing was such that supplies were sent to them with the bill of lading attached to the draft, c. o. d. In the presence of the board, Mr. Bond asked Mr. Eaves if they had a stereotype plant. Mr. Eaves admitted that they had none. Mr. Bond asked him if they had a bindery. Mr. Eaves admitted that they had none. Mr. Eaves admitted that they had not yet made arrangements for a stereotype plant, but they had made arrangements for binding. Mr. Bond testified that Mr. Eaves was heard by the board, and set forth the merits of his bid and his capacity.

We do not purpose to recite this testimony any further. It covers 263 typewritten pages, as reported by the referee. The most searching examination was made by able counsel into the acts of the board. While we do not pass upon the competency or incompetency of all the testimony introduced before the referee, we are perfectly satisfied that it appears that the state furnishing board made a diligent and careful inquiry into the skill, competency, and ability of both the Intermountain Publishing Company and the relators herein. It appears that they considered all the facts and information which they could reasonably be expected to obtain, and that they acted wisely and discreetly, and not arbitrarily and wrongfully, upon the information before them. To say that the board acted wrongfully and arbitrarily and in disregard of duty is wholly unsustained by the evidence. It is to be observed that there was a difference of only \$265 upon a contract of some \$8,000. With this slight difference in figures, and this thorough showing of fair dealing by the board, it would be a remarkable precedent for a court to hold that the action of the board should be disturbed by mandamus. It is to be observed, further, that the board did not act hastily. After a sitting of an hour and a half at the first session, the board adjourned without taking action, for the purpose of making further inquiries, and upon reassembling they gave everybody an ample opportunity to be heard.

There is one other matter left for consideration. The relators alleged that the Intermountain Publishing Company is disquali-

fied to receive the award of this contract, because Mr. Monteith was a member of the legislative assembly at all times mentioned in the affidavit, and, as relators are informed and believe, is a member of said publishing company, as a stockholder and officer therein, and business manager thereof, actively engaged in the management and promotion of the interests of said company, and as such is interested in the contract. On the argument made upon the return of the referee's report, relators do not point out to us one syllable of testimony offered by them showing or tending to show that Mr. Monteith held a single share of stock in the Intermountain Publishing Company, or that he had one dollar's worth of interest in that concern. Nor have we found such testimony in the report. Upon the contrary, Mr. Monteith testified that he had no interest in the contract, or the proceeds or profits thereof, and that he had not even a contingent interest in the profits of the publishing company; that he is paid a fixed salary, and always has been; that the obtaining of the contract would not affect his salary in any way whatever; that he has no interest in the Intermountain Publishing Company, and did not, at any of the times mentioned, own any of its stock. The only showing of Mr. Monteith's connection with the publishing company is that which was admitted by the pleadings, to wit, that he was and is business manager. But it clearly appears that the obtaining or the losing of this contract would not affect his position as manager, or his salary, in any way whatever.

We have given this case a more lengthy consideration than we at first intended, or perhaps the case deserves. But we have done this by reason of the public character of the acts of the state furnishing board, and by reason of the fact that fairness and honesty must be demanded in the acts of such board; and we believe it a wholesome precedent to inquire closely into the conduct of the board. We have heard the case twice argued, once upon the law and once upon the facts, and we have appointed an able and competent referee to make diligent investigation into the facts. The matter of printing and annotating the Codes is a great public enterprise, which should be proceeded with at once, but should not be proceeded with at all, as it has been inflated, if there was fraud, collusion, and arbitrary action by the board. When the time comes that a showing is made of such conduct by the officers of any state institution, and the matter is brought to the attention of this court in a procedure by which it can be reviewed, it will receive a prompt judgment of condemnation. The writ of mandamus is dismissed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 97)

BUTTE & B. MIN. CO. v. SLOAN et al.
 (Supreme Court of Montana. April 29, 1895.)
MINES AND MINING—LOCATIONS—EVIDENCE—NEW TRIAL.

1. Where the jury found, from conflicting evidence, that no veins or lodes existed on the lands in controversy at the time of application for placer patents, as claimed by defendants under a quartz location, the rights acquired by plaintiff under such patent will not be disturbed.

2. Where the verdict of the jury established the fact that no vein of quartz existed on the lands at the time of application for placer patents, newly-discovered evidence of a recorded location notice claiming such veins to exist is not ground for new trial.

3. It is harmless error to exclude evidence of a fact which, if proved, could not have affected the result.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Ejection for mining ground by Butte & Boston Mining Company against Mary Sloan, administratrix, and others. Plaintiff had judgment. From an order denying their motion for a new trial, defendants appeal. Affirmed.

Ejectment for mining ground. Plaintiff claimed the property involved under placer patents. Defendants claimed certain portions of the ground under and by virtue of a quartz location made upon veins which defendants claim were known to exist at the date of the application for the placer patents. The plaintiff denied the existence of any veins, known or unknown, upon the ground. There was a trial to a jury. A general verdict for the plaintiff was rendered, and special issues were returned. By these issues the jury determined that no veins were discovered, or exposed to view, within the boundaries of the mining ground in dispute; that in 1876 there was no discovery in the shaft known as the "Discovery Shaft of the Brown Girl Lode Claim"; that, when J. & T. made application for their placer patent, there were no veins or lodes within the boundaries of the property described in the patent, so exposed that a person seeking information as to whether a vein or lode existed could have seen them, and that neither J. nor T. knew of any lode or vein within the Brown Girl location; that the Brown Girl location, as located by one John Devlin prior to the application of J. & T. for a placer patent, was not so marked in its boundaries upon the ground as to be readily traced; that, at the date of the application for placer patent, no veins claimed by the defendants were known to exist; that J. & T., placer patent applicants, were well acquainted with the ground included in the placer patent, but that none of the veins now claimed by defendants were known to said J. & T. at the time of their application; and that at the date of the application for patents there were no known leads, lodes, or veins upon the ground involved in this suit. The court entered judgment in favor of the plaintiff. A motion for a new

trial was made and overruled. Defendants appeal.

Chas. O'Donnell, for appellants. Forbiss & Forbiss, for respondent.

HUNT, J. (after stating the facts). The record of the evidence in this case is voluminous, consisting, not alone of the elaborate opinions of many practical miners, of great intelligence and experience, concerning the material issue, but likewise of experts skilled in the technique of the enlightened and comprehensive science of mining engineering. It plainly appears that the case was exhaustively presented by both sides, and, like many other suits of its important class, we find the transcript embodies numerous and most substantial differences of opinion upon the vital point involved,—whether there were ever any veins, leads, or lodes legally existing, and known to exist, within the ground embraced in the placer patent, prior to and at the time applications were made for such patents by Talbot and Jones, original patentees. It is unnecessary to set forth at length the exact character of the testimony. Briefly stated, witnesses for the defendants swore that there were leads known to exist long prior to the applications for placer patents; that these leads were first seen about 1866 or 1867, and were visible in a water ditch which ran across what was subsequently relocated as the "Brown Girl Claim" in 1884; that the granite was up to the grass roots; that the lead cropped out, and float rock could be traced in an easterly direction from the ditch and from the discovery shaft; that the Brown Girl lode had a wall on the north side. Brown, called by defendants, said he put up a location notice in 1878, but did not record the same, and did not recall the name given to the claim; did not sink a shaft at that time; and did nothing, in fact, then, except to sink 15 or 18 inches. In 1884 he located the Brown Girl. Devlin, for defendants, said he had made a discovery of a quartz lode on the ground in 1876, before the Brown Girl discovery, but never recorded it. It was the Cressida. He sunk a hole about 3 feet deep, and found a wall. On one side were granite and quartz. The discovery shaft was about 30 feet westerly from the Brown Girl, although the location included much of the Brown Girl ground. It was the same lead. That the country about his location was a slide, but there was no slide ground on his particular location. The plaintiff's witnesses, in rebuttal, said: That the ground involved in suit was a slide, drift, with nothing in place in the ditches referred to by defendants' witnesses. That the rock was not in place in the discovery shaft of the Brown Girl, down to a depth of 10 feet. That there is no vein upon the ground, showing in the ditches or excavations. That there were discolorations of the surface material, or slide rock, due to

iron. These discolorations cropped out generally, but no croppings of a ledge. The ground was loose, showing oxidized granite, carrying more or less quartz passing through loose material. That the whole hill about the ground in dispute bears evidence of impregnation of iron. That there was no wall in the Brown Girl shaft. That there was no vein in the ditch, but a granite material, stained with red and yellow iron. James Larkin, for plaintiff, said he was working on the Snohomish claim in 1882, when Brown was working on the Brown Girl. At that time the Brown Girl shaft was about 4½ feet deep. There was nothing like a vein anywhere in that hole then. That the country about there was all decomposed slide rock, and witness sunk on his own claim 35 feet before he claimed a discovery and reached solid formation. Another witness, McNamara, corroborated Larkin in his evidence concerning the loose formation of the ground in the vicinity of the Brown Girl location; and in 1881 he looked over the particular ground in controversy, in search of a vein, but could see no vein. Brown's shaft was four or five feet deep about that time.

To these conflicting facts were applied a series of instructions, embracing definitions of lode claims, as approved by the supreme court of the United States and the supreme court of this state, to the effect that, to constitute "veins known to exist," within the meaning of the law, it is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes, or veins of rock in place, bearing gold or silver, or other metals. To meet the designation of "veins known to exist," the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. *U. S. v. Iron Silver Min. Co.*, 128 U. S. 673, 9 Sup. Ct. 195; *Brownfield v. Bier*, 15 Mont. —, 39 Pac. 461; *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 12 Sup. Ct. 543. Were there any veins or lodes, and were they veins or lodes known to exist, at the time application was made for the patent? And was this plaintiff, as a purchaser from the patentees, to be deprived of any portion of its claim by legal exception of any vein or lode from the placer patent grant? These were all questions based on facts generally and specially to be answered by the jury, after analyzing the evidence adduced, under proper instructions; and, with unvarying consistency, they found that there were no veins or lodes known to exist at the time of the applications for the placer patents to the ground in question. The evidence to support these findings is clear and substantial. We cannot say the jury erred. The present case is to be distinguished from *Brownfield v. Bier*, supra, referred to in argument. In the trial of that suit, veins were proved to

have existed; and the principal and difficult point for decision was, not whether there were veins at all, but whether the veins were "such veins as the decisions hold to be exempt from the placer grant, or such as were known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them." It was held they were not. This contention, however, is simplified by the fact, as found, that there were no veins at all, discovered or known to exist, within the placer-claim boundaries, at the dates of the applications for placer patents. It therefore follows that, where there were no quartz veins discovered or known to exist when the placer claimant made his application for patent, defendants failed to show that they were entitled, as against the patents, to the possession of any pretended lode claims, on the ground that such lode claims were excepted from the patent to Jones and Talbot. *Brownfield v. Bier*, supra. The evidence is sufficient to sustain the verdict.

Defendants also moved for a new trial upon the ground of newly-discovered evidence. After the trial was over, one of the defendants, Sloan, discovered that on June 13, 1876, John Devlin had located the Radical claim, upon what was afterwards the Brown Girl location. This location notice was on record, but by oversight, perhaps excusable, under all the circumstances, was not produced at the trial. Appellants now argue that the evidence of the said certified copy of the Radical Lode location will prove that a lead, or lode bearing precious metals, was known to exist on the ground now known as the "Brown Girl Lode Claim," over three years prior to the application of Jones and Talbot for the patent to the ground now known as "Mineral Entry No. 491 and 597." But the question of whether or not Devlin discovered a vein was litigated, and it was found he had not, and no vein existed in his discovery shaft. The essence of the suit was this inquiry, and the fact being found that there were no veins, and that he made no discovery, no recorded evidence of a claim of discovery could legally avail him; or, to be plainer, if no lead existed, no claim of one could overcome the fact of the physical absence of one. It would be a dangerous precedent to hold that the introduction in evidence of a notice of location of a mining claim would alone justify a reversal of a verdict in a suit where, throughout a long and expensive trial, the existence of any known vein had been the issue on trial between placer and quartz locations, and where it had been decided no veins existed at all in defendants' pretended location at any time prior to the placer claimant's several applications for patent.

The last assignment relied on is that the court erred in sustaining plaintiff's objection to the following question: "Did you ever know of any placer mining being done on

the ground known as the 'Brown Girl Lode Claim' prior to 1889?" The jury having found that Devlin never had had a valid location, and that there was no vein in the claim of Devlin, the question is not now a material one for our consideration. We think, however, that the placer patents which were issued to Jones and Talbot, and offered in evidence, conclusively established, as against defendants, the fact that the ground was placer. Nor can defendants now avoid the effect of these patents. *Dahl v. Raunheim*, 132 U. S. 260, 10 Sup. Ct. 74.

We find no error in the records. The order denying a motion for a new trial, and the judgment, are affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(11 Wash. 627)

CHAPMAN v. ALLEN et al.

(Supreme Court of Washington. April 16, 1895.)

PARTITION—WHO MAY MAINTAIN—PLEADING.

1. Partition can be maintained by a tenant against a cotenant in possession, under a general denial of right, without a prior action at law for the trial of title.

2. Under Code Proc. § 578, providing that in partition "the interest of all persons in the property shall be set forth in the complaint specifically and particularly as far as known to the plaintiff," a complaint is insufficient in which plaintiff alleges that the legal title to the whole of the land is in the defendant, and also alleges that he and plaintiff are joint owners in fee, these statements being contradictory.

Appeal from superior court, Yakima county; James Z. Moore, Judge.

Action by William H. Chapman against Henry H. Allen, Cora L. Allen, and others for the partition of real estate. From an order sustaining a demurrer to complaint, plaintiff appeals. Affirmed.

Reavis & Milroy, for appellant. H. J. Snively and Fred Miller, for respondents except Guy Allen.

ANDERS, J. This is an action for partition of real estate. The superior court sustained a demurrer to the complaint, and the only question presented by this appeal is whether the complaint states a cause of action. It alleges that the plaintiff and defendant Henry H. Allen, in March, 1890, jointly purchased certain premises in Yakima county, described as lot numbered 19 in block numbered 12 in the city of North Yakima, according to the recorded plat thereof, and immediately went into possession thereof, and so remained in joint possession until December 5, 1892, when said defendant excluded plaintiff from said premises, and has since retained possession, and appropriated to his own use the rents, issues, and profits thereof; that about November 29, 1892, the said defendant Henry H. Allen procured from the Northern Pacific

Railroad Company a warranty deed to said premises, conveying to him the whole of said premises; that he now holds the legal title to said premises, one undivided one-half for himself and one undivided one-half in trust for plaintiff, and that plaintiff and said defendant are the joint owners in fee of equal portions of said premises; that defendant Henry H. Allen has appropriated to his own use of the rents, issues, and profits of said premises more than \$200, and has refused and still refuses to account to plaintiff for the same; that at the time said premises were purchased by plaintiff and defendant, and until the — day of July, 1893, the said Henry H. Allen was a married man, and Barbara F. Allen was his wife, and that on the said — day of July, 1893, his said wife died, being then a resident of Yakima county, state of Washington, leaving, her surviving, children of herself and said defendant Henry H. Allen, and her heirs at law, the defendants Cora L. Allen, Dora D. Brooks, and Guy Allen, and that said Guy Allen is a minor; that no administration of the estate of said Barbara F. Allen is now pending, and no letters of administration or testamentary have been issued on said estate; that there are no liens or incumbrances on the said premises appearing of record, and no persons other than the plaintiff and said defendants are interested in said premises, as owners or otherwise; that a partition of that property cannot be made by metes and bounds without material injury to the rights of plaintiff and defendants. The prayer of the complaint is for a judgment for a sale of said premises, and a division of the proceeds thereof between the said parties according to their rights, and for an accounting between said parties for the rents, issues, and profits received from said premises by either of them, and for such other and further relief as to the court may seem meet and proper, and for general relief. The defendants answered, denying each and every allegation contained in the complaint, but objected to its sufficiency at the trial.

The learned counsel for the plaintiff insist that there is but one question in the case, viz. whether an action for a partition of real estate can be maintained by a tenant in common against a cotenant in possession, under a general denial of right, without a prior action at law for the trial of title; and, further, that it was determined in the affirmative by this court in *Hill v. Young*, 7 Wash. 33, 34 Pac. 144. It is true that we held in that case that a tenant out of possession may maintain a suit for partition against a cotenant in possession under an adverse claim of title; and we have no disposition to recede from that decision, for we think it is abundantly supported by many adjudications of the highest courts, in several states having statutes substantially like ours. See *Weston v. Stoddard*,

137 N. Y. 119, 83 N. E. 62, and cases cited. And, if there were no other question for our consideration than the right of a disseised cotenant to maintain this kind of an action, we would have no hesitation in reversing the judgment. But, conceding that the plaintiff may maintain the action if he is a tenant in common with the defendants, although excluded from possession under an adverse claim of title, still the question is, has he stated a cause of action? Our statute provides (Code Proc. § 578) that "the interest of all persons in the property shall be set forth in the complaint specifically and particularly as far as known to the plaintiff"; and we are constrained to say that, in our judgment, the complaint in this instance is insufficient in this respect. As we have seen, the complaint alleges as a fact that the premises sought to be partitioned were conveyed to Henry H. Allen, and that he holds the legal title to the whole thereof; and, if that be true, the plaintiff has no title to the premises, and it cannot be true, as alleged, that he and defendant are now joint owners in fee of equal portions of said premises. The allegations that the legal title is in the plaintiff, and that the plaintiff and said defendant are joint owners in fee, are contradictory, and mutually destroy each other, and amount to nothing.

But it may be suggested that the averment that said defendant now holds the legal title to one undivided one-half of said premises in trust for plaintiff shows, at least, an equitable title in the plaintiff, which the court ought to recognize and enforce. The allegation, however, that he holds the premises in trust for plaintiff, is a statement of a mere conclusion, unwarranted by any facts set forth. It is true that it is alleged that plaintiff and said defendant Allen purchased the premises in March, 1890, and jointly occupied the same until December 5, 1892; but, if the plaintiff were before the court for the sole purpose of having a trust declared in his favor, those allegations would not be sufficient to entitle him to such relief. He would have to go further, and show that, although the legal title is in defendant, he himself furnished part of the consideration paid for the premises, under an agreement that he was to have an interest therein. It is a well-settled rule that where one person procures a conveyance to himself of land for which another has paid, expecting it to be conveyed to him, a trust results in favor of the latter by implication of law, which a court of equity will enforce upon proof of such facts. But here the plaintiff does not allege payment of any part of the consideration, nor does he even ask the court to declare Henry H. Allen his trustee. He simply says Allen has the legal title, and holds an undivided one-half of the premises in trust for him, presumably because, as he says, he and said

defendant purchased and, for a time, jointly occupied, the same. If the fact is that plaintiff and defendant Allen agreed to purchase this land together, but Allen afterwards caused the land to be conveyed to himself alone, and plaintiff paid nothing, and Allen paid the whole purchase price, then Allen is the absolute owner, and plaintiff has no interest therein, either legal or equitable. If, on the other hand, the plaintiff actually paid a part of the consideration, he could, by proper pleadings, have asserted his equitable rights even in a suit for partition, and obtained a decree compelling a conveyance according to his interest. But where the action, as in this case, is for the sole purpose of procuring a partition, the relief will not be granted on the mere ground that the plaintiff is entitled to a conveyance. He must first ask and obtain a decree establishing his right to a conveyance. *Freem. Coten.* (2d Ed.) § 513.

For the reasons above indicated, the judgment must be affirmed, and it is so ordered.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

(11 Wash. 611)

FRANK et al. v. JENKINS et al.

(Supreme Court of Washington. April 18, 1895.)

SALE OF LAND—BOND AGAINST LIENS—CONSIDERATION—ACCRUAL OF CAUSE OF ACTION—PLEADING—REPLY.

1. A complaint which states that at the time of the sale of land a judgment and decree of foreclosure for a mechanic's lien stood against it, on which an appeal had been taken, and that the vendor gave a bond to the vendee to hold him harmless from any lien against the property growing out of said judgment, sets forth a sufficient consideration for the bond.

2. A purchaser of property, who has actual notice of a decree foreclosing a mechanic's lien thereon, takes the property subject to the lien, though no notice of its pendency, or transcript, is filed with the auditor.

3. Where one selling land gives the purchaser a bond conditioned to pay a judgment against the land, in case it is not reversed on appeal, and to hold him harmless from any lien arising therefrom, the purchaser may sue on the bond, upon a sale of the land under the judgment, without awaiting actual dispossession.

4. In an action on a bond, an answer which sets up affirmatively that there was no consideration is not a statement of new matter requiring a reply, under Code, § 215, the allegations in the complaint being sufficient to show a good consideration.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by Charles Frank and another against Will D. Jenkins and another to recover on a bond. From a judgment for plaintiffs, defendants appeal. Affirmed.

Dorr, Hadley & Hadley, for appellants. S. A. Callvert, for respondents.

GORDON, J. This action was brought by respondents, in the superior court for Whatcom county, to recover on a bond executed by

the appellants to respondents for the sum of \$500. The complaint alleges, in substance, that on the 13th day of February, 1892, appellant Will D. Jenkins was the owner of a certain lot in the city of New Whatcom, and that on that day an action was pending in the superior court for said county, brought by Whittier, Fuller & Co. against the appellant Jenkins, for the purpose of foreclosing a mechanic's lien against the lot in question; and that on said date a judgment and decree of foreclosure was made and entered against the said lot and the building situated thereon, establishing said lien in the sum of \$393.15; that thereafter, on the 25th of August, 1892, appellant Jenkins, for the consideration of \$6,500, sold and conveyed said lot to the respondents by deed of general warranty; that at the time of said sale the lien of said judgment, and decree of foreclosure against said lot, remained wholly unsatisfied, and the cause in which they were rendered was at that time pending upon appeal to the supreme court of the state. The bond upon which this suit is based recites that: "Whereas, the above-bounden Will D. Jenkins has sold and conveyed to the above named [respondents]: [here follows description of the property]; and whereas, there is now pending a suit for the foreclosure of a mechanic's lien, in which action Whittier, Fuller & Co., a corporation, is plaintiff, and Will D. Jenkins is defendant: Now, therefore, if the above-bounden Will D. Jenkins shall well and truly pay, or cause to be paid, any judgment which may be rendered against the said [Jenkins] by the supreme court in case an appeal is perfected, or the judgment now pending in the superior court in case said cause is not reversed, and shall hold the above purchaser harmless from any lien upon the said premises growing out of the said lien in any manner whatever, then the obligation to be void," etc. The complaint further alleges that, by reason of appellant's failure to perfect his appeal from the said decree of foreclosure, his appeal was thereafter dismissed, and the judgment of the superior court affirmed, with costs; that thereafter, pursuant to execution directing the sale of said premises, and notice of sale, as required by law, the sheriff proceeded to satisfy the said judgment and decree by a sale of said premises to one D. E. Tuck, who became the purchaser thereof, paying the full amount of such judgment and costs, and that thereupon a certificate of purchase issued to the purchaser; that the appellants failed and neglected to pay or satisfy said judgment and decree, or to hold the respondents harmless, and, though requested so to do, failed, refused, and neglected to discharge the lien of said judgment against the said premises. Appellants filed a general demurrer to the complaint, which was overruled, and an exception preserved. In their separate answers thereafter filed, they admit the execution of the bond; admit that the judgment remained unpaid and unsatisfied

at the times mentioned in the complaint; deny that the judgment was ever a lien upon the real estate mentioned; admit that execution was issued and levied upon the real estate, and the same sold by the sheriff to said Tuck; admit that appellant Jenkins had not performed the conditions prescribed in the bond; but deny that by reason of his failure and neglect any breach had occurred to the damage of respondents; and deny that the respondents have been deprived of the title of the real estate by reason of the nonpayment of the judgment, or that they have been damaged; and allege, affirmatively, "that the same [the bond] was wholly and absolutely without any consideration whatever moving between this defendant and any of the parties to said paper writing; that no benefits, advantages, or consideration of any nature whatsoever accrued to any of the parties to said writing, and the same was wholly without consideration." There was a verdict for respondents in the sum of \$484.24, and, a motion for a new trial having been overruled, judgment was entered upon said verdict, from which judgment this appeal is prosecuted.

The appellants contend (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that the allegation of no consideration set up in the answer is an allegation of new matter constituting a defense, and that it is admitted by respondents' failure to reply; (3) that there is a fatal variance between the cause of action set out in the complaint and the case made by the evidence on trial; (4) that the court erred in its charge to the jury, and in refusing to charge as requested by appellants; and (5) that the verdict is contrary to law and the evidence in the case. Appellants insist that the complaint does not aver or show any consideration for the bond sued on; that it does not appear that the judgment of Whittier, Fuller & Co. ever became a lien against the land purchased by respondents from appellant Jenkins, or that it was at any time a legal incumbrance upon it; that the bond sued upon was one of indemnity; that respondents had not suffered any loss of title or possession at the time of the commencement of their action.

Considering these objections in the order in which they have been stated, we think that the complaint sufficiently sets forth a consideration supporting the bond. An ample consideration for its execution is recited in the bond, and the allegations of the complaint, taken as a whole, are sufficient to support it. To protect the respondents (the purchasers) against the lien of the judgment, and in harmony with appellants' covenants of warranty, it was entirely competent for the parties to enter into this bond.

2. The second objection, viz. that the judgment is not a lien, is predicated upon the assumption that it was necessary for Whittier, Fuller & Co. to file with the auditor a notice of lis pendens to carry their lien forward

pending proceedings to foreclose, and thereafter to cause a transcript of judgment to be filed in the office of the auditor of the county, pursuant to the provisions of the statute, and that inasmuch as neither of these steps was taken prior to the sale of the land by appellant to respondents, and the execution of said bond, said judgment created no lien against the premises, and, as the respondents were not parties to the judgment, they could suffer nothing by reason of it; that they could have no interest in the judgment, unless it became a lien upon the land which they had bought. We do not think the objection tenable. Here was a decree which subjected specific real estate to the payment of a sum certain. The existence of the decree was known to the respondents (purchasers). The object of requiring a transcript of judgment to be filed with the auditor is to afford notice to parties thereafter dealing with the real estate of the judgment debtor, and we think the statute authorizing such filing is applicable only to ordinary judgments for the recovery of money only, and not to judgments foreclosing liens already upon the property. The statute governing mechanics' liens provides that "the liens provided for in this chapter may be enforced in a civil action in the same manner, and under the same proceedings, as govern in the foreclosure of a mortgage on real estate." Hill's St. § 1677. Section 627 of the Code of Civil Procedure, on the subject of mortgage foreclosures, provides that, "in rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action"; section 628 authorizes the entry of a judgment for the deficiency remaining unsatisfied after a sale of the mortgaged premises; and section 629 provides that such deficiency judgment shall be "similar in all respects to other judgments for the recovery of money, and may be made a lien upon the property of a judgment debtor, as other judgments, and the collection thereof enforced in the same manner." But, aside from this view of the effect of the decree as creating a lien upon the premises without a transcript being filed in the office of the auditor, we think that the constructive notice that such a record imports, where a transcript is so filed, does not forbid the existence of actual notice, and that the statute which authorizes such a record is neither restrictive nor exclusive.

The last ground of objection to the complaint is equally untenable. It proceeds upon the theory that respondents could not maintain their action upon the bond until they were actually dispossessed, and that no eviction occurred in fact prior to the commencement of this action. It is sufficient answer to this objection that the statute governing sales of real property upon execution entitles the purchaser to possession, and to the rents and profits arising from and after

the date of sale. 2 Hill's Code, § 519. *Hardy v. Herriott* (decided March 22, 1895) 39 Pac. 958. Nor do we think that respondents were obliged to await sale or eviction before action would lie upon the bond. Undoubtedly, the rule is that covenants in a deed, of quiet possession and warranty of title, are not broken until eviction; but here the bond was conditioned to pay the judgment of the superior court "in case said cause is not reversed," etc. It was something more than a mere agreement to indemnify and save harmless against the consequences of another's default. 2 Sedgw. Dam. (8th Ed.) §§ 786-789, inclusive.

We do not think that the allegation of "no consideration" set forth in the answer amounts to a statement of new matter requiring a reply, under section 215, 2 Hill's Code. The averment "that the [bond] was wholly and absolutely without any consideration," etc., amounts merely to a denial. The allegations of the complaint which show the circumstances attending its execution are sufficient to show a good consideration, and plaintiffs were not called upon to repeat them in the form of a reply.

3. There was no variance between the cause of action set out in the complaint and the evidence offered in support of it upon the trial. We think the theory upon which respondents recovered in this cause was very fully and fairly set forth in their pleading. To obviate the objection which is here made, respondents would have been required to set out in their complaint a statement of the evidence upon which they expected to rely,—something which they were not called upon to do.

4. As we have seen, the judgment and decree created a lien and incumbrance upon the premises. The court, in effect, so instructed the jury. The question became one of law, and no error was committed in so instructing. Nor do we think that the court erred in refusing to charge the jury as requested by the appellants. The requests for charges were predicated upon the theory that there was no consideration for the bond, and that the judgment was not a lien, and involve no new question for our consideration. What has already been said in this opinion concerning the sufficiency of the complaint disposes of this assignment. We do not think that there was anything in the pleadings or evidence which would have warranted the court in giving instruction No. 4 asked by appellants, and its refusal so to charge constituted no error.

5. We have given the record careful examination, and it appears to us that the verdict is not only justified by the evidence, but that any other than that actually reached would have been unwarranted. Perceiving no error in the record, the judgment appealed from is affirmed.

HOYT, C. J., and ANDERS, J., concur.

(11 Wash. 527)

WOODING v. PUGET SOUND NAT. BANK
et al.

(Supreme Court of Washington. April 1, 1895.)

**CRIMINAL LAW—RETURN OF STOLEN PROPERTY—
GARNISHMENT—ABANDONMENT—EF-
FECT OF REPEAL.**

1. Where a sheriff finds on the person of a prisoner a package of money, obtained by fraud from a bank, and the prisoner's mother voluntarily surrenders other packages similarly obtained, and each package is stamped with the name of the bank from whom it was received, the sheriff may, with the consent of the parties from whom he took it, take possession of the money, and restore the same to the bank claiming it.

2. Money taken from a person without his consent by a sheriff acting as a trespasser in so doing, and delivered by him to a third person claiming title thereto, is not subject to garnishment in the hands of the sheriff, or the parties to whom he delivered it, as the property of the person from whom it was taken.

3. A party who, for over two years, fails to prosecute proceedings commenced against a garnishee, thereby loses his rights under the writ of garnishment, regardless of the fact as to whether such final action was barred by the statute of limitations.

4. Service of writ upon garnishees is not the commencement of the action against them.

5. Where a garnishment law under which proceedings were commenced was repealed, without saving clause, before garnishees were cited to appear, the effect of such repeal is to unconditionally quash pending proceedings.

Appeal from superior court, King county;
J. W. Langley, Judge.

Action by Charles T. Wooding, doing business under the firm name and style of Wooding & Co. against William M. White, defendant, and Puget Sound National Bank and the First National Bank of Seattle, garnishee defendants. From a judgment in favor of garnishee defendants, plaintiff appeals. Affirmed.

Smith & Littell and Blaine & De Vries, for appellant. Carr & Preston, Struve, Allen, Hughes & McMicken, and W. R. Bell, for respondents.

SCOTT, J. On the 28th day of May, 1889, appellant brought an action in the superior court of King county against one William M. White, to recover \$2,214.50, with interest. A writ of attachment was issued in said cause, and on said day served on the respondents, the sheriff giving to each of the respondents a notice in writing that all debts, credits, moneys, or other personal property in their possession, or due by them or either of them to said William M. White, were levied upon, and requesting each of the respondents to furnish him with a memorandum thereof, which they failed to do. On the 10th day of October, 1890, appellant obtained judgment against White in said action. On the 6th day of January, 1891, appellant submitted to said court an affidavit showing the foregoing facts, and that the respondents had up to said time refused to furnish any written memorandum, etc.; and prayed an order from said court citing each of said respond-

ents to appear and answer under oath respecting such debts, credits, or other personal property, owing by them or in their possession, belonging to said White. It does not appear that any action was taken thereon by the court, and it is conceded that the respondents were not then cited, and that nothing further was done in the premises until the 29th day of March, 1893, when another affidavit to the same effect was submitted, and an order was issued thereon citing respondents to appear in said court on the 1st day of May, 1893, and answer under oath respecting such debts and property. The respondents appeared specially in response to said orders, and, although said matter was several times continued by consent, their rights under such special appearance were at all times reserved, and upon the final hearing respondents moved to dismiss said proceedings in garnishment, on the ground that any rights which the appellant had acquired by reason of the service of the writs of garnishment had become barred by lapse of time and by the statute of limitations. The motion was denied, and certain officers of the respondent banks were examined, and substantially the following circumstances were developed: On the 25th day of May, 1889, said White sold to the Puget Sound National Bank of Seattle two drafts, purporting to be cashier's drafts, one for the sum of \$5,500, and the other for \$2,500; and also at said time sold to the bank a certificate of deposit for \$1,000; and the amount of said drafts and certificate, less a small percentage for exchange, and \$380 which he left with instructions to pay off a certain obligation, was paid to White thereon. Near the same time, and upon the same day, White called at the First National Bank of Seattle, where he had previously transacted some business, and then had a balance of \$258.05 to his credit, and deposited with this bank a check purporting to be for \$2,500, drawn by a bank in Montana, and another check for \$100, and the total amount was placed to his credit; whereupon White drew a check for \$2,400 upon this bank, which was paid to him in money. He also negotiated certain other checks, amounting to nearly \$400, upon this bank, which were thereafter paid. The \$380 left by White at the Puget Sound National Bank was paid by the bank as White had directed. By virtue of these proceedings, White obtained from the Puget Sound National Bank the sum of \$9,000, less the exchange aforesaid, and from the First National Bank nearly \$2,800. Subsequent investigations developed the fact that the draft purporting to be for \$5,500, negotiated with the Puget Sound National Bank, had been originally made as a draft for \$55, and had been raised to \$5,500; and the draft purporting to be for \$2,500 had been originally made for \$25, and raised to \$2,500; and the draft negotiated with the First

National Bank purporting to be for \$2,500 had also originally been drawn for \$25, and had been raised to \$2,500. The Puget Sound National Bank recovered on the certificate of deposit, which was genuine, \$1,000, so that the amount fraudulently obtained from this bank was \$8,000. The two forged drafts presented to the Puget Sound National Bank were never presented for payment, being used in a criminal prosecution against White, which resulted in his conviction for forgery, and nothing was realized on them. The small checks drawn by White upon the First National Bank, and paid by it, exceeded in amount the aggregate to his credit and all collections made by the bank upon the checks; so that the amount of money which White had fraudulently obtained from the First National Bank exceeded the sum of \$2,400. The forgeries were discovered within a few hours, and immediate pursuit of White was made, and a considerable sum was expended by the banks in trying to capture him, and recover possession of the money. It is claimed that the money so expended could be charged to White, and recovered of him, the expenditure having been induced by his fraudulent acts and representations.

The appellant was conducting a banking business at Aberdeen, in this state, and his cause of action against White was to recover for money which had been obtained from him by White in a manner very similar to that in which the money aforesaid was obtained from the respondents, and he had published a notice of a reward for his arrest. Within a short time after said transactions between White and the respondents, White left for Snohomish, and was there arrested by the sheriff of Snohomish county, who had seen the published notice of a reward for his capture, and who suspected White to be the person wanted. Said sheriff had no warrant for White at the time, and did not obtain any. Meanwhile a warrant had been issued to the sheriff of King county for White's arrest upon the charge of forgery, and the next day said sheriff found White in Seattle in the charge of the sheriff of Snohomish county. In pursuance of an arrangement entered into with said sheriff of Snohomish county, the sheriff of King county there took White into custody under the warrant aforesaid. White had with him a package containing \$2,000 in currency, which was in an envelope bearing the stamp of the Puget Sound National Bank. Said currency was in packages of \$500, each package being fastened with a band bearing the stamp of said bank, and White admitted that this was part of the identical money he had obtained from that bank the day previous. This money was taken by the sheriff, and turned over to the cashier of said bank as the bank's property. White made no objection thereto. A few dollars in silver were also found upon

White's person at this time, which were placed in a safe at the sheriff's office, and afterwards disbursed as White directed. White's mother had accompanied him from Seattle to Snohomish after he had received the money at the respondent banks, and was with him at the time of his arrest. She was also arrested by the sheriff of King county for complicity in the crime, and was accused of having part of the money, and was urged to surrender it. After some conversation upon this subject, she told the sheriff that if he would permit her to go to a room by herself she would bring him the money. Her request was complied with, and in a short time she returned, and delivered to said sheriff \$8,000 in currency. All of the bills were in \$500 packages, with the exception of a thousand dollar bill, and one broken package, which had no band around it. On this occasion Mrs. White informed said sheriff that at the time White was first arrested this money was concealed in her satchel, between the lining and the outside; that the officers had searched the satchel, but had failed to find the money; that after her arrest, and when she had been permitted to go to her room to lie down, she had taken the money from the satchel, and sewed it into a thick skirt which she was wearing. The bands around the different packages of this money bore the stamps of the two banks, with the exception of the one from which the band had been apparently broken. The cashier of the Puget Sound National Bank identified the thousand dollar bill as one paid by said bank to White at the time he obtained the money aforesaid. This money was delivered by the sheriff to the Puget Sound National Bank, and \$2,400 of it was turned over by said bank to the First National Bank, being the amount White had received from the latter bank. The total amounts received from White were less than the claimed indebtedness of White to the banks. A judgment was rendered in favor of the respondents upon the hearing, and this appeal was taken therefrom.

The lower court found that the respondents were not indebted to White, and had no property in their possession belonging to him. The proof tended strongly to show that all of the money obtained from White and his mother as aforesaid, with possibly the exception of a few dollars, was the identical money which White had obtained from the respondents. Appellant insists that, even if this were so, the sheriff had no right to take possession of the money and restore it to the banks. But clearly this might have been done with the consent of the parties from whom the sheriff obtained it, and we think the facts would warrant a finding that the sheriff had the consent of these parties in restoring the money as aforesaid. White admitted that the money surrendered by him personally was a part

of the identical money he had gotten from the Puget Sound National Bank, and it was turned over to the officers of the bank in his presence without any objection. The \$8,000 obtained from Mrs. White was voluntarily surrendered by her. She apparently knew from whom it had been obtained, and how, and that the intention was to restore it to its rightful owners. Neither of said parties has at any time since then undertaken to recover said money or any part of it, or brought any action for the taking against any of the parties concerned; and this tends strongly to support the claim that the money was restored with their consent. Aside from this, however, and conceding that the money was taken from them without their consent and against their will, and that the officer acted as a trespasser in so doing, we are of the opinion that, under the authorities, it was not subject to garnishment while in his hands or in the hands of the parties to whom it was delivered. The garnishment process only reaches debts or credits owing to or held for the defendant in the principal action by the garnishee, or property of the defendant held by the garnishee as the property of the defendant. A trespasser in possession of another's goods cannot be charged as garnishee of the owner. *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 37 Am. Dec. 203; *Bank v. McLeod (Iowa)* 19 N. W. 329; *Richardson v. Anderson (Tex. App.)* 18 S. W. 195.

We are also of the opinion that the point first raised by the respondents was well grounded, and that the appellant should have been held to have lost his rights under the writs of garnishment by a failure to prosecute. Waiting for two years after the service before citing the garnishees to appear and answer should be held equivalent to an abandonment of said proceedings, regardless of the fact as to whether such final action was barred by the statute of limitations. A creditor should diligently prosecute his proceedings against garnishees. The service of the writs upon the garnishees was not the commencement of an action against them. No issue was formed which they could force to trial, and they were not put in a position where they could take any action in the premises to have the question of their liability put at rest. Such action rested with the plaintiff creditor, the moving party, and he should be required to prosecute the same with reasonable diligence.

A further point has been urged here which was not raised in the lower court, but which is claimed to be yet available, as going to the jurisdiction of the court in the premises. The attachment garnishment law, under which the first proceedings were had, was repealed before the respondents were cited to appear and testify. The repealing act was approved March 8, 1893, and it contained no

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saving clause; and it is contended that, as such appeal was absolute and unconditional, the effect was to quash all pending proceedings. This point also seems to be well taken. *End. Interp. St. §§ 478-480.*

Affirmed.

HOYT, C. J., and GORDON, J., concur.

ANDERS, J. I fully concur in the conclusion arrived at in the foregoing opinion, but upon the point as to whether the service of writs of garnishment is or is not the commencement of an action against the garnishees I do not wish to be understood as expressing an opinion.

(11 Wash. 550)

ROBERTS v. WASHINGTON NAT. BANK.
(Supreme Court of Washington. April 6, 1895.)

EQUITY—REVIEW ON APPEAL—COMMON AGENT—
VALIDITY OF TRANSACTIONS—ACTS OF DIRECTORS—FRAUD.

1. Under the act of 1893, in an equity case, it is the duty of the appellate court to determine the facts for itself, upon the proofs contained in the record. *Webster v. Thorndyke*, 39 Pac. 677, overruled.

2. Where the boards of directors of two corporations had a mutual understanding authorizing a common agent to transact business between them, followed by a course of dealing of which each of the boards had knowledge, their action is voidable, and not void; and such transactions will be valid, although no formal resolution was passed, or the record thereof kept.

3. The court will not be warranted in finding fraud from the fact, alone, that circumstances tending to show it have been proven.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by W. B. Roberts, receiver of the Washington Savings Bank of Spokane, against the Washington National Bank, for the recovery of certain property, or the value thereof. From a decree in plaintiff's favor, defendant appeals. Reversed.

Blake & Post, for appellant. Turner, Graves & McKinstry, for respondent.

HOYT, C. J. This action was brought by the plaintiff, W. B. Roberts, as receiver of the Washington Savings Bank, against the Washington National Bank of Spokane Falls, to recover certain property, or the value thereof, which it was claimed had been fraudulently obtained by the defendant from the Washington Savings Bank, and to recover the money paid by the savings bank for certain notes transferred to it by the national bank in fraud of its rights. It was alleged that the transactions which led to the transfer of the property should be set aside, and held for naught, for two reasons: First, because there was actual fraud intended and consummated by the officers of the defendant; and, secondly, legal fraud, by reason of the relation of the officers of

the two corporations through which the business was transacted. The business was done through one F. E. Goodall, who assumed to act for each of the corporations, and it was claimed that it was beyond his power, as such common agent, to do the business which culminated in the transfer of the property. Elaborate briefs have been filed upon the question of the powers and duties of agents, and of the want of power in an agent to act as such in behalf of two principals in relation to adverse transactions between them. These and kindred questions have been ably discussed in the briefs of counsel and in oral argument, but in our opinion the rights of the parties depend little, if at all, upon such questions. An inspection of the briefs of counsel will show that, notwithstanding the elaborate presentation of these and other questions of law, the propositions upon which the appellant and respondent radically differed were as to the facts established by the proofs. The authority of few, if any, of the cases cited upon either side is disputed by the other; and it is apparent that the application of the principles established by such cases would have led to little dispute if the discussion on either side had related to facts as to which the parties agreed. The trial court made findings of fact in substantial compliance with the claims of the plaintiff, as set out in the complaint; and, if these findings were warranted by the proofs, there would be little reason for questioning the correctness of its legal conclusions. The defendant excepted to all of these findings of fact, and requested the court to find substantially different upon nearly all the propositions involved; and if such exceptions had been sustained, and the facts found as requested, there could be little doubt but that the legal conclusions so be drawn therefrom would have resulted in a decree for the defendant. It follows that the substantial question which we are called upon to decide is as to whether the proofs in the record sustain the findings of the court, as made, or would better sustain those requested on the part of the defendant. If the former, the decree is substantially right, and should be affirmed; if the latter, it is wrong, and should be reversed, and the action dismissed.

Under the act of 1893, findings of fact in an equity case and in one at law are placed upon substantially the same basis; but thereunder it is made the duty of the appellate court, when exceptions are properly taken to such findings, to examine the proofs contained in the record de novo. This requirement, construed in the light of the practice of courts of equity in the determination of facts upon appeal by a trial de novo upon the record, compels us to hold that, at least in an equity case, the findings of fact do not stand upon the same footing as the verdict of a jury. On the contrary, the statute can only be given force by holding that it is the

duty of the appellate court to determine the facts for itself, upon the proofs contained in the record. It does not follow that the finding of the lower court will have no weight in such determination, but it does follow that it cannot have any such weight as does the verdict of a jury in a law case. If it did, it would only be necessary for the appellate court to ascertain that there was evidence introduced upon which the fact could be found, in order that the finding should be affirmed. And it is clear that such an investigation would not be an examination of the proofs de novo in the appellate court, as required by the express terms of the statute. What we have said as to the effect of the findings of fact under the appeal act of 1893 is, to some extent, inconsistent with what was said by us in the case of *Webster v. Thorndyke* (decided March 9, 1895) 39 Pac. 677, and to that extent that case is overruled. The question, though involved in that case, was not necessary to its determination, for the reason that the findings of fact were warranted by the proofs. It affirmatively appeared from the proofs that the findings were right; hence it was unnecessary to the decision to say anything as to their effect, and what was said was by way of argument, and for that reason not as fully considered as it otherwise would have been. A more thorough examination of the question has satisfied us that this holding did violence to some of the provisions of the statute, and we now feel compelled to construe it differently. The rule before announced was the more convenient one, and we had hoped to be able to sustain it, but find ourselves unable to do so. In the case at bar, all of the findings of fact were excepted to, and the record contains all of the proofs offered upon the trial in the court below. Hence it becomes the duty of this court to find substantially, as a new question, the facts within the pleadings established by such proofs, and determine the rights of the parties upon the facts so found, even although the trial court, upon such proofs, had found them differently. In determining the facts established by the proofs, the findings of the trial court should receive consideration, but cannot be allowed to control when, in the opinion of this court, they are contradicted by a clear preponderance of the evidence.

Before proceeding to a discussion of the disputed facts, it will be proper to say that the undisputed proofs show that the Washington Savings Bank was in existence and doing business for some time prior to the organization of the Washington National Bank; that the scheme for the organization of said national bank originated with the stockholders and officers of the savings bank; that the stock of the national bank, when organized, was owned by substantially the same persons as the stock of the savings bank; that the board of directors of the national bank and

the board of trustees of the savings bank were in the main, but not entirely, identical; that, at the time the organization of the national bank was determined upon, it was also determined to import one F. E. Goodall from the East, to act as cashier of the national bank, and in a similar capacity, but under the name of "treasurer," for the savings bank; that the two banks were to occupy the same banking office,—the business of the national bank to be conducted on one side, and that of the savings bank on the other; and that it was while the two banks were so occupying this common banking office, and the business of each being managed mainly by said F. E. Goodall, that the transactions in question were had. This statement is necessary, that we may properly examine one of the claims of the defendant, by which it sought to meet the case made by the plaintiff. Its contention was and is that at the time of the organization of the national bank there was an agreement, or such a mutual understanding among the directors of the two corporations as amounted to an agreement, that they should not only occupy a common banking room, but should also do business together, through the agency of said F. E. Goodall, in the manner in which the business which it is sought to invalidate was afterwards actually transacted. It is not seriously contended on the part of the respondent but that this proposition, if supported by the proofs, would fully meet his contention that the transactions were invalid. There is some little contention that such an arrangement could not be made between the corporations by their respective boards of trustees, for the reason that the same persons constituted the boards of each of the banks. But this contention has not been strongly urged, and, if it had been, we do not think it entitled to much consideration, for the reasons (1) that the boards were not identical; and (2) if they were, such fact would, at most, make the transactions voidable only, and hence capable of ratification, which must be presumed from the circumstances disclosed by the evidence. That it would be competent to prove such facts in aid of an allegation of actual fraud in reference to any transaction between the two corporations of which they were the common officers is undoubtedly true, but the transaction of business between them would not, by reason of such fact, be conclusively fraudulent.

It is contended, however, on the part of the respondent, that the only evidence of authority to make such an agreement would be by some resolution of the proper board, and that such action could only be shown by the record of its proceedings. There is some force in this claim, but we are not prepared to indorse that doctrine, to the extent that would be necessary to sustain the contention of the respondent. A corporation cannot escape responsibility for an act which its board of directors has expressly authorized, or which its

manager has done or authorized under such circumstances as would warrant the belief by one transacting business with the corporation that it had been duly authorized, and thereafter escape liability on account of the act authorized or done by reason of the fact that its record fails to disclose any authority therefor. If the boards of directors of the two banks had in fact each of them passed formal resolutions, and made them of record in the minutes of their proceedings, authorizing business to be transacted between them by the common agent, F. E. Goodall, such transactions through him, in pursuance of such authority, would, in our opinion, have bound each of the corporations for which he assumed to act. The general rule, to the effect that such transactions by him would be unauthorized, would be nullified by the express authority thus conferred; and in our opinion, if the passing of such resolutions by the respective boards could authorize him so to act, an understanding to that effect, followed by a course of dealing of which each of the boards had knowledge, would have the same effect.

If these conclusions are correct, there is but a single question of fact which it is necessary for us to decide, upon the proofs contained in the record; and that is as to whether or not it is thereby shown that there was an understanding among the members of the boards of directors of the banks that said F. E. Goodall should transact business between them as the agent of each, or the common agent of both. And, if it was, was such understanding carried into effect by a course of dealing between the two banks in pursuance thereof, to the knowledge of the members of the boards of directors? If the understanding and course of dealing so existed, the claim of the respondent that these transactions were illegal cannot be sustained. The proof in reference to the understanding is not as full and complete as it might be, but substantially all the evidence upon that question went to sustain the contention of the defendant. Two or three witnesses gave evidence which tended directly to prove that there was such an understanding between the banks, and several others testified to facts which indirectly tended to show the same fact. The talk that was had at the time the organization of the national bank was determined upon, the importation of a man from abroad to act as the common agent, what was said in reference to the character of paper which could be handled by one bank that could not be handled by the other, all tended to support the direct testimony that there was an agreement or understanding that they should do business together in substantially the same way that the business in question was done. We think that the existence of such an understanding or agreement was abundantly established by the proofs. It also abundantly appears therefrom that the transactions between the banks, almost from the day of the organization of

the national one, was such as would have been justified only by such an understanding or agreement. That such was the course of dealing is not very strongly disputed by the respondent, but it is claimed by him that the boards of directors of each of the banks were not shown to have had any knowledge of this course of dealing. It appeared from the practically undisputed proofs that this course of dealing had been continued for two years; that its existence during all of this time would have been shown by an examination of the books of either of the banks, and especially by an examination of those of the savings bank. This being so, we think it must be presumed that the board of directors had knowledge thereof. That even a superficial examination of the books of the savings bank would have shown these transactions is evident from the proofs, and that it was the duty of the board of directors to make at least a superficial examination many times during this period of two years is a fact of which the court will take judicial notice; and, if they did not make it, they, or those whom they represent, must stand the consequences, and not those with whom the corporation may have had dealings. Besides, there is some proof tending directly to show knowledge on the part of at least a portion of the board of directors of the savings bank of the existence of this course of dealing between the two banks. This testimony tended to show that all who were actively participating in the business of the savings bank had such knowledge. If the other members saw fit to intrust the management to these active members, they and the stockholders must abide the results of their management.

In our opinion, the course of dealing between the two banks, duly authorized by each of them, was such that the transactions in question did not amount to legal fraud. Was there proof of actual fraud? We have carefully examined the entire record, and have been unable to find anything that even remotely tends to prove actual fraud in any of the transactions prior to those of June 5, 1893. As to the transactions on that day, there are some circumstances shown by the proofs which have some tendency to show that there was an intent on the part of the national bank, by its agent, to overreach the savings bank. But these circumstances were not sufficient to warrant a finding of actual fraud; for, while it is true that such fraud may be shown by circumstances, yet the court will not be warranted in finding fraud from the fact alone that circumstances tending to show it have been proven. Fraud will not be presumed, and must be established by proof, either direct or circumstantial. If by the latter, the circumstances relied upon must be such as to be reasonably consistent only with the intent to defraud, and to be in some degree inconsistent with an honest intent.

The transaction upon which the larger part of the claim of the respondent was founded

grew out of business with a partnership known as the Custer Mining Company. What we have said is perhaps enough to show that these transactions could not be avoided by the respondent, but it is claimed on the part of the defendant that there was another reason why these transactions should be held binding upon both the banks. It was that, at the time the agreement to extend credit to the partnership was made, it was so made as well in behalf of the savings bank as in that of the national bank; that the arrangement was consented to by both banks, and was to the effect that the paper of the partnership should be carried by each of them in substantially equal proportions; that the taking of the paper by the national bank was simply a matter of convenience, and, to the extent of half of it, the national bank, in so taking, acted as the agent of the savings bank. Upon these questions the proofs are also somewhat unsatisfactory, but in view of the fact that there was some positive testimony to that effect, and other circumstances tending to establish its reasonableness, while there was not a particle, either direct or indirect, to the contrary, we think the fact should be held to have been established by the proofs, and that for that reason, as well as the one already stated, the savings bank could not recover on account of the Custer Mining Company notes which were transferred to it by said national bank.

It is further suggested by the respondent that the transactions of June 5th were illegal for the reason that at that time the savings bank was insolvent. The proofs upon the question of insolvency were such as to show that, in the light of the events that afterwards developed, the bank was insolvent, but they failed to show that under ordinary circumstances the assets would not have exceeded the liabilities. For some purposes the bank was undoubtedly insolvent, but whether it was so for the purpose of construing transactions between it and its creditors may be open to question. But it is not necessary that we should decide as to such insolvency, for the reason that in our opinion the transactions of that day between the two banks were supported by such consideration moving from the national bank as to make them valid, even although the savings bank was insolvent. The savings bank was in need of ready money on that day, and, to secure it, transferred part of its property to the national bank.

Some other reasons have been assigned and argued by the appellant why the decree of the lower court should be reversed, but what we have said substantially determines the rights of the parties, and we shall leave the others without further consideration. The decree will be reversed, and the cause remanded, with instructions to dismiss the action.

ANDERS and GORDON, JJ., concur.

(26 Or. 320)

BELLINGER v. THOMPSON et al.

(Supreme Court of Oregon. Dec. 17, 1894.)

ACTION ON ADMINISTRATOR'S BOND.

In an action on an administrator's bond, the validity of the bond and the liability of the defendants alone are triable, and the rights of the defendants among themselves cannot be determined.

On motion to recall mandate. Denied.

For former opinion, see 37 Pac. 714.

BEAN, C. J. The motion of defendants Dekum and Thompson for an order recalling the mandate in this case, with a view to the determination of the rights of the defendants among themselves, must be denied. This is an action at law against the defendants, as sureties on the official bonds of Ingalls as executor; and the only question made by the pleadings, considered by the court, or properly triable in the action, is the validity of the bonds sued on, and the liability of the defendants to the plaintiff. The rights and duties of the defendants as among themselves, or the amount each should contribute towards the payment of plaintiff's judgment, depend upon the application of equitable principles to a state of facts not disclosed, but only hinted at by the record. In order to prevent further possible litigation, it would be gratifying to the court to be able to enlarge the scope of its decision, so as to embrace the respective rights and liabilities of the defendants as between themselves; but it is very doubtful whether this could be done, even if the issues had been framed for that purpose. Such a question is wholly foreign to the object of the action, and entirely unnecessary to its determination; and within *Hovenden v. Knott*, 12 Or. 267, 7 Pac. 30, it would seem, could not be considered. But, however this may be, no such issue was tendered or made, and there are no findings of fact upon which a decision could be based. Nor do we think the judgment, as entered, in any way determines this question, or will affect the right of contribution between the defendants, in a proper proceeding for that purpose. It is a judgment in favor of the plaintiff against the defendants jointly and severally, and fixes their liabilities as to the plaintiff, but not among themselves. Motion overruled.

WELCH v. CITY OF ASTORIA. ASTORIA LAND & TRUST CO. v. SAME. HAMILTON REAL-ESTATE CO. v. SAME. WARREN et al. v. SAME. WINGATE v. SAME. KINNEY v. SAME. LEINENWEBER v. SAME.

(Supreme Court of Oregon. July 5, 1894.)

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

Bills by D. H. Welch, the Astoria Land & Trust Company, Hamilton Real-Estate Company, H. S. & W. E. Warren, George Wingate, M. K. Kinney, and Mary Leinenweber against

the city of Astoria to restrain the collection of taxes. Bills dismissed. Plaintiffs appeal. Affirmed, on the authority of *Welch v. City of Astoria* (Or.) 37 Pac. 66.

George Noland, for appellants. F. D. Winston, for respondent.

STATE v. WOOD.

(Supreme Court of Oregon. Jan. 10, 1895.)

Appeal from circuit court, Multnomah county. H. C. Wood appeals from conviction. Affirmed.

Edw. Mendenhall, for appellant. John H. Hale, for the State.

PER CURIAM. As there is no one present to represent the appellant, and no brief on file, the judgment of the court below is affirmed.

STATE v. VANN.

(Supreme Court of Oregon. Jan. 10, 1895.)

Appeal from circuit court, Multnomah county. Tomasio Vann appeals from conviction. Dismissed.

Edw. Mendenhall, for appellant. John H. Hall, for the State.

PER CURIAM. It now appearing to the court that the defendant is dead, this case is dismissed.

STATE v. WHITE.

(Supreme Court of Oregon. Jan. 10, 1895.)

Appeal from circuit court, Multnomah county. Georgie White appeals from conviction. Dismissed.

John F. Logan, for appellant. John H. Hall, for the State.

PER CURIAM. At the suggestion of the state's attorney that the defendant has been pardoned by the governor, the appeal herein is dismissed.

CURTIS v. SESTANOVICH et al.¹

(Supreme Court of Oregon. July 5, 1894.)

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by E. D. Curtis against A. M. Sestanovich and others. Judgment for defendants, and plaintiff appeals. Reversed.

John H. Hall, for appellant. G. G. Bingham and P. H. D'Arcy, for respondents.

PER CURIAM. The notice of lien in this cause in its material averments is identical with that of *Curtis v. Sestanovich* (this day decided) 37 Pac. 67. In the case at bar the court sustained the demurrer to the complaint, and dismissed the cause, from which decree the plaintiff appealed. The opinion in the case referred to being applicable to the facts alleged in the complaint therein, the decree of the court below must be reversed, the demurrer overruled, and the cause remanded, for further proceedings not inconsistent with said opinion. Reversed.

: ¹ Rehearing denied.

SWANSON et al. v. LEAVENS.

(Supreme Court of Oregon. Nov. 19, 1894.)

Appeal from circuit court, Multnomah county. Action by Peter and Charles Swanson against J. M. Leavens. Judgment for plaintiffs, from which defendant appealed, but failed to file a printed abstract of the record, or have the time for so doing extended. Respondents move to affirm the judgment. Affirmed.

W. W. Page, for appellants. C. A. Moore, for respondents.

PER CURIAM. The judgment herein will be affirmed for failure to comply with rule 4 of this court (37 Pac. vi.), taking effect October 1, 1894.

SHARP v. HARTMAN.

(Supreme Court of Oregon. July 5, 1894.)

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

This was originally a suit by Penumbra Kelly and others to wind up the affairs of the Northwest Loan & Trust Company, an alleged banking concern in the city of Portland, manipulated by one George B. Markle. The defendant, Hartman, was appointed receiver in the summer of 1893, and afterward Kate A. Morgan Sharp intervened, claiming a preference for certain moneys delivered to the trust company for the purpose of paying a mortgage, but which it had converted to its own use. The court below disallowed the preference, and the intervener appealed. Affirmed.

For a statement of the facts in this case, see *Muhlenberg v. Trust Co.*, 26 Or. —, 38 Pac. 932.

Snow & McCamant, for appellant. Paxton & Paddock, for respondent.

PER CURIAM. The facts in the case bring it within the ruling this day announced in *Ferchem v. Arndt*, 26 Or. —, 37 Pac. 161; and an order will be entered accordingly.

(26 Or. 599)

HAMBLIN REAL-ESTATE CO. v. CITY OF ASTORIA et al.

(Supreme Court of Oregon. July 23, 1894.)

TAXATION—INJUNCTION—TENDER.

Where mortgages on real estate are fraudulently omitted from taxation, and plaintiff tenders and deposits in court an amount rightfully due by him for taxes, the collection of the legal excess will be enjoined.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

Bill by the Hamblin Real-Estate Company against the city of Astoria and others to enjoin the collection of taxes. Bill dismissed. Plaintiff appeals. Reversed.

Fulton Bros., for appellant. F. D. Winton, for respondents.

PER CURIAM. The facts in this case are the same as in the case of *Welch v. Astoria* (decided July 5, 1894) 26 Or. —, 37 Pac. 66, with the exception that the complaint not only contains an allegation of tender, but also that it was kept good by bringing and depositing the amount thereof in court for the defendant; and hence, within the princi-

ple announced in the *Welch Case*, the complaint states a cause of suit. The decrees must therefore be reversed, and the cause remanded for trial. Reversed.

FROST v. WEISTER.

(Supreme Court of Oregon. Nov. 19, 1894.)

Action by one Frost against one Weister. Judgment for plaintiff, and defendant appeals. Appeal dismissed, on motion of appellant.

(107 Cal. 175)

REDEMEYER v. HENLEY et al. (No. 15,671.)

(Supreme Court of California. April 27, 1895.)

ACTION ON FIRM NOTE—PLEADING.

Where, in an action against a partnership on a note, the complaint named the individuals of the firm, asserted the existence of the partnership, and alleged the execution of the note in the firm name by one of the partners, it sufficiently alleged his authority to make the note.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by A. F. Redemeyer against Whitcombe Henley and others, as partners, on a promissory note. Judgment was entered for plaintiff on default, and defendants appeal, on the ground that the complaint did not state a cause of action. Affirmed.

T. L. Carothers, for appellants. J. A. Cooper, for respondent.

VANCLIEF, C. Action on a promissory note made by the defendants to plaintiff, in which judgment was rendered in favor of plaintiff by default. The defendants have appealed from the judgment on the judgment roll, which contains no bill of exceptions; and the only point made by appellants is that the complaint does not state facts sufficient to constitute a cause of action. The following is a copy of those parts of the verified complaint which it is contended are deficient: "(1) That the defendants, Whitcombe Henley, Barclay Henley, and Thomas B. Henley, are now, and at all the times herein named have been, partners, doing business in the county of Mendocino, state of California, under the firm name and style of W. Henley & Bros. (2) That on the 15th day of April, 1893, the said defendants, Whitcombe Henley, Barclay Henley, and Thomas B. Henley, partners, doing business under the firm name of W. Henley & Bros., as aforesaid, by the said W. Henley, made and executed their certain promissory note in writing, of which the following is a copy, to wit: '\$1,601.60. Ukiah, April 15, 1893. One day after date, without grace, we, or either of us, promise to pay to A. F. Redemeyer at Ukiah, or order, the sum of sixteen hundred one and 60-100 dollars, for value received, with interest thereon at the rate of ten per cent. per annum from date until paid. W. Henley & Bros., by W. Henley.' And then and there delivered

the same to plaintiff, and plaintiff is now the lawful owner and holder thereof."

The substance of the objection to the complaint is that it does not show that W. Henley was authorized to make the note, because such authority is not expressly alleged nor implied in any of the express allegations. But I think it is implied in the express allegation that "said defendants, Whitcombe, Barclay, and Thomas B. Henley, partners, doing business under the firm name of W. Henley & Bros., as aforesaid, by the said W. Henley, made and executed" the note. This allegation is not true, unless W. Henley had authority from Barclay and Thomas B. to make the note; yet its truth is admitted by the default of the defendants. There is nothing on the face of the note inconsistent with the truth of this allegation, as contended by appellants. I think the judgment should be affirmed.

We concur: BELOHER, O.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(5 Cal. Unrep. 26)

WOODBIDGE v. WORLD PUB. CO. et al.
(No. 15,923.)

(Supreme Court of California. April 27, 1895.)

REVIEW ON APPEAL.

A finding by the court on conflicting evidence will not be disturbed on appeal.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Alfred F. Woodbridge against the World Publishing Company and others for the subjection of property. From judgment for defendants, plaintiff appeals. Affirmed.

Wm. Grant and C. S. Cushing, for appellant. Bartholomew Noyes, for respondents.

PER CURIAM. This action is in the nature of a creditors' bill to subject property in the possession of the defendant California World Publishing Company to the payment of a judgment recovered by the plaintiff against the defendant World Publishing Company. The court below found the facts, and gave judgment against the plaintiff, from which, and from an order denying his motion for a new trial, he appeals. The notice of motion for a new trial stated that the motion would be made upon the grounds of the insufficiency of the evidence to justify the decision, and that it was against the law, and of errors in law occurring at the trial, and excepted to by the plaintiff.

It is earnestly contended that several of the findings were not justified by the evidence, but it would subserve no useful purpose to notice them in detail. It is claimed that every witness in the case, with one exception, was absolutely adverse to the plaintiff, and that he was not bound by the testi-

mony of witnesses adverse to him; and it is said that, while there was some testimony tending to support the findings, still "the whole transaction shows, beyond a doubt, that the facts found cannot be the truth." There is testimony set out in the statement which, in our opinion, tends to support all of the findings. Whether that testimony was true or false was a question for solution by the trial court, and not on appeal. The case falls within the well-settled rule as to conflicting evidence, and the judgment cannot be disturbed upon the first ground urged.

It is also contended that the court failed to find upon several of the issues raised by the pleadings, and that some of the findings are inconsistent and contradictory. But we think the findings substantially cover all the material issues, and we discover no such inconsistency in them as would justify a reversal.

It does not appear from the record that any rulings of the court during the trial were excepted to by the plaintiff, nor are there any specifications attached to the statement showing errors of that kind. It follows that the judgment and order appealed from must be affirmed, and it is so ordered.

(107 Cal. 177)

MCGOWAN et al. v. FORD, County Treasurer.
(Nos. 15,841, 15,842.)

(Supreme Court of California. April 27, 1895.)

COUNTY INDEBTEDNESS — MANDAMUS TO COMPEL PAYMENT—BURDEN OF PROOF — ALTERATION OF COURTHOUSE — VALIDITY OF CONTRACT — LIQUIDATED DAMAGES FOR DELAY.

1. County Government Act, § 25, subd. 9, requiring the board of supervisors to let contracts to erect, or rebuild and furnish, a courthouse, and other necessary public buildings, to the lowest bidder, after 60 days' notice, does not apply to a contract for repairs or alterations in the courthouse and improvements in the grounds surrounding it.

2. Where a contract for the alteration of a courthouse, and for the making of improvements and walks around it, provides for liquidated damages in case of delay in finishing the courthouse, such damages cannot be recovered under an allegation that the "work" is not finished at the time stipulated.

3. Under Const. art. 11, § 18, and the county government act (sections 5, 6, 36), providing that each year's revenues must pay each year's indebtedness, the board of supervisors, after issuing a warrant for payment of work completed within the fiscal year, cannot exchange therefor another warrant issued in the next fiscal year, payable out of the revenues of that year.

4. On an application for a writ of mandamus to compel the treasurer of a county to pay a warrant, when plaintiff alleges that the warrant was regularly issued, his ownership of it, the refusal of the treasurer to pay it, and the fact that there was money in the treasury out of which it could be paid, the burden is on defendant to show that he was justified in refusing payment.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Application by Matthew McGowan and another for a writ of mandate to compel William Ford, treasurer of Mendocino coun-

ty, to pay two warrants drawn on him by the county auditor. From a judgment making the writ peremptory as to both warrants, defendant appeals. Reversed as to warrant No. 1,746, and affirmed as to warrant No. 1,747.

J. E. Pemberton, for appellant. T. L. Carothers and J. A. Cooper, for respondents.

BELCHER, C. There are two appeals in this case, and two separate transcripts are presented, but the questions involved may properly be considered together. The respondents made application to the court below for a writ of mandate to compel the appellant, as treasurer of Mendocino county, to pay two warrants drawn on him by the county auditor. The material facts stated in the petition are as follows: On July 11, 1893, the county of Mendocino was justly indebted to respondents in the sum of \$4,545.27 for work and labor done and performed by them under contract with said county in repairing the courthouse, county jail, and grounds and sidewalks surrounding the courthouse and public buildings on the courthouse square in Ukiah city. On said July 11, 1893, the board of supervisors of the county duly made an order accepting said work, and awarding to respondents the sum of \$4,545.27 for the performance of the same, according to the terms and conditions of the contract; and by the order directed the auditor of the county to draw his warrant on the county treasurer for the said sum. On said July 11, 1893, the county auditor drew two warrants on appellant as county treasurer for the aggregate sum of \$4,545.27,—the first warrant, numbered 1,746, for \$2,970.27, and the second, numbered 1,747, for \$1,575. The said warrants were delivered to the respondents, and by them presented to and registered by the treasurer on July 13, 1893, and were indorsed by him: "Not paid for want of funds." In December, 1893, there was money in the hands of the treasurer for the payment of said warrants, and respondents then presented them to appellant as such treasurer, and demanded payment thereof; but, notwithstanding there was money in the proper fund appropriated for their payment, he then refused, and ever since has refused, to pay the same, or any part thereof. On January 8, 1894, after the refusal to pay the warrants, respondents filed their petition for the writ of mandate, and the court granted an alternative writ, making it returnable on the 15th day of the same month. In due time appellant appeared and filed his answer to the petition. The answer admits that on the 18th day of July, 1892, respondents and the board of supervisors of said county entered into and executed what purported to be a contract, under the terms of which respondents agreed to make certain alterations in the courthouse of said county, to build and construct certain additions to said

courthouse, lay certain walks around it, and make certain alleged improvements on the grounds thereof, for the agreed compensation of \$7,990, but alleges that the said contract was not let to the lowest bidder, after a publication of notice to bidders and contractors that such a contract was to be let for 60 days prior to the time set for opening bids, as required by subdivision 9 of section 25 of the county government act of 1891, and was therefore not a valid contract. It is then alleged that respondents have been paid for the work done under the said contract the sum of \$5,000, leaving due them, if the contract is valid and no deductions are to be made, only \$2,990. It is also further alleged that by the terms of the contract the work was to be completed on or before the 1st day of November, 1892, and that respondents expressly agreed to "complete and deliver the said building, entire and perfect in all its parts," to the county on or before the day named, and that "for each and every day or portion thereof that the said building shall remain unfinished or uncompleted after the said 1st day of November, 1892," they would pay to the county the sum of \$10, as liquidated damages; that the "said work" was not completed before April 5, 1893, and respondents had not paid the liquidated damages, or made any deductions or allowances on account thereof. The answer then proceeds to state that on April 6, 1893, respondents filed and presented to the board of supervisors two claims, one for \$2,990, "balance on contract," and the other for \$1,575, "balance due on extra work," and that the board on that day allowed the same for the sums named; that warrants therefor were drawn by the auditor and delivered to and accepted by respondents, and thereafter presented to and duly registered by the treasurer, and indorsed, "Not paid for want of funds;" that about a month later,—it having been discovered by respondents and the members of the board of supervisors that the board had incurred liabilities against the county during the fiscal year ending June 30, 1893, in excess of the income and revenue provided for that year,—for the purpose of evading the provisions of section 18 of article 11 of the constitution, and the statutes passed in conformity thereto, it was agreed by and between the respondents and the members of the board that under the pretense that the work called for by said contract was not completed, the said warrants should be recalled and revoked, and the time for finishing said work should be extended so as to end in the fiscal year beginning July 1, 1893, and the warrants for the payment of the same be drawn in that year, and apparently payable out of the revenue of that year; that thereafter, respondents consenting thereto, the board of supervisors made and caused to be entered on its minutes the following order: "It duly

appearing to this board that on the 6th day of April, 1893, warrants were issued to" respondents "for work done in putting in cement walks, steps, and improving the courthouse under contract" made by respondents with the county of Mendocino; "and it further appearing that said warrants were inadvertently issued before the said work was completed, or the amount thereof due, and that the said contract is not completed according to the plans and specifications therefor; and it further appearing that the said" respondents "are still the owners and holders of the said warrants, and that the same are yet unpaid: It is therefore ordered that the said warrants be, and the same are hereby, canceled, and they are recalled and declared void and of no effect; this order not to impair the right of said" respondents "to receive their pay through proper warrants when the said work is completed and accepted and the amount due; and the time to complete said contract in accordance with the plans and specifications is hereby extended to and including the 5th day of July, 1893." The answer further states that thereupon respondents voluntarily surrendered said warrants, and consented to their being canceled and destroyed, but thereafter performed no more work on said courthouse, walks, or grounds, and that nevertheless the warrants mentioned in the petition were afterwards ordered to be issued by said board in pursuance of said agreement; and "that there are no funds whatever in the treasury of said county belonging to the revenue of the fiscal year ending June 30, 1893, from which the warrants mentioned in plaintiffs' application and the writ herein can be paid; but that all the money now in the fund on which said warrants are drawn, or which has been therein at any time since said warrants were drawn, has been derived solely from the taxes, income, and revenue of said county for the fiscal year ending June 30, 1894."

The respondents demurred to the answer, but subsequently withdrew their demurrer, and moved the court for judgment on the pleadings, and after argument by counsel the motion was submitted and taken under advisement. Thereafter the court filed a written opinion, holding that respondents were entitled to the relief demanded as to warrant No. 1,746 for \$2,970.27, but not as to warrant No. 1,747; and judgment was thereupon entered, making the writ peremptory as to the first-named warrant. Afterwards the case came on regularly for trial by the court, without a jury, as to warrant No. 1,747 for \$1,575; and both parties declined to offer any evidence, claiming that the burden of proof was upon the other side. After argument and due consideration, the court made and filed its decision, holding that the undenied allegations of the petition made a prima facie case for respondents,

and that, in the absence of any evidence in support of the affirmative allegations of the answer, respondents were entitled to judgment; and judgment was thereupon entered, making the writ peremptory as to the last-named warrant. From these judgments the appeals are prosecuted.

1. Appellant contends that the board of supervisors had no jurisdiction or power to enter into the said contract with respondents, because notice by publication to bidders was given for only 11 days, and not 60, as required by subdivision 9, § 25, of the county government act of 1891; and hence the contract was ultra vires and void. The section referred to provides that boards of supervisors, in their respective counties, have jurisdiction and power "to cause to be erected, or rebuilt and furnished, a courthouse, jail, hospital, and such other public buildings as may be necessary: provided * * * all such buildings must be erected by contract, let to the lowest responsible bidder, after notice by publication in a newspaper of general circulation published in such county, for at least sixty days," etc. The contract in question was not for the erection of any building, but for making repairs or alterations in the courthouse, and for laying walks and making improvements upon the grounds surrounding the courthouse. Obviously, therefore, the statute invoked and the cases cited have no application to such a contract, and do not render it void.

2. The point is made, but not much urged, that the county was entitled under the contract to liquidated damages, because the "work" was not completed within the time fixed therefor. The averments of the answer are that respondents expressly agreed to complete and deliver the building to the county on or before November 1, 1892, and that for each day the building should remain unfinished or incomplete after that day they would pay to the county \$10 as liquidated damages. There is no averment that the building was not completed and delivered within the time agreed upon, but only that the work was not completed before April 5, 1893. But the "work" included as well the walks and improvements on the ground, and it may well be assumed, therefore, that the building was completed in time, and only the walks and improvements on the ground remained unfinished, thus giving to the county no right to claim any sum as liquidated damages.

3. Appellant further contends that the indebtedness to respondents was incurred during the fiscal year ending June 30, 1893, and could only be paid out of the revenues provided for that year, and that all such revenues had been drawn and expended before the allowances in question were made and the warrants therefor issued. Section 18 of article 11 of the constitution provides that no county shall incur any indebtedness or liability, in any manner or for any purpose,

exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, and any indebtedness or liability incurred contrary to this provision shall be void. This language of the constitution is repeated in section 5 of the county government act, and in section 6 of the act it is provided that "all contracts, authorizations, allowances, payments, and liabilities to pay, made or attempted to be made in violation of this act shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county." Section 36 of the same act also declares that "the board shall have no power to make allowances against any fund which, with all allowances previously made, and salaries and liabilities fixed by law payable therefrom, shall exceed the auditor's estimate of revenue for the year. * * * Any allowance made contrary to the provisions of this section shall be null and void, and the auditor shall not draw his warrant therefor, nor the treasurer pay the same." In *Gas Co. v. Brickwedel*, 62 Cal. 641, the court said it was clear that the framers of the constitution, in making the provision above referred to, meant "that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income and revenue of any future year." The question, then, is, when was the indebtedness involved in this case incurred? Was it in a fiscal year ending in 1893, or in that ending in 1894? The question, so far as it relates to the indebtedness for the payment of which judgment was granted on the pleadings, must be solved by a consideration of appellant's answer, for when respondents moved for judgment on the pleadings they in effect admitted that all the averments of the answer were true. *Ward v. Flood*, 48 Cal. 46; *Fleming v. Wells*, 65 Cal. 339, 4 Pac. 197; *People v. Johnson*, 95 Cal. 474, 31 Pac. 611. The answer clearly states that respondents fully completed the work to be done under their contract before the 6th day of April, 1893, and on that day presented to the board of supervisors a claim for the balance due on the contract, and the same was allowed, and a warrant therefor drawn and delivered to them. It further states that in May following, by agreement between respondents and the members of the board of supervisors, and for the purpose of evading the provisions of the constitution and statute and making the money payable out of the revenue of the succeeding fiscal year, that warrant was surrendered and canceled, and the warrant dated July 11, 1893, was issued and accepted by respondents as a substitute therefor; and that when the last-named warrant was drawn all the money in the treasury out of which it could be paid, or which had been therein at any time since it was drawn, was derived solely from the

income and revenue of the county for the fiscal year ending June 30, 1894. If these statements are true,—and for the purposes of this decision they must be accepted as such,—it is obvious that the indebtedness was incurred as early at least as April 6, 1893, when the first warrant was issued, and could only be paid out of the revenue provided for that fiscal year. It is also obvious that the orders of the board, made for the purpose of carrying the indebtedness over and making it payable out of the revenue of the next fiscal year, were unauthorized and without effect. See *Schwartz v. Wilson*, 75 Cal. 502, 17 Pac. 449, where a similar question was considered. We conclude, therefore, that the court below erred in granting the judgment on the pleadings.

4. Appellant contends that the second judgment appealed from—that making the alternative writ peremptory as to warrant No. 1,747 for \$1,575—was erroneous, and should be reversed, because the claim presented and allowed, as shown by his answer, was for extra work, and was not properly itemized, as required by the statute. The only question is, on which side was the burden of proof? It is earnestly urged that the averments of the answer show that the board of supervisors never had jurisdiction to audit and allow the claim, and that it devolved upon respondents to show by affirmative proof that it had such jurisdiction. It is averred in the petition, and not denied, that the board allowed the claim and ordered a warrant drawn therefor, and that a warrant was regularly drawn by the auditor and delivered to respondents. The presumption is that official duty is regularly performed (Code Civ. Proc. § 1963, subd. 15), and it seems to us that, when respondents presented their warrant to appellant for payment, there being money in the proper fund for the purpose, they were apparently entitled to have it promptly paid without question; and, when they were compelled to go into court to compel payment, they made a prima facie case by setting out the regular issuance of the warrant, their ownership of it, the refusal of the treasurer to pay it, and the fact that there was money in the treasury out of which it could be paid. We conclude, therefore, that the burden was upon the appellant to show that he was justified in refusing payment. We advise that the judgment as to warrant No. 1,746, involved in appeal No. 15,841, be reversed, and the cause remanded, and that the judgment as to warrant No. 1,747, involved in appeal No. 15,842, be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment as to warrant No. 1,746, involved in appeal No. 15,841, is reversed and the cause remanded, and the judgment as to warrant No. 1,747, involved in appeal No. 15,842, is affirmed.

(107 Cal. 166)

CITY OF EUREKA v. FAY et al. (No. 15,719.)

(Supreme Court of California. April 27, 1895.)

DEDICATION OF HIGHWAY—EVIDENCE—PARTIES.

1. In an action by a city to recover possession of land alleged to have been dedicated as a street, it appeared that a strip on each side of the tract had been sold by R., defendants' grantor, and the grantee had subsequently platted the whole tract, including therein the middle strip held by R., had a map of the tract made, and dedicated a portion of the land to the city as a street, which was never opened. R. protested against the platting of the land, and would not permit a record to be made of the map thereof. Subsequent to the conveyance to defendants, the city passed an ordinance accepting all lands dedicated to it by the owners thereof. R., in conveying lots on the tract, referred to the map for their description. *Held*, not to sustain a finding that there was a dedication by R., nor does the reference by him to the map constitute an estoppel.

2. Where it appeared that part of the demanded premises was in the tract conveyed by R. to the maker of the plat and map, and after the death of the grantee was conveyed by the administrator of his estate to another, as described in the map, and subsequently, in selling some of them, such other designated them by the numbers thereon, and that in one sale prior to the passage of the ordinance accepting land dedicated to the city he referred to the lot as bounded on the street in question, the acts of both constituted a dedication of that part, and the administrator's deed is competent evidence of the fact.

3. Neither the heirs of the dedicator nor the grantee of his administrator are necessary parties in an action to recover possession.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by the city of Eureka against Lura A. Fay and George M. Fay to recover possession of land alleged to have been dedicated to the plaintiff. Verdict for plaintiff. From judgment entered thereon, and an order denying their motion for a new trial, defendants appeal. Judgment affirmed in part, and reversed in part, and order reversed.

J. D. H. Chamberlain, for appellants. J. N. Gillett, for respondent.

VANCLIEF, C. The plaintiff, a municipal corporation, brought this action to recover possession of a strip of land alleged to be a portion of Sixth street, in said city. The cause was tried by a jury, whose verdict was in favor of plaintiff, and judgment was rendered thereon. The defendants have appealed from the judgment and from an order denying their motion for a new trial. The plaintiff claims title to the demanded premises by dedication, partly from Charles Raymond, and partly from Richard Duff, while defendants claim the whole premises by conveyance from Charles Raymond, and the principal and controlling questions relate to the sufficiency of the alleged dedications.

1. In October, 1864, Raymond owned a lot of land adjoining the town of Eureka containing about 12 acres, and on the 20th day

of that month conveyed to Charles Duff two distinct parcels thereof, and retaining a strip between these parcels of 180 feet in width; and on January 30, 1872, Charles Duff conveyed these two parcels to Richard Duff. Some time in 1873, while the two parcels and Raymond's strip were inclosed as one tract, Richard Duff procured the whole to be surveyed and divided into blocks and lots as an addition to the city of Eureka, and a map thereof to be made by R. F. Herrick, who, as a witness for plaintiff, testified as follows: "By occupation I am a surveyor. (Map introduced in evidence shown witness, and he is asked if he ever saw it before.) A. Yes; I made that map in 1873. I made it at the instance of Richard Duff. It covers the Duff tract,—a tract of land that Richard Duff owned at that time. It also covered land which was owned by Charles Raymond. I made a survey of the ground. I drove stakes for the most of it, locating the blocks, but I don't know whether I drove stakes for the lots or not; but I did drive stakes for the corners of the blocks. I think I drove stakes for the block marked on this map as bounded on the north by Sixth street, on the east by A street, on the south by Seventh street, and on the west by California street. This California street, running through the center, represents a street in Clark's addition that joins on. The streets marked out on this map are continuations of streets in the city of Eureka. I made my survey to conform to those streets. They are simply continuations or elongations of those streets." Upon his cross-examination he said: "The lands lying between these two red lines marked upon the map were the lands of Charles Raymond. Raymond held those lands between those two red lines in one body. I could not well make a map of the Duff and Raymond tract for Richard Duff without including that land. Charles Raymond did not have anything to do with the survey of the land or the making of the map. He was around there part of the time I was surveying it. I think he saw me setting stakes there upon corners of the blocks. He lived right there upon the premises at that time. He knew I was surveying the land for Richard Duff. The Duff and Raymond tracts, at the time the survey was made, were all fenced in one body, and so remained for several years afterwards." The map shows but few whole lots on Raymond's land. In "block 2," composed of eight lots, there are five fractional lots on his land which are either triangular or quintangular. The evidence, without conflict, shows that Raymond frequently protested against the map, saying he would not be bound by it; and that he prevented the recording of the map, and it never was recorded. The evidence also shows that Raymond's land, through which Sixth street was extended by the survey, has always been inclosed by fences, and the bill of exceptions

contains the following: "It is admitted that the plaintiff never opened the alleged street in controversy, or worked it, nor have the said premises ever been open to public use, nor has the plaintiff ever accepted the said alleged dedication, or offer to dedicate, otherwise than by ordinance No. 88." This ordinance was passed April 7, 1885, and is as follows:

"Section 1. All streets and alleys within the corporate limits of the city of Eureka which have been dedicated by the owners thereof to the use of the public are hereby accepted and declared to be public streets of the city of Eureka."

The only ground upon which it is claimed by respondent that Raymond ever dedicated, or offered to dedicate, any part of Sixth street through his land, is that in two conveyances of portions of his land he referred to said map for a description of the lots conveyed; but neither of the lots so described adjoined Sixth street, nor was Sixth street referred to or mentioned in either of the descriptions. The conveyance principally relied upon is that of Raymond to W. C. Espie, dated March 23, 1885, and recorded April 8, 1885, one day after the passage of ordinance No. 88, in which the land conveyed is described as "lots five and six in block two, according to the map or plat of that certain addition to the city of Eureka known as the 'Duff & Raymond Tract.'" The scrivener who wrote this deed testified that the description was dictated by Raymond, who pointed out the lots on a tracing of the map then in the possession of Mr. Randall, who then claimed the Duff interest in the tract, and in whose employ the scrivener was at the time he wrote the deed. On cross-examination the scrivener (Mr. Murray) further testified as follows: "In this interview, when you drew this deed for Espie, or at any other interviews, and when you were having business relating to this map or plat, did Mr. Raymond say he would not be bound by this plat? Repudiate that plat? A. Yes, sir; he did. Q. Did he, in any of these interviews, refuse to permit this plat to be filed? A. He did. Q. At that time this plat was in Mr. Randall's hands? A. Yes, sir; and Mr. Randall was selling lots out of his portion of the Duff and Raymond tract. Q. Was or was not Mr. Raymond's protest the reason why this map was not filed? A. It was. I have heard this protest against this map from Mr. Raymond several times, but I cannot specify the dates. Mr. Raymond was living on the tract at the time. He knew that the map was designated as the Duff & Raymond map, and he pointed out to me on that map the lots that he wanted to transfer." The other conveyance by Raymond was to Thomas Blakewell, dated in June, 1882, in which the lot was described as follows: "Beginning at the northwest corner of Seventh and A streets, in the city of Eureka; running thence north, along the

west side of A street, sixty (60) feet; thence west, parallel with Seventh street, one hundred and ten (110) feet to an alley; thence south, along the east side of said alley, sixty (60) feet to Seventh street; thence east, along the north side of Seventh street, one hundred and ten (110) feet to the place of beginning; being lot number four (4), in block two (2)."

The deed from Raymond to the defendant Lura A. Fay, under which defendants claim, was executed June 24, 1887, more than two years after the passage of the ordinance of acceptance (No. 88); and surely this deed evinces no intention to dedicate any part of Sixth street, but the contrary, since it purports to convey that part of the street in question. And, even if it could be construed to be an offer to dedicate, there is no evidence of acceptance by the city or the public. It is therefore clear that the evidence does not justify the verdict to the effect that Raymond ever dedicated or offered to dedicate to the public any part of Sixth street. The reference to the Duff map by Raymond for the mere purpose of describing lots sold by him, while expressly repudiating it for all other purposes and preventing the recordation thereof, has no substantial tendency to prove that he intended to dedicate to the public any part of a street defined on such map not adjacent to the lots sold nor referred to in the description thereof. *Cerf v. Pflieger*, 94 Cal. 131, 29 Pac. 417; *People v. Reed*, 81 Cal. 70, 22 Pac. 474; *Phillips v. Day*, 82 Cal. 30, 22 Pac. 976. None of the cases cited by respondent go to the extent necessary to sustain this as sufficient evidence of intention to dedicate any part of Sixth street. This case is clearly distinguishable from that class of cases in which the grantor of lots has been estopped, in favor of his grantee, from claiming as his private property the streets or parks by which he expressly bounded such lots. The record shows no ground of estoppel in this case; for it does not appear that the city council had even constructive notice of the Duff map, at the date of its general ordinance of acceptance of all offers to dedicate streets, etc., nor that it passed said ordinance in reliance upon any representation, by word or act, of Raymond. That ordinance had no reference nor application to the land in question, unless, before its passage, Raymond had offered to dedicate that land to the public. So that the controversy is reduced to the question whether Raymond had offered to dedicate the demanded premises before the passage of ordinance No. 88, and, surely, the evidence was insufficient to prove that he had.

2. As to the alleged dedication of a distinct part of the demanded premises by Richard Duff, it is to be remarked that about two-fifths of said premises lie northeast of and adjoin the northeasterly side of Raymond's strip of land, and within the boundaries of the northeast parcel conveyed, as

aforesaid, by Raymond to Charles Duff, and by the latter to Richard Duff, and which was owned by Richard Duff at the time he caused the survey and map to be made by Herrick. And, although the deed from Raymond to the defendant Lura A. Fay purports to convey the whole of the demanded premises, there is no evidence tending to prove a deraignment of title to that part thereof which is shown to have been owned by Richard Duff at the time he made the survey and map from Richard Duff to either of the defendants. On the contrary, it appears that the administrator of the estate of Richard Duff conveyed it to Randall by the following description: "All those lots, blocks, and parts of lots lying in the Duff & Raymond addition to the town, now city, of Eureka, in Humboldt county, state of California, numbered and described by reference to the plat thereof made by R. F. Herrick, as follows: All of lots number one (1), two (2), three (3), four (4), and seven (7), in block one (1), and that portion of lots number five (5) and six (6), in block one (1), and lots one (1) and two (2), in block two (2), lying northwest from the red line on said plat marking the northwest boundary of that portion of said addition belonging to Charles Raymond; also that portion of lots number four (4), five (5), six (6), and seven (7), in block two (2), and lot one (1), in block five (5), lying southerly of the red line on said plat, marking the southerly boundary of that portion of said addition belonging to said Raymond." The defendants objected to this deed on the grounds that an administrator has no power to dedicate the land of his intestate; that defendants are not bound by the acts of Duff's administrator; and that neither Randall nor the heirs of Richard Duff are parties to the action. Conceding that the administrator had no power to dedicate, I think the deed was competent and relevant to show that Duff's title had passed directly to Randall before the commencement of this action, thus laying the foundation for evidence either that Randall had dedicated, or that he had acquiesced in the dedicatory acts of his grantor, and completed them, in case the dedication had not been completed in the lifetime of the latter; and, for these purposes, the introduction of the administrator's deed was followed by evidence tending to prove that Randall had, at least, acquiesced in all the dedicatory acts of Duff. He had accepted a conveyance of the lots merely, as described on the map made by Duff. He sold many of those lots, designating them by the numbers on said map, and describing them as bounded by the streets as laid out on the map; and in two instances referred to Sixth street, and in one case described the lot sold as bounded on one side by Sixth street. The map was in his possession, and, according to the testimony of his clerk (Mr. Murray) above quoted, he was selling lots from his portion of the tract in March, 1885, before

the passage of the ordinance of acceptance. Nor was it a valid objection to the administrator's deed that Randall and the heirs of Richard Duff were not parties to the action. The plaintiff was not required to make all persons through whom it deraigned its title parties defendant. If either Richard Duff or Randall dedicated that part of the land in question situate northeast of the red lines on the map, plaintiff's chain of title thereto, from the highest source, was unbroken and complete, and shows that Raymond and wife, the grantors of the defendant Lura A. Fay, had no title thereto at the date (June 24, 1887) of their deed to her, and there is no evidence that they ever acquired any title thereto afterwards. I think, however, that the evidence was sufficient to justify the jury in finding an offer to dedicate by Richard Duff, and an acceptance thereof by the city during his lifetime, especially as against the defendants, who appear to have no title. I perceive no reason to doubt that Richard Duff intended to dedicate, and intended his acts as an offer to dedicate. He would have recorded his map but for the opposition of Raymond. As to that part of the demanded premises situate between the two red lines on the map, I think the order and judgment should be reversed, and a new trial granted; but as to that part of said premises lying northeast of said red lines, and not between them, I think the order and judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order and judgment are reversed, and a new trial granted as to all that part of the demanded premises described as situate between the two red lines on the map; but, as to the remainder of said premises lying northeasterly from said red lines, the order and judgment are affirmed.

(21 Colo. 1)

JOHN MOUAT LUMBER CO. v. CITY OF DENVER.¹

(Supreme Court of Colorado. Feb. 18, 1895.)

DEDICATION OF STREET — ACCEPTANCE BY CITY — EVIDENCE.

1. There is no statutory dedication of a street by the filing of a plat between the time of the adoption and the taking effect of the first statute authorizing such a dedication.

2. The platting of streets and sale of lots thereby amounts to a mere offer of dedication, so far as the city is concerned; and, though the offer may not be withdrawn at pleasure, the city may, under certain circumstances, lose its right to accept it.

3. Evidence that, from the time of the filing of a plat to the time of bringing suit, more than 20 years elapsed, during which streets marked on the plat were not used by the city for any purpose, and that they could be made fit for street purposes only by the expenditure of a large amount; that for several years before suit such

¹ Rehearing denied April 1, 1895.

streets, which were near the center of the city, were inclosed by a fence, and improved and used as private property, and that there was a residence in one of them; and that the connecting streets had been surrendered for railroad and other purposes,—made a *prima facie* showing that the city did not intend to accept them as public streets.

Error to district court, Arapahoe county.

Action by the John Mouat Lumber Company against the city of Denver to determine the better right to certain streets. From a judgment of nonsuit, plaintiff brings error. Reversed.

This suit was instituted by plaintiff in error, the John Mouat Lumber Company, a corporation, against the city of Denver, for the purpose of determining who had the better right to those portions of Twenty-Sixth and Twenty-Seventh streets, between Blake street and the railroad grounds, as marked upon Case & Ebert's addition to the city of Denver. See plat. In the district court, plaintiff suffered a nonsuit at the conclusion of its testimony. To the judgment of nonsuit it duly excepted, and brings the case here upon error. The facts are undisputed, and, so far as necessary to an understanding of the opinion, are as follows: The land in controversy is a part of a quarter section of land patented by the United States to Francis M. Case under date of July 17, 1867. In April, 1868, Case filed a map of Case & Ebert's addition to Denver city, of which addition the parcels of land in controversy are a part. Depot street is one of the streets upon this plat. It embraces a part of the ground in dispute, viz. the intersection of Twenty-Sixth and Twenty-Seventh streets with Depot street. The other parcels of land in dispute are the two culs-de-sac between Depot street and Blake street, upon Twenty-Sixth and Twenty-Seventh streets; the entire ground in controversy being a strip 180 feet in length by 80 feet in width on Twenty-Sixth street, and a like amount on Twenty-Seventh street, as platted. There are no streets beyond the railroad tracks, or on the northwesterly side of the ground in dispute, and there is no means of ingress or egress in that direction. There are now, and have been for many years past, a large number of railroad tracks entering and contiguous to Depot street, at the point of intersection with Twenty-Sixth and Twenty-Seventh streets. By an ordinance duly passed and approved on the 4th day of May, 1871, the city of Denver vacated and abolished Depot street, but no part of either Twenty-Sixth or Twenty-Seventh streets was included in such vacating ordinance. The evidence does not show that any part of the premises in controversy was ever accepted as a public street by the city prior to the bringing of this suit, but, on the contrary, it is shown that portions of the property were at all times impassable, and unfit for use for street purposes; one of these streets having a large depression in it, covered with water, described by the witnesses as a slough, and the other having a

ditch and a steep embankment, seven or eight feet in height, although pedestrians and teams at times passed across the premises. Some years before the institution of this action, plaintiff in error purchased the grounds theretofore known as "Depot Street," and also the two culs-de-sac aforesaid, took possession, inclosed the premises with a substantial fence, and has ever since remained in such possession. By the ordinance vacating and abolishing Depot street, all streets and alleys lying northwest of the railroad company's right of way were also abolished. The evidence shows that neither of the parcels of land in controversy has ever been accepted by the city for street purposes; that neither has ever been graded or in any way improved by the city, but the ground has been for many years unused by it, and occupied as private property. In one of these streets a dwelling house is situated, near the center. This house, which was built in 1871, remained at the time of the institution of this suit, in 1888.

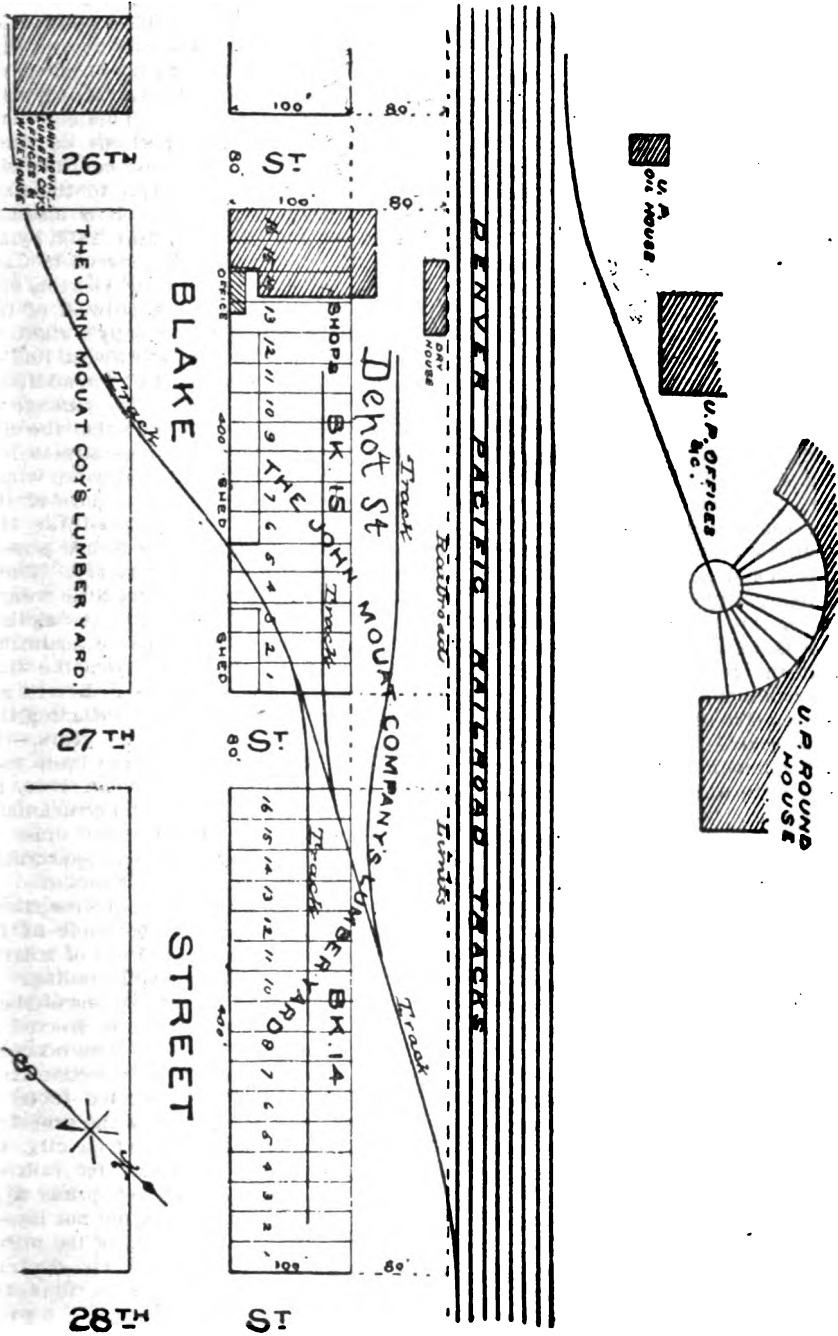
Markham & Carr, for plaintiff in error.
John F. Shafroth, F. A. Williams, and A. B. Seaman, for defendant in error.

HAYT, C. J. (after stating the facts). There was no statutory dedication by the filing of the plat, for the reason that the first statute upon which a statutory dedication could be based, although adopted in January, 1868, did not go into effect until the 1st day of July, 1868, while the plat of the Case & Ebert addition to the city of Denver was filed on the 7th day of the intervening month of April. Rev. St. 1868, p. 619; 2 Dill. Mun. Corp. § 628; *City of Denver v. Clements*, 3 Colo. 472.

It is equally clear, we think, that there was a common-law dedication by the owner of the pieces of land in controversy, these parcels being portions of certain streets marked upon the plat of the Case & Ebert addition to the city of Denver. After the filing of the plat, the owners of the territory platted, from time to time, sold lots in this addition with reference to this plat. Although these lots were sold to private parties, they were deeded by reference to the plat, and the grantors and their privies are estopped from denying the dedication to the public of the streets and alleys marked thereon. This is the rule established in *City of Denver v. Clements*, *supra*. The decision in the *Clements* Case was affirmed in the subsequent case of *Ward v. Farwell*, 6 Colo. 86. In both cases the following language from Mr. Angell is quoted with approval: "It may be stated, as a general rule, that where the owner of urban property, who has laid it off into lots, with streets, avenues, and alleys intersecting the same, sells his lots with reference to a plat in which the same is so laid off, or where, there being a city map in which this land is so laid off, he adopts such map, by sales with reference thereto, his acts will

MAP

SHOWING BLOCKS 14 AND 15, CASE AND EBERT'S ADDITION.



amount to a dedication of the designated streets, avenues, and alleys to the public." Ang. Highw. § 149. The doctrine of the text of Mr. Angell is supported in the following, among other, cases: *Bartlett v. Bangor*, 67 Me. 460; *Carter v. City of Portland*, 4 Or. 339; *West Covington v. Freking*, 8 Bush, 121; *Hawley v. Mayor, etc.*, 33 Md. 270; *City of Evansville v. Evans*, 37 Ind. 229; *Weisbrod v. Railway Co.*, 21 Wis. 609; *In re Opening of Pearl St.*, 111 Pa. St. 565, 5 Atl. 430; *Elliott, Roads & S.* p. 89; 5 Am. & Eng. Enc. Law, p. 407, and cases cited.

It must, however, be conceded that the rule contended for by appellant—that such platting and sale of lots constitute a dedication of the streets and alleys delineated upon the plat only as between the grantors and purchasers from them, and that, so far as the city is concerned, such acts amount to a mere offer of dedication, which may be withdrawn at any time prior to acceptance by the public authorities of the city—is well supported by both reason and authority. *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774; *People v. Reed*, 81 Cal. 70, 22 Pac. 474, and cases cited. If this question were *res nova* in this state, we should examine the conflicting decisions with care, for the purpose of ascertaining to which side preference should be given; but, under the circumstances, we do not feel warranted in entering upon this field of investigation. The rule that it is better to have the law certain, than that the result in a given case should be in accordance with strict logic, has force in all cases, but more particularly in those where the rights of real property are concerned. At common law there must be both an offer of dedication by the owner, and an acceptance by the city, to constitute a complete dedication. This has been held by this court in two recent cases. *City of Denver v. Denver & S. F. R. Co.*, 17 Colo. 583, 31 Pac. 338; *Trine v. City of Pueblo*, 20 Colo. —, 30 Pac. 330. The *Clements Case*, although recognizing the doctrine that, to constitute a complete dedication, an acceptance on the part of the public authorities is necessary, holds that by the filing of a plat showing blocks, lots, streets, and alleys, and selling lots with reference thereto, the owner is thereby estopped from denying an intention to dedicate such streets and alleys to public use, and that he cannot recall his dedication, but the streets may be opened by the local authorities at such reasonable time as the public interest may require. The facts in this case are in many particulars similar to those in the case of *City of Denver v. Clements*, *supra*. In that case, as in this, a plat had been prepared, and made a public record. Upon these plats certain parts are designated as streets, and certain other portions as alleys, these streets and alleys being a continuation of certain public streets and alleys of the city of Denver. After the filing of such plat, many lots were sold with reference thereto: and we hold in this case, in accordance with the opinion of the court in the

Clements Case, that these acts show an offer to dedicate on the part of the owner, which offer he may not withdraw at his pleasure. This does not, however, do away with the necessity for acceptance, and the city may, under certain circumstances, lose its right to accept. The only evidence in this record relied upon to establish an acceptance by the city shows that, although the particular portions of the streets in controversy in this action were not used or occupied by the public to any considerable extent, other portions of these streets were occupied and used continuously from the time of filing the plat to the time of the institution of this suit. It is also admitted that on the 4th day of May, 1871, by an ordinance duly adopted, Depot street, in Case & Ebert's addition to the city of Denver, and all streets and alleys lying northwest of the Denver Pacific Railway Company's right of way, and southeast of the southwest line of W street, in said Case & Ebert's addition, were vacated and abolished. The passage of this ordinance it is said indicates that the city authorities understood that these streets had been accepted; otherwise the ordinance would have been unnecessary. At the date of the institution of this suit, it is alleged, the city authorities were about to take formal possession of the premises in controversy. These circumstances are entitled to but little weight upon the question of acceptance. As against this, the evidence on the part of plaintiff's witnesses tends to show that from the time of the filing of the map of Case & Ebert's addition, in 1868, to the time of bringing this suit,—a period of more than 20 years,—the ground in controversy had never been used by the city for any purpose whatsoever, although pedestrians and others did occasionally pass over it during a portion of the time. It has of late years been inclosed by a substantial fence, and otherwise improved and used as private property. The evidence further shows that this ground could only be made fit for street purposes by the expenditure of a large amount of money in filling and grading. It is also shown that in the center of one of these streets there is a dwelling house, erected in 1871, which has since that date been occupied as a place of residence without objection from any source. These uncontroverted facts, in view of the peculiar location of the property, its proximity to the main part of the city, the surrender of connecting streets for railroad and other purposes, we think, are *prima facie* sufficient to show that the city did not intend to accept the property as a part of the public streets of the city of Denver. The doctrine of estoppel in pais is equitable in character, and applies to the city as well as to the property owner. Judge Dillon, in his work on Municipal Corporations, states the law as follows: "The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in

recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but, upon all the circumstances of the case, to hold the public estopped, or not, as right and justice may require." Dill. Mun. Corp. (4th Ed.) § 675. We, of course, shall not attempt to anticipate the character of the evidence that may be introduced to rebut that introduced by plaintiff in this behalf. Until the facts are fully presented the court cannot finally pass upon the question.

In view of a new trial, we may properly consider the effect of the ordinance vacating Depot street upon the places of intersection with Twenty-Sixth and Twenty-Seventh streets. The validity of the ordinance vacating Depot street is not contested in this case, but it is contended that as this ordinance did not, by its terms, vacate either Twenty-Sixth or Twenty-Seventh streets, and as these streets extended across Depot street, the premises, at the places of intersection, still remained public streets. A reference to the plat filed shows that the premises alluded to were covered equally by Depot street and by Twenty-Sixth and Twenty-Seventh streets. As to these parcels of land, there was therefore an offer of dedication to the public—First, as a part of Depot street; second, as parts of Twenty-Sixth and Twenty-Seventh streets. It follows from this that the vacation of Depot street had no effect upon either Twenty-Sixth or Twenty-Seventh streets, the intersections of those streets with Depot street still remaining as before the passage of the ordinance. This will leave the question of acceptance of this space by the city upon the original offer of dedication open to investigation, under the same terms as the remainder of the disputed territory.

In this case there has never been a statutory dedication of the premises in controversy to the city for public purposes. The right of the city is based entirely upon equitable considerations, and as against these are to be weighed the equities of plaintiff in error with its title. From the evidence introduced, the superior equities are with the plaintiff; hence the judgment of nonsuit should not have been rendered. It will accordingly be reversed, and the cause remanded. Reversed.

(6 Colo. App. 174)

LINDEN et al. v. BLACK.

(Court of Appeals of Colorado. April 8, 1895.)

SUIT FOR PRICE OF GOODS—DEFENSES—BREACH OF CONTRACT WITH ANOTHER.

Defendant, under a private arrangement with a life insurance agent, purchased clothing from plaintiff, who had promised such agent to take a policy of life insurance at some future time, the first premiums on which were to be paid in clothing to the agent and defendant. After the delivery of the clothing so purchased, plaintiff refused to take the insurance. *Held*, that such refusal was no defense to a suit brought against defendant for the value of the clothing.

. v. 40P. no. 4—16

Appeal from Arapahoe county court.

Action by Alfred Linden and another against John R. Black. Judgment for defendant, and plaintiffs appeal. Reversed.

C. P. Evans and E. E. Edmonds, for appellants. F. S. Tesch, for appellee.

REED, P. J. Appellants were tailors, who made and sold to appellee clothing, which, with some repairing, amounted to \$73, none of which had been paid. Suit was brought before a justice of the peace; a trial had; judgment for plaintiffs for the amount of the bill. An appeal was taken to the county court; trial had to the court; judgment for the plaintiffs for the amount of the bill (\$73); motion for a new trial made and sustained; new trial had to the court, with finding and judgment for the defendant, from which an appeal was taken to this court. No question was made in regard to the correctness of the plaintiffs' account. The only question is in regard to the defense, which is one of the most remarkable ever interposed and allowed in a court of justice. The defendant was a druggist's clerk, in no way connected with life or other insurance. One William H. Mastin, a friend of his, was, or claimed to be, a soliciting agent for the Equitable Life Insurance Company. The evidence of defendant, his brother, and Mastin was: That plaintiffs had agreed, each, to take of the insurance company, through Mastin, a life policy of \$3,000, the first payment on one of which would be \$87.50, on the other \$93.30, aggregating \$180.80; the payment, or the greater part of it, to be paid in clothing to Mastin and defendant. That thereupon defendant ordered and received goods for himself and brother to the amount of the bill (\$73). Mastin got goods to the value of \$68. Mastin testified, "The clothes which were to be taken as pay for the first year's premiums were to be taken by myself, John Black, and Will Black." Some time after the delivery of the goods, Mastin presented applications for plaintiffs to sign to obtain policies of insurance. They declined to sign applications, or take insurance; presented their bill to defendant, who refused to pay because plaintiffs had not taken the policies of life insurance. Neither defendant's bill, nor that against Mastin, was paid. This statement of facts, without comment, should be enough to dispose of the case; but as counsel for appellee, evidently in good faith, urges the correctness of the judgment, and seems to think there was a defense, and the trial court established it as a legal defense, courtesy requires that some attention be paid to it.

A promise to take life insurance at some future time, and a failure to take it, when no application is made, accepted, or policy issued, does not create a cause of action. It is not shown that the Equitable Insurance Company ever had any knowledge whatever in regard to the transaction,—not only was not damaged, but in no way connected with it.

It is a well-settled rule of the law of agency that an agent to sell, unless specially authorized, cannot barter or trade, but can only accept cash. Mastin was only a soliciting agent, and as such could only have been entitled to a commission after insurance was effected. It is not presumable that such commission absorbed the entire first annual payment, of \$180.80, so that he could apply it to use of himself and friends. What his commission would have been if the insurances had been consummated, is not disclosed. There was no contract for insurance that any party could enforce. If there had been, it could only have been between the insurance company and plaintiffs; and no suit for damages for nonperformance, or as basis of defense, could be available to a soliciting agent, or any one else, without an assignment. How the defendant could avail himself of it as a defense is a legal conundrum. The only privity shown to have existed was that defendant was a friend of the soliciting agent. It is not pretended that he had paid the insurance company or its agent for the clothing, or was under any legal obligation to pay. So far as appears, the clothing was to be a gift from the agent to the defendant and brother. It is apparent that such generosity was to be either at the expense of the insurance company or plaintiffs. The intention of the parties is clearly apparent. Aside from the want of legal sufficiency, the claim should have been rejected on the ground of public policy and morality. Courts should not countenance defenses that bear the brand of fraud so conspicuously. In no legal aspect could the claim inure to the benefit of the defendant, and operate as a set-off or counterclaim, or as any defense whatever, against the demand of the plaintiffs. The judgment will be reversed, and cause remanded, with instructions to enter judgment for the plaintiffs unless some other and legitimate defense is interposed. Reversed.

(6 Colo. App. 154)

CORT v. NEWMAN.¹

(Court of Appeals of Colorado. April 8, 1895.)
SPECIAL CONSTABLE—APPOINTMENT—APPEARANCE.

1. Where a special constable is appointed, under Gen. St. 1883, § 2068, providing that a justice may appoint one when there is a probability that goods will be removed before application can be made to a qualified constable, and that the appointment shall be by a written indorsement under seal upon the back of the process, the burden is on the party justifying under such an appointment to show affirmatively that the causes authorizing it existed, and that it was made in the manner prescribed by law.

2. Where goods were taken under a void process, and a trial was had at the instance of the owner to adjudge whether they were exempt, his appearance was insufficient to confer jurisdiction over the subject-matter.

Error to county court, Arapahoe county.

Action by M. Cort against F. H. Newman

¹ Rehearing denied May 13, 1895.

for the possession of goods wrongfully taken. From a judgment for defendant on an agreed statement of facts, plaintiff brings error. Reversed.

Osborn & Taylor and A. M. Ellington, for plaintiff in error. Alfred Muller, for defendant in error.

THOMSON, J. This is an action for the possession of goods and chattels. The affidavit of the plaintiff, Cort, sets forth his ownership and right of possession of the property, and alleges that it was taken from him by the defendant, pretending that he was a constable, and that he took the property on execution, whereas he was not a constable, nor authorized to act as such. The affidavit contains the usual other averments, and alleges that the property was exempt from attachment and execution by law. The complaint is in the common form. The answer alleges the commencement of a suit against the plaintiff by one Prince before a justice of the peace, the issue of a writ of attachment in the cause, the appointment of the defendant by the justice as special constable to serve the writ, and the levy by him as such special constable upon the property by virtue of the writ. It also alleges that after the levy a trial of the plaintiff's claim of exemption was had before the justice, in a proceeding instituted by the plaintiff for that purpose, in which it was adjudged that he was not entitled to the exemption. It is also averred that at the trial of the cause the attachment was sustained, and judgment rendered in favor of Prince for the amount of his claim. The replication put in issue the averments of the answer. The cause was tried upon an agreed statement, as follows: That the plaintiff was the head of a family, and entitled to the property as exempt, unless his right to the exemption was settled by the judgment of the justice; and that the defendant, although acting as such, was not properly appointed a special constable, and was not authorized to act as constable, unless the validity of his acts was settled by the justice's judgment. The statements in the answer as to the trials and judgments were admitted. Section 2068 of the General Statutes of 1883 provides that a justice of the peace may appoint a suitable person to act as constable when there is a probability that goods and chattels will be removed before application can be made to a qualified constable; and that the appointment shall be made by a written indorsement, under the seal of the justice, upon the back of the process to be executed. The agreed statement does not set forth what, if anything, was done in the way of attempting to appoint the defendant special constable, but states generally that he was not properly appointed or authorized to act. The appointment by a justice of a person to act as constable must be in strict conformity with the statute, or

the appointment is void, and the service of the process a nullity; and a defendant who justifies under an alleged appointment must affirmatively show that the causes authorizing the appointment existed, and that it was made in the manner prescribed by the statute. There is no presumption in his favor. *Gordon v. Knapp*, 1 Scam. 488. Upon the facts as admitted, the defendant was a trespasser. His seizure of the property was not a levy, but a wrongful taking. The justice acquired no jurisdiction of the property by the defendant's act, and was therefore without power to try or decide any question concerning it. That such a trial was had at the plaintiff's instigation, and that he appeared and participated in it, is immaterial. Want of jurisdiction of the person may be waived by appearance, but jurisdiction of the subject-matter cannot be conferred by consent. What the plaintiff's rights in the matter of a claim of exemption, made in a proper case, would be, is unimportant. There can be no trial of such a claim, except upon a legal seizure of the property. The judgment of the justice upon the exemption claim was void. Upon the admitted facts, judgment was given for the defendant, whereas it should have been for the plaintiff. It must therefore be reversed. Reversed.

(6 Colo. App. 173)

LOTHROP v. FLOWER.¹

(Court of Appeals of Colorado. April 8, 1895.)

REVIEW ON APPEAL.

A finding by the court upon conflicting evidence will not be disturbed.

Appeal from district court, Arapahoe county.

Action by John S. Flower against Wilbur C. Lothrop. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel H. Baker, for appellant.

REED, P. J. Appellee brought suit to recover \$200, as alleged commission due in regard to a certain transaction. The original claim was for \$240, but a settlement was had, and \$200 was the amount agreed upon, and conceded by appellant, for which amount suit was brought. In answer to complaint of appellee, appellant filed a counterclaim or set-off. It appears that the parties had exchanged properties; that from appellee to appellant being an unfinished residence, requiring various small jobs to be done to complete it, which it is alleged appellee agreed to do, but failed, and appellant caused them to be done, charging the cost to appellee. The sum claimed by appellant was: Money expended, \$166.80; damage by loss of time and failure to perform, \$60; total, \$226.80. There was a trial to the court without a jury, in the county court, resulting in a judgment against ap-

pellant for \$161.45. An appeal was taken to the district court, where a trial was had to the court without a jury, resulting in a judgment against appellant for \$179.44, from which an appeal was taken to this court. The assignments of error are general; in effect, that the court should have found for the other party. There are no specific objections, and no questions of law raised to be determined. The evidence was conflicting, and the only question for the court appears to have been what amount of counterclaim or set-off appellant should be allowed. The court apparently found the amount to be something over \$20, and gave judgment for the balance. The amount to be allowed was a question of fact, deducible from the evidence, and dependent to some extent upon the credit given to the evidence of respective witnesses. The court was in a better position to decide the questions presented than we can be, and the finding and judgment should not be disturbed. Affirmed.

(6 Colo. App. 157)

LLOYD v. WILLIAMS et al.¹

(Court of Appeals of Colorado. April 8, 1895.)

FRAUDULENT CONVEYANCE—CHANGE OF POSSESSION.

On an issue as to the validity of a sale of a stock of goods, as against an attachment creditor, it appeared that the sale was made to a clerk of the vendor, who had been in the store for some months, and that no inventory of the stock was taken upon the making of the sale; that the signs on the store were unchanged; and that there was nothing to indicate a change of possession, though the vendor left the store on making the sale, and did not return, and the attachment levy was made the day after the sale, the vendee informing the officer that he owned the goods, and showing him the bill of sale. *Held*, that the sale was void, there being no immediate delivery and actual and continued change of possession, as required by Gen. St. § 1523.

Appeal from Arapahoe county court.

Action by Thomas E. Williams and Henry N. Wood against E. McIntosh to recover for goods sold and delivered. A stock of goods was attached as the property of McIntosh, and L. W. Lloyd intervened, claiming the goods as his property. From a judgment adverse to the intervener, he appeals. Affirmed.

T. E. Waters and Betts & Rinkle, for appellant.

THOMSON, J. Williams & Wood brought their action before a justice of the peace against E. McIntosh to recover \$211.58 for goods sold and delivered. A writ of attachment was issued in the case, and levied upon a stock of goods, as the property of McIntosh. L. W. Lloyd intervened, claiming the goods as his property. Judgment was rendered against McIntosh for the debt, and against the intervener upon his affidavit of intervention. The intervener appealed to the county court, where

¹ Rehearing denied May 13, 1895.

¹ Rehearing denied May 13, 1895.

judgment again went against him, and he brings the case here by appeal.

It appears from the evidence that on November 3, 1892, Lloyd was the owner and proprietor of a grocery store at No. 2704 Champa street, Denver, and that on that day he sold the entire stock and business to McIntosh; taking in payment his unsecured note, payable on demand, for \$1,910. Two or three days after this, McIntosh paid him \$300 on the note. After the sale the business was conducted by McIntosh until May 16, 1893, when he resold the goods and business to Lloyd. During the time McIntosh conducted the business, Lloyd was in his employ, at a salary of \$50 per month; taking orders and delivering goods for him, and making purchases in his behalf. In the course of Lloyd's employment, he several times purchased goods for McIntosh from Williams & Wood, the plaintiffs. The consideration of the sale from McIntosh to Lloyd was the return to the former of the note which he had given. No inventory of the stock was taken, the signs upon the store remained the same as they had been, and nothing was done to indicate to the public that a change of possession had taken place. The sale was consummated between 4 and 5 o'clock of the afternoon of May 16th, and the writ of attachment was levied at 11 o'clock the next morning. McIntosh left the store when he received his note, remarking, "The goods are yours," and did not return. When the officer came with the writ, Lloyd informed him that he was the owner of the goods, and showed him the bill of sale.

The only question in the case is, was there such an immediate delivery, followed by such actual and continued possession of the things sold, as to satisfy the requirements of the statute of frauds? Unless there was, the sale was absolutely void, as against the creditors of the vendor, and subsequent purchasers in good faith. Where articles sold are taken by the purchaser, and removed to another locality, and there remain in his exclusive custody, the question is not attended with any difficulty. The acts of possession are definite, and explain themselves. But where, as in this case, there is no removal of the goods, and they remain in all respects exactly as they were, the fact of the transfer must be made apparent in some other way. In applying the statute to a case of this kind, Chief Justice Elbert said: "The vendee must take the actual possession, and the possession must be open, notorious, and unequivocal, and such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller, and into the purchaser. This must be determined by the vendee using the usual marks or indicia of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property." *Cook v. Mann*, 6 Colo. 21. In the case at bar, when the attachment was levied there was nothing about the store,

or upon the premises, from which any person could infer that McIntosh was not still the owner. Nothing had been done to advise the public, or persons dealing there, that the property had changed hands. No inventory was taken, and the goods were left in the same position which they had formerly occupied. The signs that were upon the store building while McIntosh was proprietor were untouched, and no new sign was displayed. It is true that McIntosh was not there on the morning of the 17th, and that Lloyd was there. But Lloyd had been there before. During the whole time of the proprietorship of McIntosh, Lloyd was acting for him, in the business, as his employé and agent; and it is fair to assume that McIntosh had not been there himself constantly. The presence of Lloyd, and the absence of McIntosh, on that occasion, are both matters which, in themselves, were entirely without significance. It is also true that Lloyd told the officer that he was the owner, and showed him the bill of sale; but a mere bill of sale is no compliance with the law, and "the statute does not permit the transaction to rest upon the declarations of the parties." *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. 705. Even if the plaintiffs, before commencing their suit, had full knowledge of the transaction, the situation would not be altered. They would only have known of a sale which was void as to them. *Perrin v. Reed*, 35 Vt. 2. This sale may have been made in good faith. There is nothing in the evidence to indicate that it was not. But the statute is peremptory in its terms, and whether there was fraud in fact, or not, the transaction was of no avail, as against the plaintiffs. The judgment will be affirmed. Affirmed.

(6 Colo. App. 323)

BESHOAR v. CHAPPELL et al.¹

(Court of Appeals of Colorado. Feb. 11, 1895.)

CORPORATIONS — ACTION BY STOCKHOLDER — DEMAND ON DIRECTORS.

1. Where plaintiff, a stockholder in a corporation, brings an action for himself and the other stockholders to have certain stock issued by the corporation canceled, or the value thereof paid into the treasury, and it appears that the suit was not brought in good faith; but in the interest of a rival corporation, under an agreement that it should direct the suit and pay the costs, plaintiff cannot maintain the action.

2. Where an action is brought by a stockholder of a corporation against an officer, to compel him to redress an injury committed by him against the corporate property, the pleadings must show a demand by the stockholder on the corporate authorities to institute proceedings, or a sufficient excuse for the omission to do so.

Error to district court, Pueblo county.

Two actions by M. Beshoar against Delos A. Chappell and others to hold defendants responsible for the disposition of stock of the Grey Creek Coal & Coking Company, and an

¹ Rehearing denied May 13, 1895.

action by the latter company against Beshoar and another to compel the surrender of certificates of stock, were consolidated, and tried as one case. From a judgment dismissing the complaint, Beshoar brings error. Affirmed.

D. C. Beaman and Gerry & Rittenhouse, for plaintiff in error. Caldwell Yeaman, for defendants in error.

BISSELL, P. J. In the statement of what is requisite to an apprehension of the suit, and to an application of the law which we conclude must control its decision, we shall very closely adhere to the facts recited in the findings of the court. They may be occasionally supplemented by our own conclusions respecting some matters, but in no instance will there be any departure from what the trial court has stated. The force and effect of these findings are thoroughly settled. As a general proposition, parties are not entitled to attack a judgment on the claim that it is unsupported by the evidence. Wherever the controversy, in its important and essential features, rests on conflicting testimony, the appellant must be able to demonstrate error of law, to maintain his appeal. Nevertheless, we have read this very voluminous record, and while we are compelled to affirm the judgment, notwithstanding our conclusion that there is enough in the case to show that under some circumstances, and with proper parties, what was done by the appellee Chappell would subject him to legal responsibility, we are satisfied the trial court did not err in its conclusions respecting some facts which we deem decisive of the action.

In 1887 the Cincinnati-Colorado Coal, Coke & Iron Company, which is designated in the evidence, and will be hereafter referred to, as the "Four C. Company," was the owner of some lands in Las Animas county. They were coal lands, and apparently had been somewhat developed by that corporation. The company had not reached a paying basis, and was without sufficient capital to proceed with the satisfactory development of the mines. At this time the appellant, Beshoar, with some other persons, was the owner of the capital stock of the Four C. Company. On behalf of his company, he entered into negotiations with Chappell which looked to the organization of a new corporation on a basis which would permit funds to be raised to open up the property. The parties concluded the thing was feasible, and Chappell organized a new company, called the Grey Creek Coal & Coking Company. The capital stock of this latter corporation was 2,000 shares, of \$100 each. This new company was organized by the election of officers and a board of directors, and then received from Beshoar, on behalf of himself and the stockholders of the Four C. Company, a written proposition, which, substantially, was that the Four C. Company would sell to the Grey Creek Coal & Coking Company their real estate, which

was described in the proposition, for 1,000 shares of the capital stock of the company. In the proposition, nothing whatever was said in regard to the remaining 1,000 shares. The evidence, however, discloses that it was in the contemplation of the parties that the 1,000 shares of stock should be sold at 60 cents on the dollar, to produce a development fund of \$60,000, which should be devoted to opening up the property. Evidently, the stockholders of the Four C. Company were willing to surrender one-half of their holdings for this purpose, and in place of canceling, transferring, or surrendering any of the Four C. Company's stock, pursued this plan. There were some limitations of time which were to control Chappell in his scheme to float the new company, but this is not important to the dispute. This proposition was submitted at a directors' meeting held on the 22d of September, 1887. It was accepted, and what was done by the Grey Creek Company will be assumed to be enough to secure them in their legal rights. The project was carried out by the Four C. Company, which conveyed the lands to the other corporation. The capital stock of the Grey Creek Company was issued. Nine hundred shares of it went to Beshoar, according to the arrangement; 100, which he had agreed to give Chappell for his services in the premises, were turned over to him; and the remaining 1,000 shares were left for sale, to raise the development fund. The trial court finds that these 1,000 shares of stock were sold by Chappell for \$60,000, in cash, which went into the treasury of the company, and was applied by its officers and directory to the development of the lands which had been transferred. In stating this fact, we do not express our opinion concerning its justness. We expressly decline to yield our assent to the result respecting this matter, for we desire that the affirmance shall not extend so far as to conclude any parties in any subsequent litigation which may be instituted regarding it. The stock was deposited in the First National Bank of Trinidad, subject to sale, and payment of the subscription price; and when the whole sum of \$60,000 was paid in, and properly applied, the stock was turned over to the purchasers. The court finds the money was actually put into the development of the property. To illustrate the animus and modus, we must now state what is really the occasion of the suit:

On the 26th of September a written agreement was entered into between the Colorado Coal & Iron Company and Chappell, which need only be stated to disclose the hidden motives. It was recited therein that Chappell had procured from Beshoar and others an option on a controlling interest in the stock of the Grey Creek Company, and he undertook to obtain from that company a lease of the estate for a term of 20 years, on sundry conditions. The only one of importance is that which looked to the expenditure of money for the development of the

property. The Colorado Coal & Iron Company undertook to spend \$80,000 for this purpose. It will be observed there was a very strange coincidence between the amount which the Colorado Coal & Iron Company agreed to spend and the sum for which Chappell undertook to sell the Grey Creek Company's stock. The evidence likewise disclosed that as fast as money was disbursed by him, as an officer of the Grey Creek Company, in payment of the bills which were incurred in the development, these vouchers were turned over to the manager of the Colorado Coal & Iron Company, who honored them by checks of that corporation for their face value. It thus resulted that what Chappell paid out with his right hand for the Grey Creek Company he instantly got back in his left from the Colorado Coal & Iron Company. On the 27th of September, which was the day following the execution of the agreement between Chappell and the Colorado Coal & Iron Company, the Grey Creek Company and the Colorado Coal & Iron Company made an agreement of lease which contained the provisions and various conditions specified in the agreement between Chappell and that corporation. It was executed by the lessors through Chappell, the vice president, and by the proper officers on behalf of the Colorado Coal & Iron Company. Under the provisions of this lease, the Colorado Coal & Iron Company spent \$80,000, opened up the property, paid royalties from time to time, but in the end suspended operations. The transaction concerning this stock is not creditable to the appellee Chappell, and we cannot close our mental vision to what is so evident from the record: that the scheme was one cunningly devised for the appropriation, without cost to him, of one-half of the capital stock of the Grey Creek Company. This in no wise militates against what we said at the outset concerning the force of the court's conclusion on matters of fact, because our opinion in no wise affects the legal result which we have reached. We have simply given expression to our doubts respecting this matter, for, if the thing be possible, we desire to so far leave the matter open that the Grey Creek Company may ultimately be able to establish and enforce its rights. We have stated enough to show the alleged basis for the suits which Beshoar afterwards brought. Beshoar claims that for a long time he was ignorant of the situation, and without knowledge of what Chappell had done with reference to the disposition of the Grey Creek Company's stock, and was uninformed concerning this contract between the Colorado Coal & Iron Company and Chappell. There was a change in the management of the Colorado Coal & Iron Company, and in the investigations which followed it this agreement between Chappell and the company came to the surface, and Beshoar learned of it. How little or how much he knew before

of the transactions is not easily ascertained from the testimony. The record shows the lease to the Colorado Coal & Iron Company was made in February, 1888, and shortly thereafter that company went into possession of the property, and engaged in its development. Beshoar knew of the lease, and had frequent conferences with Chappell concerning its terms. Whether he had any other information which should have advised him concerning the exact nature of the transaction, is not apparent. He was not told of this contract between Chappell and the Colorado Coal & Iron Company, nor did he learn of it until about the middle of 1890, when he was fully advised concerning its existence and its terms. After the resurrection of this agreement, Beshoar and the Colorado Coal & Iron Company made an arrangement to start a litigation to hold Chappell responsible for what he had done, and establish Beshoar's rights as a stockholder, for the benefit both of Beshoar and the Colorado Coal & Iron Company. The arrangement which was made provided substantially for the advancement to Beshoar of \$8,000, or, at all events, he was in some way to receive that amount of money, and the Colorado Coal & Iron Company undertook the prosecution of such suits as might be necessary to establish Beshoar's rights. The Colorado Coal & Iron Company were to pay all costs, furnish an attorney, and in general maintain the prosecution. Thereupon, three suits were begun. The first, we will call "3,209"; the second, "3,362" (which are cases by Beshoar against divers defendants); and the third, "3,218," which is the Grey Creek Company against Beshoar and MacKenzie. We will only state enough of the purposes of these actions to illustrate their scope, and the object of the pleader. In the first, Beshoar charged that Chappell had sold 1,000 shares of stock, and appropriated the proceeds to his own use; further, that he had issued other stock, and disposed of it, appropriating the results of the sales. In 3,362, Beshoar charged that all the stock which had been issued, other than that which had come to him, had been issued without any consideration whatever, and was fraudulent and void in the holder's hands; and he sought to have it canceled, thereby increasing the value of his own holdings. In 3,218, the Grey Creek Company charged that some certificates of stock had been irregularly issued, and had illegally come into the possession of Beshoar, and his refusal to surrender them for cancellation. The company prayed a decree that Beshoar be compelled to surrender them for destruction. All these three suits were ultimately consolidated, and tried as one case. There was no rule compelling the parties to replead, nor were the issues in the several suits in any wise changed by the order. Nothing further need be stated concerning the object of the suits, or the general averments of the various pleadings. This much

further must be stated, because it is of great gravity and importance in forcing the result: It will be observed nothing has been said concerning any statement in the pleadings as to the reason why the suit was brought by Beshoar, and why it was not brought by the Grey Creek Company, against Chappell. It is very evident, as a general proposition, that if Chappell had sold the stock of the company while acting as an officer or director of it, or had appropriated the proceeds of it while acting in any such capacity, he would be liable to answer to the company for whatever he might have received. It is equally true, if he had issued the stock without consideration, and the stock had ultimately come back into his possession, the company would have had the legal right to compel its surrender and cancellation, on making out a proper case. Beshoar was a stockholder, and, to the extent of his holding, interested in the affairs, management, and prosperity of the new company. His rights as a stockholder need not be here discussed, but they are referred to in this manner to emphasize the omission in his pleading. There is nothing in either of the complaints which he filed showing a demand on the officers of the Grey Creek Company with reference to the enforcement of the corporate rights, nor did he, as plaintiff, allege in either one of the suits anything which might operate by way of excuse for the omission of this request. There is nothing to show an attempt to secure action by the officers or board of directors of the company, or concurrent action with the other stockholders to compel those people to proceed. The twenty-first finding of fact is very specific and direct on this point. It likewise demonstrates that the directors of the Grey Creek Company, other than Chappell, were in no manner connected with the contract which Chappell had made with the Colorado Coal & Iron Company, and were perfectly free to act as they might be advised for the protection of the stockholders of the corporation which they represented. We quite concur with the court in its conclusion that the evidence does not show any such condition of affairs respecting the management and directory of the Grey Creek Company as tends to excuse the stockholder from preferring a request for corporate action.

What has been stated suggests the only two propositions which we deem it essential to discuss or decide. The first respects the interest in which the litigation is being prosecuted, and the second is the failure of the plaintiff to either plead or prove a cause of action on his behalf as a stockholder. If this litigation had been honestly instituted by a stockholder for the protection of his and other stockholders' rights, and was not so evidently a suit instigated by a rival company for its own interests, we should strive to be astute to discover some remedy for a very evident

wrong. The far-reaching and flexible nature of equitable powers might, with proper proof, and under other circumstances, enable us to do justice as between the stockholders of the Grey Creek Company and Chappell, its officer and director. But we have no inclination to struggle for this result, because it is a well-settled principle that whenever it is made to appear that the suit was not begun in good faith by a shareholder for the protection of his rights, but was in reality originated and prosecuted by another corporation for its own benefit, the court will consider what led the plaintiff to institute his suit, and, finding some other reason than a desire to protect stockholders' rights, will refuse to entertain the bill. *Forrest v. Railway Co.*, 4 De Gex, F. & J. 125; *Filder v. Railway Co.*, 1 Hern. & M. 489; *Belmont v. Railway Co.*, 52 Barb. 637; *Waterbury v. Express Co.*, 50 Barb. 157; *Camblos v. Railroad Co.*, 4 Brewst. 563, Fed. Cas. No. 2,331. Naturally, the cases respecting this proposition are limited, since the question could not often arise. It seldom happens that shareholders, otherwise than for the protection of their own interests, come into courts of equity to seek redress for wrongs done the corporation of which they are members. But, wherever it is apparent that this has been done, the courts have never hesitated to send the plaintiff out of court, and refuse him relief. In enforcing the doctrine, the courts do not attempt to balance the relative advantages to the plaintiff stockholder or to the company which have assumed the burden of the litigation for some benefit which they expect to derive from the judgment. It is enough that another company directs the suit and pays the costs. It would be very easy to demonstrate that in this particular litigation the balance of advantage accrued to the Colorado Coal & Iron Company, which is the controlling spirit in this litigation. The agreement which they entered into with Beshoar would give them control of a majority of the stock of the Grey Creek Company, and render it possible for them to enforce the agreement which they had made with Beshoar to secure a new lease on the Grey Creek property at a very large reduction in the rental. The property must have been of value to them, and the lease a gain, or the contract would never have been made. It may be conceded that Beshoar would likewise have been benefited if either of his two suits had been successful. In the one case a large amount of money would go into the treasury of the Grey Creek Company, and he would be entitled to his proportionate share of it; and in the other he would become substantially the only stockholder, and would therefore reap very much greater ultimate benefit than would have come to him if the total issue of 2,000 shares was adjudged valid. We are not permitted to speculate about where the preponderating interest lies. It would be a disadvantage to the Grey Creek Company, as a corporation, to reduce the rental which they

were entitled to receive for the use and occupancy of their property. This benefit would have inured to the Colorado Coal & Iron Company, which controls the litigation, and these two facts forbid this stockholder to maintain his present suit.

The other consideration is equally fatal. The plaintiff was without capacity to maintain the suit. It is too late now to insist that a stockholder, as such, is never without the right to file a bill for the protection of his interests, or even for the redress of what may be termed a corporate wrong. In the increasing diversity of corporate organizations, it not infrequently happens that the control and management of their affairs fall into the hands of unscrupulous persons, who do not hesitate to use the corporate powers to their personal advantage, and to the destruction of the rights of stockholders. This increasing danger and difficulty has often led to the institution of suits for the protection of stockholders. The powers of a court of equity are not often vainly sought to redress a manifest injury where the corporate authorities have refused to proceed. This is no infraction of the general rule that corporations must act by properly constituted authority and organization, and by corporate methods, and in corporate ways. The necessity of effort to procure such action has been settled by a series of well-considered cases. The question was set at rest in this state in an exceedingly well-considered and able opinion by the present chief justice of the supreme court. To the fullest extent, that learned court indorsed the doctrine of the English cases, and expressed its approval of the leading case in the supreme court of the United States. *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46; *Hawes v. Onkland*, 104 U. S. 450; *Foss v. Harbottle*, 24 Eng. Ch. 461; *MacDougall v. Gardiner*, 1 Ch. Div. 13; *Memphis v. Dean*, 8 Wall. 65. Tested by this rule, none of the suits brought by Beshoar can be maintained. His pleadings are totally wanting in all averments either of request or of excuse, and, being bills on behalf of a stockholder to redress a corporate injury, they do not state a cause of action. We might be inclined to disregard this defect, if the case, as he made it, contained the elements of an excuse for his failure. None were proven, and none exist. The court very properly found that none of the other directors or officers of the Grey Creek Company were concerned in the contract which Chappell made with the Colorado Coal & Iron Corporation, or had anything whatever to do with reference to those acts which Beshoar charges were a fraud on the Grey Creek Company. It was found that Beshoar made no request of the Grey Creek officers or directors to institute a suit against Chappell to compel him either to account for the stock, or the money which he had received from the sale of it. As Chappell was the only person concerned in the diversion of the funds, or in the appropriation of the stock, we cannot

presume that the Grey Creek Company, as a corporation, would have failed, on request, to institute the proper suit for the enforcement of the corporate rights. It was Beshoar's duty to show that he had exerted all means within his power to obtain by corporate action the redress of his grievances. The court must be satisfied that all honest and reasonable efforts were resorted to to the accomplishment of that end. Failing in this, he will not be permitted to maintain his suit. There is nothing in the present case which brings the plaintiff within the rule, and there is no testimony in the record which permits us to assert for his benefit what, under other circumstances, might prove operative as an excuse. The suit was not honestly instituted by Beshoar for his own benefit, and he was without capacity to maintain it. The judgment, as to him, must be affirmed. We desire, however, to state that this affirmation shall not be operative to conclude the Grey Creek Company, or any stockholder of that corporation, from instituting and maintaining such suit as they may be advised concerning this matter, providing otherwise the legal right still remains with them. Affirmed.

(6 Colo. App. 248)

COLORADO COAL & IRON CO. v. CARPITA.¹

(Court of Appeals of Colorado. April 8, 1895.)

DEATH OF EMPLOYE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—APPEARANCE OF ATTORNEY.

1. Where a miner leaves his room, and goes to a place of conscious danger, where he was not called by the nature of his employment, he is guilty of contributory negligence barring recovery for injuries received.

2. Where an action is brought under the general damage act, which requires proof of negligence, as contradistinguished from proof of a specific violation of some provision of the mining statute, and the plaintiff makes no attempt to prove that the mining boss was incompetent, or any disregard of the coal-mining act, but rests her case on the negligence of defendant in not maintaining a safe place for its employes, an instruction that the law requires the employment of a competent mine boss by the defendant is misleading.

3. Where the right of an attorney to appear is questioned upon evidently good grounds, it is the duty of the court to require the attorney to exhibit his authority.

Error to district court, Las Animas county.

Action by Anna Carpita against the Colorado Coal & Iron Company for damages for death caused by wrongful act of defendant. From a judgment for plaintiff, defendant brings error. Reversed.

D. C. Beaman, for plaintiff in error. J. J. Hendrick and John A. Gordon, for defendant in error.

BISSELL, J. A corporation commonly known as the "C. C. & I. Co.," who are the appellants, were the operators of a coal mine at Berwind, in Colorado, in the summer

¹ Rehearing denied May 13, 1895.

of 1892. On the 11th of July two men were killed in the main entry of the mine, about 400 feet from its mouth; and Anna Carpita, the widow of one, brought this action to recover damages for the death of her husband. The case does not abound in data which enable us to give a thoroughly exact description of the property, but enough, probably, to make the situation and the circumstances plain. The accident happened in the main entry about 400 feet from its mouth. Whether this entry was the continuation of an incline running to the surface, or reached by a shaft sunk from the surface, does not appear. The seam of coal was of an average thickness of five feet, and was covered at the top by a layer of bone coal, and its boundary is somewhat variously described by the witnesses. Some called it a soapstone, which is technically known as steatite, being a granular description of talc, closely resembling stone, which scales and disintegrates on exposure to the air. Other witnesses, apparently of somewhat larger experience, call it slate, which is an indurated clay, forming one of the alternating beds of the coal measures. Whether it be the one or the other, its common characteristics are very much the same. It is of a clay structure, hardened under pressure until it closely resembles rock. The witnesses agree that this material is much seamed and fractured, and, on the removal of the coal, moves and separates in a way which the miners term "slip." The bone coal is of a varying thickness, from a few inches to two or three feet, and hides the fractures or seams in the overlying roof. Sometimes these slips run parallel with the entry, when they are quite dangerous, and result in rock falls. Slips at right angles to the entry are seldom so dangerous, for the ends rest on what are termed the "ribs" or "pillars," consisting of the unmined coal which forms the boundaries of the entries. On the left of the main entry, as it is entered, at distances varying from 30 to 50 feet, rooms were run by the miners for the extraction of coal. There were some 20-odd rooms between the mouth of the main entry and a cross entry, which was some little distance beyond the room in which Carpita and his partner, Franza, were at work. Parallel to this main entry a back entry had been run from near the mouth, about 1,300 feet, to the cross entry. The rib or pillar which had been left standing between these two entries was from 30 to 60 feet thick. One of the main purposes of this entry was the ventilation of the mine, although it could be used, at the pleasure of the miner, as a traveling way, instead of the main entry, which was commonly used for that purpose. The main entry was generally timbered throughout its course. The extent and the character of the timbering were varied by the nature of the roof, regard being had both to its structure and solidity. There is

much controversy between the witnesses as to the timbering which had been done between rooms 4 and 5, which was the point of the accident. We need not settle the controversy, for the case will turn upon a legal proposition, unaffected by this conflict. When a fall occurs in this formation, it sometimes takes a shape which the miners term a "pot hole"; being a fracture usually square on two sides, and running at an angle up to a point in the roof, so that the rock is of conical shape when it drops. The original fall described by the witnesses was of this form. Some time in the afternoon a large break occurred in the roof, about 400 feet from the main entry, and some 6 or 8 tons of rock fell. It broke some of the timbers which were under it, and left a large section of the roof exposed. It was some 2 or 3 feet wide, and probably about 8 or 10 long. This fall hurt nobody. As soon as it happened, the mining boss and some of the laborers proceeded to remove the rock, and clear the way for the passage of the cars which carried the coal broken by the miners in the various rooms. The roof was examined and tapped by the boss, to determine its solidity; and, with the workmen which he called to his assistance, he proceeded to place a prop or stull, topped by a cap or cross bar, under the rock, to hold it while they were preparing and putting in such timbers as, in their judgment, might be necessary to securely hold the breaking roof. The regular timbering is described by the workmen as consisting of lags and cross bars, which seem to be what other miners usually call "posts" and "caps," as they are used in the drifts and levels of metal-producing mines. After this fall the cars necessarily stopped, and the miners were compelled to suspend work. After this work had been begun, Carpita and his partner, Franza, passed out through the main entry to the surface. They came back shortly, and went to their room, where they remained but a short time, when they again started to the surface. On arriving at the place of the fall, Franza passed on, while Carpita stopped, leaned up against the post or prop, and commenced talking with Lamb. Carpita could not have remained long before the accident. Franza had passed along a distance of less than 50 feet when there was a second squeeze or slide, which pressed the prop from under the overhanging rock, and a mass of it fell, and killed Carpita and Lamb, where they stood. The Carpita and the Lamb cases were argued together, and, while differing in some of their legal features, are dependent upon the same general facts for their history. This statement is substantially full enough to cover both cases.

It is an indisputable proposition that no cause of action arises where the decedent has been guilty of a negligence which contributed to the injury complained of. The doctrine of contributory negligence is well established in

this state, and the cases on this subject are numerous and uniform. *Railroad Co. v. Farrow*, 6 Colo. 498; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Kennedy v. Railway Co.*, 10 Colo. 493, 16 Pac. 210; *Railway Co. v. Wilson*, 12 Colo. 20, 20 Pac. 340; *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. 148; *Jackson v. Crilly*, 16 Colo. 103, 28 Pac. 331; *Railway Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348. The evidence demonstrates, beyond peradventure, that Carpita voluntarily, and without occasion, assumed the risk which caused his death. He had no business at the point where the accident happened. He was a miner employed in a room many hundreds of feet away from the point of the accident, and his labors only took him to the room in which he was employed. His right to leave his room and go to the surface may be conceded, but the concession will not aid the plaintiff. Had he gone to the surface, and remained there, he would not have been hurt. He had no right to linger in a place of danger, when he was not compelled to do it by the performance of required labor. Conscious, as he must have been, of the danger lurking in the falling rock, he was bound, in the exercise of ordinary prudence, to go to the surface. Miners, who work underground, should be conscious, and probably are conscious, of the perils of the mine, as those who go down into the sea are conscious of the perils of the deep. This knowledge imposes the duty of greater care. A still stronger reason is found in the circumstance that Carpita was not compelled to go under the place which the recent fall had demonstrated to be dangerous. There was another entry through which he might have gone to the surface. A miner will not be permitted to take a dangerous way, when a safe one is provided for him, and, if he be hurt, charge the company with a responsibility for the injury which ensues from his own imprudence. As soon as it was demonstrated that Carpita voluntarily went into a place of danger, the right of action was destroyed. It made no difference whether this testimony came from the plaintiff's witnesses or the defendant's. When there was no conflict, there was nothing left for the jury to determine.

A very considerable argument is built up on the section of the mining statute which gives a right of action to the widow and lineal heirs in case of a breach of some of the statutory requirements, or of any failure to observe any of those things which the statute prescribes. The suit was brought in the name of Carpita's widow. The evidence showed there were several children, and it is insisted that, since the right of action is given to the widow and lineal heirs, they must be joined in the suit. What the rule would be in a case unmistakably founded on a violation of the statute, we do not undertake to determine. The statute gives a right of action for a violation of what it prescribes, but this fact does not destroy the right to sue for the injury occasioned

by the death of the decedent under the other damage acts which are on the statute books. We do not intend to decide whether it would be possible to join a cause of action under the general damage act with one founded on a violation of the coal-mining act. There are cases which intimate the plaintiff may recover on proof of facts which establish a cause of action at the common law, even though the complaint contain averments which are only material and relevant in an action brought for a violation of a statute of this description. This case comes very closely within that line of decisions, and the allegations which tend to show a violation of the mining act can be rejected as immaterial, and enough will be left to warrant the introduction of proof tending to show negligence on the part of the company, and the right of the plaintiff to maintain her suit. If it is ever proper to join the two causes of action, they should be separately stated, and each should contain enough to show a cause of action on the theory which may be adopted. The necessity to refer to the pleading springs from the circumstance that the trial court failed to observe this distinction in its instructions to the jury. Some of them were apt statements of the law controlling the case, when it is viewed as an accident under the general damage act, which requires proof of the company's negligence, as contradistinguished from proof of a specific violation of some provision of the mining statute. The plaintiff made no attempt to prove a disregard of the provisions of the coal mining act, but rested the case on the evidence which tended to show the company's negligence in maintaining a safe place for its workmen, and in repairing it when it was found to be insecure. The jury may have been misled by the court's suggestion in this particular; and when they were told the company was required by the law to employ a competent mine boss, and they concluded that his acts with respect to the maintenance of the roof and its repair, after the rock had fallen, were unskillful and negligent, they were compelled to find for the plaintiff, regardless of the general question of negligence or want of skill. The plaintiff did not attempt to show the boss to be incompetent or unskillful, or lacking in experience, and in no manner brought the case within what the act requires in respect to this matter. This suggestion will be sufficient to guide the court in the subsequent trial of the case. Where the case is one plainly within the terms of the act, and the real basis of the action is the alleged violation of its provisions, possibly the act alone must be looked to, to ascertain the remedy, and to determine the parties who may sue. The present action is not within that class. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766.

While it may not influence the ultimate determination of the suit, one of the matters complained of by the appellant requires attention. After the commencement of the trial, and through the examination of one of the

witnesses for the plaintiff, it transpired that the widow of the deceased was living in Italy, and had never been in this country. The action was begun about 11 days after Carpita was killed. This would appear to demonstrate the impossibility to procure authority from the widow to bring the action before it was actually commenced. The defendant asked leave to call on the plaintiff's attorney to show his authority, which was denied. What may have been done respecting this matter since, we do not know. Where the right of the attorney to appear is questioned, not capriciously, but upon evidently good grounds, it is the duty of the court to require the attorney to exhibit his authority. The court did not proceed according to this well-established rule, and, while it is possible the suit may now be prosecuted regularly, we think the court erred in denying the defendant's application. Whether anything further should be done in the matter, we are unable to determine, and the course to be taken must be settled by the nisi prius court. For the errors discussed, and resolved against the plaintiff, the judgment must be reversed, and the case remanded for a new trial. Reversed.

(6 Colo. App. 256)

COLORADO COAL & IRON CO. v. LAMB
et al.¹

(Court of Appeals of Colorado. April 8, 1895.)

MISJOINDER OF PARTIES — DEATH OF EMPLOYEE —
CONTRIBUTORY NEGLIGENCE — FELLOW SERV-
ANT — MEASURE OF DAMAGES.

1. An objection to a misjoinder of parties plaintiff, when such appears on the face of the complaint, can only be raised by demurrer.

2. When plaintiff's intestate was killed by the falling of a roof in defendant's mine, where he was, during a temporary suspension of work, conversing with a fellow workman, the question of his contributory negligence was for the jury.

3. In an action against a mining company, where it appeared that plaintiff's intestate, while engaged in removing debris from the mine, caused by a fall of the roof, was killed by a second fall of the roof, which could have been avoided, and plaintiffs were allowed to prove the condition of the roof previous to the first fall, a failure in the charge to distinguish between the proximate and remote cause of death, and to instruct the jury to disregard the proof respecting the condition of the roof previous to the first fall, is error.

4. When it appears that the decedent was killed by the negligence of the mine boss appointed under the coal-mining act of 1885, which compels his appointment, makes it his duty to attend to the mine and make it safe to work in, and subjects him to punishment in case of failure, and it does not appear that he had any authority over the workmen, other than that prescribed by statute, he and decedent are fellow servants, and the company is not liable for his negligence.

5. In repairing a place known to be insecure, a workman takes upon himself the added risk incident thereto.

6. Where all the facts as to the condition of a roof in a mine, which fell on plaintiff's decedent, are before the jury, opinion evidence as to its condition as to safety is inadmissible.

7. In an action for injuries causing death, it is error to permit evidence to be given re-

specting the possibilities of promotion of plaintiff's decedent.

8. In an action by the parents for the death of a son past his majority, the age of the respective parties, the earnings of deceased, and the contributions previously made to their support, or proof of an existing practice of contribution, is a proper basis on which the jury may compute damages.

Error to district court, Las Animas county.

Action by James and Isabella Lamb against the Colorado Coal & Iron Company for the death of their son, caused by the falling of a roof in defendant's mine. Verdict for plaintiffs. Defendant brings error. Reversed.

D. C. Beaman, for plaintiff in error. J. J. Hendrick and John A. Gordon, for defendants in error.

BISSELL, J. The accident by which Carpita met his death killed George Lamb. It is completely detailed in the statement made in the preceding case. Iron Co. v. Carpita, 40 Pac. 248. We deem it wholly unnecessary to repeat the facts, and regard it as sufficient, for the purposes of this decision, to refer to that opinion, and add such matters as are essential to emphasize the distinction between the two actions, and to make plain what is necessary for an adequate discussion of those things which are essential to the disposition of this controversy. Lamb was a driver employed to haul coal which had been mined in the various rooms to the mouth of the pit. He was at work when the fall happened. It stopped the moving of the cars, and necessarily suspended his labors until the rock was removed. As soon as the roof fell, the mine boss, Allen, with some other workmen, proceeded to do what was necessary to repair the roof and make it safe. This work involved several things. In the first place, the loose rock had to be shoveled away, and the timbers framed and put in place. In the meantime, to guard against any possible danger of a subsequent fall, Allen put a prop and a cap at the point where the fall had occurred, to sustain the roof while the rock was being taken away and the timbers framed and set up. Lamb, the driver, assisted in the removal of the rock. There is testimony tending to show this was a part of his duty as a driver, although there was no evidence of an order directing him to proceed. This does not seem to be of much consequence, since it was evident the mine boss knew he was at work, and made no objection to his assistance. While he was there assisting in this labor, there was a second fall from the roof, which caught and killed the two men. There is a good deal of conflict in the testimony respecting the condition of the roof at this time, and about the adequacy of the means adopted to hold it while the first fall was being taken away. Were this the only question involved, the verdict of the jury would dispose of it. Other errors have crept into the record, and the case must be examined in some other of its aspects. The complaint is open to the same criticisms

¹ Rehearing denied May 13, 1895.

which were, in an incidental way, suggested in the preceding case. It is really difficult to determine the theory of the pleader who brought the suit. The bulk of it consists of allegations appropriate to an action under the general damage act, while it contains averments only appropriate to an action based on a violation of the coal-mining act. It was not aptly attacked in the court below, for the demurrer was a general one, and no motion was made to strike out the parts which tended to establish the company's neglect of duty, as defined by the act. When the case goes back for another trial, as it must, the complaint should be reformed to state a cause of action under the general act, or to state one under the coal-mining act, as the pleader may be advised. Should he attempt to pursue the course which some authorities indicate, and state a cause of action under both, the question as to the joinder of the two causes of action could be raised in the manner pointed out by the Code. We do not intend to decide whether this can be done, for the case does not legitimately present this precise question, and we are averse to expressing an opinion about a matter not properly presented by the case. There might be a question of considerable difficulty about parties, but it is neither anticipated nor disposed of. The jury were not instructed respecting the duties of the company under the coal-mining act, as was done in the *Carpita* Case. This trouble is therefore removed from our present consideration.

The action was brought in the names of the father and the mother, whose relationship was stated, and their right of action based on this fact. The defendant demurred on the general ground of a failure to state facts sufficient to constitute a cause of action, but it did not demur because of a misjoinder of parties plaintiff. This question was sought to be raised by answer. That part of their plea was stricken out, on motion, to which an exception was saved. When the plaintiff started to put in his proof, the defendant objected on the ground of a misjoinder, still insisting that the plaintiffs could not sue jointly. Whether this would be true under the coal-mining act, we do not decide. The objection to the misjoinder is quite easily disposed of by reference to the Code, which requires this question to be raised by demurrer when the misjoinder appears on the face of the complaint, and gives the defendant the right to raise it by answer only in those cases where the complaint fails to show such misjoinder. As we construe the Code, where this pleading shows persons are joined who have no right to maintain a joint action, the defendant must demur, and thus save the question; otherwise he waives it.

The circumstances pertaining to Lamb's death do not show such contributory negligence on his part as to enable us to say, as a matter of law, that his negligence contrib-

uted to the injury. He was probably at work doing what his duties required, and we are unable to conclude his death resulted from his temporary suspension of work while conversing with *Carpita*, who was killed at the same time. This question of the negligence of the deceased was submitted to the jury under apt instructions, which correctly stated the law of contributory negligence, so far as it was applicable to the present case, and the finding of the jury concludes this question. There is much more difficulty respecting the instructions covering the question of the duty of the company with respect to the roof. As abstract propositions of law, the court's statements would not be subject to very much criticism; but, as applied to the present case, they do not serve to enlighten the jury respecting the duty of the company, and what, as a matter of law, would be negligence on their part in this regard. From the commencement, the case seems to have been tried on an erroneous hypothesis. The complaint, and the evidence offered to support its allegations, confused the general duty of the defendant respecting the care of its mine with their particular duty which it was attempting to discharge when Lamb was killed. The plaintiff was permitted to prove the general condition of the roof antecedent to the accident, and on this evidence the jury were instructed as to the company's duty to keep the mine in a safe condition for the protection of the workmen. The trouble probably arose from the difficulty of deciding what may be taken as the proximate cause of the injury, and those remoter matters which may not be weighed in that connection. There is no subject more difficult of apprehension, either by the lay or the professional mind, than this one of proximate cause. Many courts, in all manner of cases, have attempted to lay down definitions respecting it since the day when the "squib was thrown into the market place." Lamb was not killed because the company had failed, if they did fail, to keep the roof of the entry in a safe condition. The first fall of rock did not kill Lamb. His death resulted from a succeeding fall, which might have been avoided, had proper means been used for the purpose. In this the witnesses agreed. There is some dispute respecting the situation of the roof, and it is not made clear whether either end of it rested on the rib, but it is tolerably certain two or three additional props would have averted the disaster. This is not an absolute demonstration, from the evidence, but the witnesses all concur in the opinion that the roof could have been adequately supported by props until the final sets of timber were completed and put in place. Manifestly, if this be true, the original negligence did not occasion the injury sued for. There was an absence of an unbroken connection between the alleged negligence of the company in the care and maintenance of the roof, and their want of care in

propping it up, which brought about the injury. *Railway Co. v. Kellogg*, 94 U. S. 469; *Lannen v. Gaslight Co.*, 44 N. Y. 459; *Rogers v. Inhabitants of Newport*, 62 Me. 101. It would not serve a useful purpose to cite the numerous cases which are illustrative of this general doctrine. They all agree the defendant is responsible only for the natural and probable consequences of a wrongful act. The judicial labor is always spent in the search for what the learned jurists call the "*causa causans*," rather than the "*causa sine qua non*." It is especially difficult for the ordinary jurymen to disregard what appear to be the causes, however remote, which have some sort of apparent connection with the actual thing which occasioned the injury. When the plaintiff was permitted to prove the antecedent condition of the roof, and the jury concluded, if they did, the company had been negligent respecting its care and maintenance, they would not be very astute to find in the failure to prop the roof while the repairs were being made the real cause of Lamb's death. This question is fairly saved by the request for instructions, even though prompt and apt objections were not always interposed to the introduction of the testimony. Much of the evidence was admissible in order to show the condition of affairs when the repairs were begun. But the jury should have been directly instructed to disregard the proof respecting the condition of the roof of the entry antecedent to the first fall, in determining the question of negligence, and the cause of the injury. The remote and the proximate causes should have been aptly and carefully distinguished, and although, probably, it might have been quite impossible to eliminate the whole difficulty, the law should have been carefully stated to the jury.

Another question fairly presented calls for some additional statement to precede the general discussion of the principle. Robert Allen was the mine boss appointed under the statute. He was a man of many years' experience, and his competency was not attacked by any of the plaintiffs' witnesses. It was he who directed the placing of the prop and cap under the roof to support it while they were removing the first fall, and getting the timber sets ready for a permanent support. Lamb had no connection with Carpita, except as a fellow laborer in the mine, engaged in a different employment. He was a driver occupied in hauling coal to the mouth of the pit. He was engaged in the work of removal when the second fall came and killed him. The exact duties of a mine boss, aside from those described by the coal-mining act of 1885, are not disclosed. It was not shown that the boss had any control over the men in the mine, other than what must necessarily come to him from the discharge of his statutory duties. Whether he had power to employ or discharge them is not a matter of evidence, nor is his authority either over the

mine or over the men established. It must, however, be coincident with the authority given him by the statute. Somewhat more than a general reference must be made to the coal-mining act of 1885, for much reliance by way of defense is placed on it by the appellants. It contains many provisions obligatory on the mine owner and the miner. Relative rights and obligations are imposed on each. The mine boss is an individual so designated by the statute, who must be employed by the mine owner, and put in charge, with reference to its safety and its security. He has entire supervision of the whole system of the ventilation of the mine, likewise of its entries, drifts, and rooms, and all machinery and appliances which are used in its operations. He is bound to make his reports regularly to the mine inspector, and is subject to severe penalties for any violation of the act. Of necessity, this would include any failure on his part in the supervision, inspection, and care which the statute requires. Miners are likewise given the right to inspect the mine and machinery, either in person or by committee, conjointly with the owner, or otherwise, as they may choose, and to take such steps as their prudence may dictate to secure their own safety and prevent accidents. In another section a right of action is given to certain designated parties in case they sustain damage by reason of any failure to comply with the provisions of the statute, or because of any violation of its requirements. The act is identical, in the particulars involved in this suit, with the one in force in Pennsylvania, and regulating the operation of coal mines in that state. Manifestly, this question is new to the jurisprudence of the state. There is probably no subject of the law which has been developed with greater learning, illumined by more persuasive arguments, and yet rested on more diversified foundations than the law of negligence, as applied in actions brought to recover damages for injuries sustained because of the negligence of other persons employed by the common master. The large and constant increase in the mining, manufacturing, and business interests of this and other commercial countries has occasioned a corresponding growth of aggregated and corporate interests, which are necessarily intrusted to the various instrumentalities of agency for their management and control. This has brought into peculiar notice, and under a broad and enlarged discussion, the question of who is a fellow servant, for whose negligence the master may not be called on to respond. Many of the elements which have sometimes been applied to settle this question are in reality but items of evidence, and furnish no reliable guide by which the main inquiry, "Was the master negligent, and is he responsible?" can be settled. Where the proof shows the fellow servant to have been in control of the men under him, we cannot logically insist the master shall, under all circumstances, be liable for his negligence, even

though it has occasioned the injury. Authority does not dispose of the matter. The inquiry still remains, was the master negligent? and the courts must still ascertain whether the fellow servant occupied such a relation to the master and to his collaborer as that his negligence is to be taken as the negligence of the master. What is known as the Ross Case, 112 U. S. 377, 5 Sup. Ct. 184, is one of the most striking illustrations of the cases of this class to be found among the decisions of the best courts of the country. To a good many of the profession, it appeared like a departure from the established law, and to amount in fact to a radical modification of the rule respecting fellow servants. Of course, most courts yielded their judgment to that of the very distinguished tribunal which pronounced it, although it became law by the judgment of a bare majority. When this case was cited with approval by the present learned chief justice of our supreme court, in *Railroad Co. v. Discoll*, 12 Colo. 520, 21 Pac. 708, he very happily chose, as an illustration of the basis on which the Discoll Case was put, a quotation which is very abundantly sustained by the principle underlying the law, and expressly approved by the later case, which so largely modifies and interprets the Ross Case. It must always be true that wherever the individual whose negligence occasioned the injury to the servant stands in the place of the master, and is in reality his alter ego, his negligence is the negligence of the master, who must answer in damages for the injury which his neglect has occasioned. This view is most elaborately presented in a very able and exhaustive opinion by Justice Brewer in *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914. This case has substantially gone back to the doctrine so perfectly expounded in the various opinions expressed in the argument before the house of lords in *Wilson v. Merry*, 1 L. R. H. L. Sc. 326. In the chancellor's opinion, he says the liability does not depend on the question whether the workman was or was not, in any technical sense, a collaborer. The true rule must be found in the solution of the question whether there has been negligence on the part of the master in that with reference to which he has contracted with the servant. The Scotch case undoubtedly goes further with respect to the nonliability of the master for the negligence of the fellow servant than the more modern American cases, of which the Baugh Case is a striking example. The fundamental question always remains whether the individual whose negligence has occasioned the injury stands in such relation to the master that his acts can be deemed a breach of the contract which he has made with the servant. This being resolved in favor of the plaintiff, he may recover. We are not unmindful of a very broad distinction between those cases which show negligence in providing a safe place for the servant to work in, and safe machinery for him to use in his labor, and those

which concern the general operations of the business in which the workman may be engaged. It has been very generally held, the master may not escape liability on proof that the injury came because of the negligence of a fellow servant, who was intrusted with the duty of providing a safe working place for his fellow servant. *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Ford v. Railroad Co.*, 110 Mass. 240; *Car Co. v. Parker*, 100 Ind. 181; *Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423. This exception to the general doctrine is not based on any distinction which proceeds from the status or the relation which the one servant bears to the other. It rests on the impregnable foundation that, since the master is bound to provide a safe place in which the servant may work, whoever may be intrusted with the performance of this duty stands in his place, and, for all practical purposes of responsibility and duty, is the master himself. Consequently his negligence is the master's negligence, and he may be holden. As we view this case, it does not come within the exception. The Pennsylvania cases undoubtedly hold the mining boss to be a fellow servant with the other laborers in the mine. They do not permit any recovery by the injured person where the case shows the injury was occasioned by the negligence of the mine boss. The court rests these cases on the coal-mining act, which in Pennsylvania, as in Colorado, has much to do with the duties and responsibilities of mine owners and employes. *Coal Co. v. Jones*, 86 Pa. St. 432; *Canal Co. v. Carroll*, 89 Pa. St. 374; *Reese v. Biddle*, 112 Pa. St. 72, 3 Atl. 813; *Coke Co. v. Roby*, 115 Pa. St. 364, 8 Atl. 593. Thus far the Pennsylvania cases do not infringe the rule respecting the liability of a master for the negligence of a fellow servant, because those are cases which grew out of the performance of his work by the fellow servant. It was the manner in which the work was done which occasioned the injury complained of in the *Lineoski* Case, and in this respect it is analogous to the one at bar. *Lineoski v. Coal Co.*, 157 Pa. St. 153, 27 Atl. 577. There the evidence tended to show there had been a good deal of leakage for some months in the roof of the mine, indicating a large collection of water at some point immediately contiguous to the roof. According to the evidence, the roof was very much disturbed and shaky, and it ultimately fell, flooded the mine, and killed a great many miners. The case tended to show notice of this condition had been given to various persons in charge of the property, and the mine boss, but he had neglected to make the repairs which were necessary to its safety. The court held the mine boss a fellow servant, and that this fact would excuse the company, which was adjudged not liable. The opinion was put on the precise ground of the equality of the workman and the mine boss under the statute which compelled the appointment of

the boss, and defined his duties. If we should follow the Pennsylvania decisions, we should be compelled to hold the mine boss, Allen, to be a fellow servant with Carpita and Lamb, and, even though the jury might find Allen negligent in the performance of his duty, the company might not be charged. We confess, our personal convictions approve this decision. We are unable to see how it is possible to compel a company to employ a mine boss, upon whom are laid the responsibility and the duty by statute to attend to the mine and its safety as a place to work in, clothe him with full authority and power in this respect, and subject him to punishments and responsibilities in case of failure, and then hold the master responsible for his acts. He is in no sense the representative of the master, from whom the statute attempts to take entire control of this part of his mining operations. The master may supervise him, and he may, so far as may be, direct such changes to be made as his judgment indicates to be necessary; but when the statute put the control of this particular matter into the hands of the boss, and left to his judgment both the question of safety and the means to be used to that end, we are unable to see how he is, in any sense, either as vice principal or otherwise, the representative of the master, or how he can stand in any other relation to his co-laborer than that of a fellow servant. The evidence is entirely silent with respect to any matters which tend to show that the mine boss had any powers of control, or any authority to employ or discharge, which are so frequently used to determine the question whether the person whose conduct is under investigation is or is not a fellow servant with the one who was injured. There is nothing in the record which discloses his relation to the company to be other than what was derived from his statutory authority. Whether he owed a duty to the company, or had any power from it, by virtue of the terms of his employment, we are not informed. Under these circumstances, we must conclude he was a fellow servant.

There is another principle which, to our minds, is of great and governing importance in this regard. There is a wide difference between providing a safe place for the servants to work in, and putting a place already found to be insecure in condition for the resumption of labor. If it happened to be true the entry was insufficiently timbered and insecure, according to the judgment of the jury, when the first fall occurred, and nobody had been injured, the master must undoubtedly have had the right to put the place in shape for the resumption of labor. He had the right to put an insecure place into a safe condition. Laborers who were employed to aid in this effort took upon themselves whatever of added risk might have come from the then situation of the entry. It is a most undoubted principle that, where a piece of property is out of re-

pair, the men who are employed in making it safe take upon themselves whatever of added risk comes from the existing condition of the place or the work. *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433; *Porter v. Coal Co.*, 84 Wis. 418, 54 N. W. 1019; *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. 497; *Fraser v. Lumber Co. (Minn.)* 47 N. W. 785. Under these circumstances, it is plain, if Lamb was employed to assist in the work of making the roof safe for the miners, he took upon himself the risk which might accrue from the circumstances. With respect to the negligence or the care, the judgment or the imprudence, of the mine boss, in propping the roof up, he was, as to him, a co-servant; and, even though the jury might have been satisfied that the mine boss was negligent and failed to use proper care, the plaintiff could not recover.

A ruling made by the court respecting the introduction of testimony calls for attention. Whether, standing alone, it would be enough to reverse the case, we do not decide; but it is clearly a rule of evidence, and is noted to prevent the recurrence of the error. While the plaintiff was on the stand, he was asked whether, in his opinion, the roof was properly secured at the time the deceased was at work. This was not a case which called for expert testimony on this subject. The answer of the witness, which was naturally adverse to the company, tended to determine the thing which was the very essence of the action, to wit, the negligence of the company. This was a question for the jury to determine, under all the evidence. It was a matter which, when the facts were before them, they could as well decide as the witness himself; and the case was not brought within the rule which permits the opinions of witnesses to be given to the jury in place of the facts on which those opinions must, of necessity, be based. *Railroad Co. v. Wilson*, 12 Colo. 20, 20 Pac. 340; *Spiva v. Mining Co.*, 88 Mo. 68; *Lineoski v. Coal Co.*, 157 Pa. St. 153, 27 Atl. 577.

Another matter to which our attention is directed, and on which error is predicated, springs from the proof which the plaintiff offered respecting what he insisted were the possibilities of promotion and advancement for his deceased son. The company promptly objected, but the court permitted the plaintiff to prove the different classes of employes which ordinarily work in a coal mine, and the usual wages which they receive. Such proof is altogether too problematical and uncertain as a basis of damages. There are always possibilities of promotion and advancement for every person. Whether any given person will reap the harvest depends on his personal qualities, his industry, his zeal, and the duration of his life. It is impossible, in the nature of things, for proof to be introduced which shall cover the various elements in the problem. As courts

have held in similar cases, all evidence of this description is entirely inadmissible. *Railroad Co. v. Elliott*, 149 U. S. 286, 13 Sup. Ct. 837.

Only one other matter remains to be considered in order to dispose of all the important propositions which have been suggested, and to guide the lower court in the subsequent trial. This relates to the measure of damages. It will be remembered, this is a suit brought by the parents to recover for the injury which they sustained in the loss of a son who had passed his majority. When the suit is conceded to be brought under the general damage act, there can be little doubt of the right of the parent to recover for the pecuniary injury which has been sustained. There is a good deal of difference in the rule adopted in different states respecting this right, and in the limitations which restrict the damages. Whenever statutes of this description are in force, it is almost universally conceded, the plaintiff may recover on proof of facts tending to show probable loss because of the death. What proof may suffice in the one case is not always deemed sufficient in another. *Houghkirk v. Canal Co.*, 92 N. Y. 219; *Railroad Co. v. Keller*, 67 Pa. St. 300; *Richmond v. Railway Co.*, 87 Mich. 374, 49 N. W. 621; *Dalton v. Railway Co.*, 4 C. B. (N. S.) 297; *Potter v. Railroad Co.*, 22 Wis. 615; *Birkett v. Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Scheffler v. Railway Co.*, 32 Minn. 518, 21 N. W. 711; *Railway Co. v. Compton*, 75 Tex. 667, 13 S. W. 667; *Tiff. Death by Wrongful Act*, §§ 167, 172, 174; *Milling Co. v. Sharp* (Colo. App.) 38 Pac. 850. The difficulty experienced respects the proof offered to show the pecuniary injury. It is not generally laid down that tables recognized as authority by which to settle the expectancy of the lives of the plaintiff and the deceased must be introduced in order to give the data on which to compute the loss, and furnish some basis on which the jury can rest their calculation. It is often slender, and generally unsatisfactory. When the age of the respective parties is established, the earnings given, the contributions which have been theretofore made stated, or any proof offered of an existing practice of contribution, enough has been laid before the jury to warrant them in computing, according to their own judgment, the loss which has been suffered. These data were furnished in the present case. The evidence tended to show that the son had contributed his wages to the general fund for the support of the family, antecedent to his death, and in other respects the proof was sufficient to furnish a basis on which the jury might legitimately act.

All of the various errors complained of have been considered, and we conclude the case was not properly tried. The judgment must be reversed, and the case remanded for a new trial. Reversed.

(11 Utah, 344)

WHITTEMORE v. COPE et al.

(Supreme Court of Utah. April 27, 1895.)

STATUTE OF FRAUDS — PAROL PARTITION OF LAND — RATIFICATION BY MINOR HEIRS — EVIDENCE — STARE DECIS — ADVERSE POSSESSION — LIFE TENANCY.

1. A parol partition of land between coheirs, carried out and followed by actual possession in severalty of the several parcels, will be enforced, notwithstanding the statute of frauds, on the ground of part performance, when the partition is equitable, and the parties acted understandingly.

2. Though, at the time of a parol partition of their father's land, two of the sons were minors, if after reaching majority, and knowing the circumstances of the partition, they retained possession of, exercised exclusive dominion over, and sold the parts allotted to them, and asserted no claim to the lands allotted to the other heirs, they cannot repudiate the partition.

3. A person selected to make a parol partition of lands may thereafter testify as to the fact of partition.

4. Where the facts are the same as in a previous case, though the parties are different, an appellate court will adhere to its previous decision, there being nothing manifestly erroneous therein.

5. Where a surviving wife has a life estate in her husband's homestead, the character of her possession may be changed by a parol partition, to which she and the heirs of the husband agree, so as to make her possession adverse.

Appeal from district court, Third district; before Justice S. A. Merritt.

Action by C. O. Whittemore against Thomas H. Cope and others for the recovery of a share of the estate of Thomas H. Cope, deceased. From a decree based on a referee's report, in harmony with the cross complaint of defendants, plaintiff and defendant George H. Cope appeal. Affirmed.

C. O. Whittemore, in pro. per. S. P. Armstrong, for appellant George H. Cope. William, Van Cott & Sutherland and Bennett, Marshall & Bradley, for respondents.

KING, J. Plaintiff avers in his complaint that one Thomas H. Cope died intestate in 1864, and at the time of his death was the owner of lot 5, block 3, plat "B," Salt Lake City, and lot 16, block 18, Big Field survey; that said lots were distributed by a decree of the district court to the defendants Thomas H. Cope and George H. Cope, as his sole surviving heirs; that, prior to the distribution, Thomas H. Cope, claiming to be sole heir, sold lot 16 to one Thomas Jack, through whom defendants Mary Ann Jack and B. S. Young claim title; that defendant Thomas H. Cope is the owner of an undivided one-half part of said lot 5, and defendants Jack and Young are owners of an undivided half of lot 16. Plaintiff further alleges that he and George H. Cope are each the owners of an undivided one-fourth of said lots, and that, if Jack and Young are entitled to all of lot 16, they are entitled to their full share of the estate out of lot 5. Partition is prayed for according to the rights of the parties. George H. Cope answered, admitting the allegations of the complaint to be true, and asked for

partition. The other defendants answered, and denied specifically complainant's averments, except as to the death of Thomas Cope, and pleaded the statute of limitations, and at the same time, filed a cross complaint. They there allege that Thomas H. Cope is the owner in fee and in the possession of said lot 5, and Mary Ann Jack is in the possession and the owner in fee of the north three acres of said lot 16, and B. S. Young is the owner in fee and in the possession of the south two acres of said lot; that in 1864 said Thomas Cope had a possessory right only to said lots, and to lot 2, block 14, and lot 4, block 3, in Salt Lake City; that in said year he died, having no title to said land, and said Thomas H. Cope, George H. Cope, Janet Cope, and Margaret Cope claimed to be his only heirs; and that in 1867 an oral partition was made, which was fair and equitable in all respects; and it was so agreed (and partitioned accordingly) that Janet should own lot 5, Margaret lot 4, Thomas H. lot 16, and George H. lot 2; that, in pursuance of said agreement and partition, each person took possession of the lot set apart to him or her, and held sole possession of the same under the partition, and ever after each of said persons claimed only the parcel of land so partitioned to him or her, and claimed the exclusive right, title, and possession thereto, free and clear of any other person; that, since said partition, several possession has been held thereunder, and it has been acquiesced in and ratified by the parties thereto; that said lot 5 was conveyed by the United States to the mayor of Salt Lake City, in trust, and by said mayor was conveyed to Thomas Jack, as administrator of the estate of Thomas Cope, deceased, in trust for his heirs, and thereafter said administrator duly conveyed said lot by deed to Janet Cope and Thomas H. Cope, the latter being named as one of the grantees, at the request of Janet; that in 1891 Janet Cope died testate, Thomas H. being devisee of said lot 5, and her will was duly admitted to probate; that, from the time of said partition to her death, she held sole and exclusive possession of said lot 5, and since 1893 has paid all of the taxes thereon, and greatly improved it, and said Thomas H., from the proceeds resulting from the sale of lot 16, and with her acquiescence and consent, constructed a house on her lot; that said devisee, since her death, has held sole and exclusive possession thereof, and has paid all taxes thereon; that one Conk, patentee of the greater part of lot 16, in recognition of said partition, conveyed said part to Thomas H., and by mesne conveyances the remainder of said lot 16 was conveyed to him; that in 1884 lot 16 was sold by Thomas H. to Thomas Jack, and in 1885, by decree of the district court, the latter's interest was vested in defendant Mary Ann Jack, who conveyed in 1887 the two south acres to William Leggett, and he sold the same in 1890 to defendant B. S. Young; that valuable improvements and houses have been erected

on lot 16 by said persons. The complaint then alleges adverse possession of lots 5 and 16; that said Margaret Cope never questioned, nor does she now, the validity of said partition; that by reason of the same, and the ownership acquired thereunder, she sold and conveyed said lot 4, appropriating the proceeds to her exclusive use; that her son, said George H. Cope, with full knowledge of said partition, the holding in severalty thereunder, the conveyance by his mother, and the improvements placed upon lots 5 and 16, and their great increase in value, in 1888 conveyed all of said lot 2 by warranty deed to one Showell, and appropriated the whole of the purchase price, and this was done by reason of the ownership acquired by him under said partition, which it is alleged was never questioned until the bringing of this suit; that said lots so conveyed by Margaret and George H. are beyond the reach of said persons claiming to be heirs of said deceased, and the grantees have good and valid titles thereto; that in 1890 said George H. attempted to convey an undivided one-fourth interest in said lots 5 and 16 to plaintiff, and that at the time of taking the conveyance he knew of all of the facts connected with the partition; that no consideration was paid by the plaintiff, but it is averred that he agreed to bring suit for the recovery of a portion of said lots, and to pay the costs of the action in consideration of said conveyance. Defendants prayed that the title to lot 5 be quieted and decreed to be in fee in Thomas H. Cope, and that the title to lot 16 be quieted and decreed to be in the other defendants. The cause was tried before a referee, whose findings of fact were in harmony with the cross complaint. He not only found that a parol partition had been made, but also that the plea of the statute of limitations was well taken. A decree was duly entered by the trial court, based upon the referee's report, and from the judgment of the court plaintiff and defendant George H. appeal. After the appeal had been perfected, the appellants stipulated in writing that the appeal, so far as it affected lot 16, should be dismissed, and the judgment of the district court relating thereto affirmed. Appellants have assigned numerous errors, but concede, in their brief, that the only questions for determination are embraced within the following interrogatories: (1) Did Janet Cope hold lot 5 adversely? (2) Is a parol partition of lands valid, and was the deposition of the witness Moon (offered to prove the partition) admissible? (3) Did the parties acquiesce in and ratify the parol partition (if made)?

We will first consider the points involved in the second question. Appellants contend that a parol partition of lands is within the statute of frauds, and therefore invalid. Section 2831, Comp. Laws Utah, provides "that no estate or interest in lands, * * * nor any trust or power relating thereto, shall hereafter be created, granted, assigned; sur-

rendered or declared unless by act or operation of law or by deed of conveyance in writing subscribed by the party," etc. In support of the appellants' contention, 1 Washb. Real Prop., and Browne, St. Frauds, are cited. In the first-named work it is stated that no parol partition can be effectual unless accompanied by deeds from one cotenant to the other, inasmuch as the statute of frauds applies to such cases. If this means that no rights can be acquired by coparceners either in equity or law under a parol partition, when they have followed the partition by actual possession in severalty, we cannot assent to the doctrine. Undoubtedly, this view has been entertained by the English courts, and many of the American courts, as well as text writers of respectability; but we think the better rule to be the one which is most equitable, viz.: "That a parol partition, carried out and followed by actual possession in severalty of the several parcels, is valid, and will be enforced, notwithstanding the statute of frauds, on the theory that it has been removed from its operation by part performance." 17 Am. & Eng. Enc. Law, p. 668, and cases cited; Freem. Coten. § 402; Tomlin v. Hilyard, 43 Ill. 300; Ebert v. Wood, 1 Bin. 216; Welch v. Thompson, 39 Ga. 559; McMahan v. McMahan, 13 Pa. St. 376; Ayres v. Jack, 7 Utah, 249, 26 Pac. 300. "While the legal title might not, perhaps, be considered as passing by a parol partition, unless after a possession sufficiently long to justify the presumption of a deed, yet the parol partition, followed by several possession, would leave each cotenant seized of the legal title to one-half of his allotment, and the equitable title to the other half, and, by a bill in chancery, could compel from his cotenant a conveyance of the legal title according to the terms of the partition." Tomlin v. Hilyard, 43 Ill. 302. In the case of Ayres v. Jack, supra, the oral partition of lands herein described was sustained. After Thomas H. had disposed of his lot (16) to Jack, Ayres and others thought they discovered a defect in the purchaser's title, and obtained a deed from Thomas H. and his wife and Janet for the same parcel of land. They were told: "They took all the chances of the purchaser;" and it appears the grantors made no claim to the land. Suit was brought, and the defendants set up an equitable title, relying upon the oral partition. The court held that the "equitable title ought to be protected and enforced, and that the plaintiffs, having bought with knowledge of the defendants' rights, can take nothing by their deed." Notwithstanding the statute of frauds, it is not regarded as an insuperable objection to the maintenance of an equitable defense by a purchaser of land under a parol sale. Possession taken under the contract of sale takes the case out of the statute. There seems to be no good reason why this doctrine should not apply to parol partitions.

Where possession, actual and exclusive in its character, is taken under the partition and is followed by all the indicia of ownership, we think such a title is initiated as will receive equitable cognizance. To enforce this rule prevents the possible perpetration of a fraud and wrong by one cotenant upon the others, when the latter, acting in good faith upon the partition, have added improvements to their several parcels, the law being that "actual occupancy is enough to put parties dealing with the premises upon inquiry, * * * and that a person at his peril deals with or purchases real estate of one in the possession of another." Toland v. Corey, 6 Utah, 395, 24 Pac. 190. No hardship is imposed upon third persons.

We think there is an analogy between cases where it is sought to enforce a parol partition and those which receive equitable cognizance growing out of a parol sale of lands. The burden will rest upon the party affirming the existence of the oral contract of sale, and also who claims under the parol partition; and equitable relief should only be granted in the latter case when the partition is equitable, and when the parties act understandingly. But it is argued by the appellants' counsel that at the time of the alleged partition, in 1867, the two sons of the deceased were minors, and not only did not participate in the partition proceedings, but, owing to their tender years, were unable to comprehend their rights or the nature of a partition, even if explained to them. This feature of the case was presented to the court in Ayres v. Jack, supra, as shown by the record; and, while there is no reference to it in the opinion, it is clear the court did not deem it objectionable to the partition, under the facts of the case. We have no hesitancy in saying that upon attaining their majority, and after a full understanding of their rights and the partition previously made, if there was no ratification and confirmation of the partition by them, it would be invalid. But words were not indispensable to a ratification of the partition; affirmation might result from acts and conduct. If George H. and Thomas H., upon reaching their majority, knowing the circumstances of the partition, retained their possession of the land theretofore set apart to them, claimed it as their own, asserted no claim whatever to the other lands occupied by the persons who had been their cotenants, enjoyed the fruits thereof, and exercised dominion over it, we think the oral partition is binding upon them. They cannot be heard in disaffirmance of the partition; they are conclusively presumed to have ratified the partition, and the rights of the various parties to the partition and their title to the land would relate back and attach as of the date of the partition. Freem. Coten. § 414; Lynch v. Baxter, 4 Tex. 431; Wood v. Fleet, 36 N. Y. 490. It would be inequitable to permit a repudiation of the partition where these

facts exist, especially if the status of the property partitioned is changed, or rights have been acquired under a recognition of its validity. The evidence in the case at bar is that Margaret sold her lot, and enjoyed all the proceeds. George H. did the same. Thomas H. employed a portion of the proceeds arising from the sale of the lot 16 in improving Janet's lot. The lots conveyed are beyond the control of the parties to the partition, and it would be against equity and good conscience to now divide Janet's portion, which was devised to Thomas H. While there is some conflict in the testimony as to whether George H. fully understood the parol partition, and ratified it, a careful examination of the record convinces us that the record was sufficient to warrant the findings of the referee upon that point.

2. Was a partition made, and, if so, did the parties acquiesce in and ratify it? Thomas Cope died in 1864. His family consisted of his legal wife, Janet, Thomas H., a son of a deceased wife, Margaret, a polygamous wife, and George H., her son. Janet resided on lot 5, with her stepson, Thomas H., and Margaret and her son resided on lot 4. About three years after the death of Thomas Cope, the wives, owing to disagreements respecting the property, selected three persons to partition it among them and the two sons. While Margaret was not entitled to receive anything, it was desired that the property should be equally divided among the four. At that time Thomas H. was about 14 years of age, and George H. 4 years. Four lots had been left by the deceased (worth about \$500 each), but his only title was that of naked possession. A partition was made by the persons selected, which appears to have been equitable and just. It was reduced to writing, but subsequently lost. Under the partition, Janet was given lot 5, upon which she was residing, Margaret lot 4, Thomas H. lot 16, and George H. lot 2. Thereafter the lots were known by the names of the persons receiving them. Janet resided upon her lot until her death, in 1890, and devised it to Thomas H. She greatly improved it, claimed it as her own, paid all the taxes assessed against it; and after 1883 Thomas H. took possession of lot 16, claimed it as his own, and finally, in 1884, sold it to Thomas Jack, who, in part payment therefor, and at the request of Thomas H., constructed a house upon lot 5 for Janet. After her death, Thomas H. took possession of lot 5, and held exclusive and adverse possession up to the time of the bringing of this suit. Margaret held exclusive possession of lot 4, paying the taxes thereon, and claiming it as her own, until she sold it, appropriating all the proceeds to her own use. Her son, George H., knew of her claim and the sale. She received the rents derived from lot 2 until George H. reached the age of 17 or 18 years. He then took possession of the lot, claimed it as his own, obtained the crops growing thereon, paid the taxes assessed

against it, and finally sold and conveyed it by general warranty deed, for the sum of \$1,250. He retained the entire proceeds. No claim, so far as is shown by the record, was made by any other members of the family to the lot or any of the purchase price. We think the evidence is sufficiently definite and certain to justify the finding that a parol partition was made, and that all parties acquiesced therein; and it was not error to admit the deposition of the witness Moon, who was one of the persons selected to partition the property, and whose testimony was confined solely to the question of partition. After ascertaining the facts regarding the partition, and several years after becoming of age, George H. conveyed his lot. His conveyance under the circumstances, and the appropriation of the proceeds, not only ratified the partition made during his minority, but, if anything was lacking upon his part to complete it, operated to complete the partition and render it binding. *Eaton v. Tallmadge*, 24 Wis. 217; *Buzzell v. Gallagher*, 28 Wis. 678; *Millican v. Millican*, 24 Tex. 426; *Markoe v. Wakeman*, 107 Ill. 251; *Jackson v. Richtmyer*, 13 Johns. 375; *White v. Clapp*, 8 Metc. (Mass.) 370; *Piatt v. Hubbell*, 5 Ohio, 243. As above stated, this court, in *Ayres v. Jack*, has sustained this parol partition, and the facts developed in the case at bar seem to have been fully presented upon the trial of that cause. While that case is not *res judicata*, it seems the doctrine of *stare decisis* ought to be invoked, especially when there is nothing manifestly erroneous in the decision. Upon principles of judicial propriety, as well as the importance of having the law fixed and certain, a court ought to respect its own decisions; and in analogous cases there would seem to be the greater reason for adhering to them where the facts are the same, though between different parties. *Kolb v. Swann*, 68 Md. 516, 13 Atl. 379; 2 Black, Judgm. § 603. Plaintiff does not claim to be an innocent purchaser for value, or to have been misled by defendants. In fact, the record shows he had full knowledge of the partition. He is a practicing attorney and had purchased and sold lot 2, knowing that the title came through George H. and the parol partition. He advised persons that, because of the oral partition and the statute of limitations, the title to lot 2 was good; that they would be safe in building valuable houses thereon; and that he was employed to defend the title if it were attacked. It appears that his present interest was acquired for services in bringing this suit. His relation to the case is not such as to commend him to a court of justice.

It is insisted by counsel for appellants that Janet's possession could not be adverse in its character, because the lot was the homestead of her deceased husband, and she held a life interest therein. In 1868 the land laws of the United States were extended over Utah, and the mayor's entry was made in November, 1871. Lot 5 was included in the land ac-

tually settled on and occupied as a town, and was received from a private sale, and no title to it could be acquired except under the town-site act of 1867 and the laws of Utah passed in pursuance thereof. Thomas Cope had no estate whatever in said lot, not even an inchoate right. He could not devise it and give title, and it would not pass to his heirs. No interest that he possessed could be the foundation upon which to predicate a homestead title, and out of his naked possession no estates in life or remainder could be carved. *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509; *Missionary Soc. of M. E. Church v. Dalles City*, 107 U. S. 336-345, 2 Sup. Ct. 672. We do not mean to hold that a homestead can only be based on a title. In the case at bar, after Cope's death, the possessory title vested in another, and no homestead could exist upon the creation of a new title. *Wap. Homest.* pp. 102-109; *Myrick v. Bill (Dak.)* 17 N. W. 268. But, admitting that a homestead did exist, we think this would not preclude a parol partition, which would change the holding, and invest it with a different character.

It is argued that this was no change in the character of Janet's holding; that, having held as the wife of the deceased, the presumption is that she continued as a life tenant until there was an actual disseisin. After partition of the land, each owned in severalty an interest equal to that which before had been held in common, and a new possession is not essential. It need not be taken in pursuance of the partition; for, as all the cotenants are in possession at and prior to the partition, there need not be any new taking of possession. It is sufficient that, after the agreement for partition, each retains possession of and exclusively occupies that tract set apart to him by such agreement. *Freem. Coten.* p. 516; *Hauk v. McComas*, 98 Ind. 460.

It is contended that the proceedings in the probate court negative the idea of a partition, and conclusively establish that both Janet and Thomas H. claimed only by descent. This issue was presented by the pleadings, and found adversely to plaintiff, and we think the evidence justifies the finding. Besides, the probate court only declares the rights of the heirs under the law of succession. *Chever v. Ching Hong Poy*, 82 Cal. 68, 22 Pac. 1081. And in this case Thomas Cope had no property subject to administration. The fact that the mayor's deed to lot 5 named the administrator as grantee does not alter the situation. The administrator held the title to lot 5 in trust, and the probate court had no jurisdiction to distribute. *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509; *Burns v. Hamilton*, 33 Ala. 210; *Cobb v. Stewart*, 83 Am. Dec. 467; *Coulson v. Wing*, 42 Kan. 507, 22 Pac. 570; *Delay v. Chapman*, 3 Or. 459. The conveyance to the administrator was a dry trust, and executed in the heirs immediately. *Kay v. Scates*, 78 Am. Dec. 399.

And, a partition having been effected, the administrator would hold the title in trust for the cotenants to whom it was partitioned. Considerable importance was attached by appellants to the conduct of Thomas H. in executing a conveyance to Ayres of lot 16, after selling it to Jack. This question was fully considered in the case of *Ayres v. Jack*, and demands no further attention.

It is contended by appellants that the proceedings in the probate and district courts, the petitions filed and reports made, are incompatible with the theory that there was a partition, and conclusively disprove it. While there is some foundation for their view, the record shows that evidence was introduced which tends to explain the seeming incongruities, and support the respondents' position that the parol partition was recognized by all, and became the basis of acquired rights; and, the referee having taken this view, we feel there is no occasion or warrant for disturbing his findings. We find no error in the record, and affirm the judgment, with costs.

BARTCH and SMITH, JJ., concur.

(11 Utah, 363)

HOMBERGER et al. v. ALEXANDER et ux.

(Supreme Court of Utah. April 27, 1895.)

DEPOSITION—CERTIFICATE OF OFFICER—SUFFICIENCY—WAIVER OF OBJECTIONS—CONSTRUCTION OF STIPULATION—ESTOPPEL—PLEADING—DISSOLUTION OF FIRM—EVIDENCE OF NOTICE.

1. A stipulation, waiving all objections to the form of taking depositions, covers the objection that they were taken before a notary public instead of before a commissioner.

2. The certificate of an officer, before whom depositions were taken, that "witnesses appeared in person before me, and answered the interrogatories and cross interrogatories herein, as appears by the duly signed and sworn-to depositions hereto annexed," without stating whether the depositions were sworn to before or after the answers were written, or that the witness' oath required by statute was administered, or that their answers were read over to the witnesses before signing, or showing in any way with certainty that the commissioner performed his official duty, is insufficient.

3. A cause of action, based on the allegation that plaintiff was not informed of the dissolution of a firm to which defendant belonged, is, in effect, based on an estoppel in pais, and hence the facts constituting the estoppel should be stated.

4. Evidence that plaintiffs were subscribers to, and received, commercial reports which reported the dissolution of a firm, is competent, as tending to show knowledge of the dissolution.

Appeal from district court, Third district; before Justice Samuel A. Merritt.

Action by M. Homberger & Co. against Daniel Alexander and Julia Alexander upon a note. From a verdict for plaintiffs, defendant Julia Alexander appeals. Reversed.

C. S. Varian and Brown & Henderson, for appellant. Dey & Street, for respondents.

SMITH, J. This action was brought in the Third district court by plaintiffs against the defendants as copartners upon a prom-

Issory note dated August 4, 1892, for \$1,200, signed, "D. Alexander & Co." The complaint charges that the defendants were copartners at the time of the making of the note, and that they as such made, executed, and delivered the same to plaintiffs. No defense was made by D. Alexander, but Julia Alexander filed an answer, denying that she was a copartner with D. Alexander at the time the note was made, and denied that she and D. Alexander, as copartners or otherwise, executed or delivered the note. The trial was had in the district court upon the complaint and this answer of Julia Alexander. Trial was had before a jury. Verdict and judgment for plaintiffs. Motion for new trial was overruled, and the appeal is by Julia Alexander. On the trial the plaintiffs offered in evidence the depositions of the two members of the plaintiffs' firm, and of the firm bookkeeper, which were taken upon the following stipulations: "It is hereby stipulated and agreed that the depositions of Meyer Homberger, Morris Koengsberger, and Isaac Speien may be taken in the above-entitled cause on the part of the plaintiffs, before George Einstein, a notary public in the city of New York, state of New York, and that when so taken the depositions may be read and used in evidence on the trial of said cause on the part of the plaintiffs. It is expressly agreed and stipulated that all objections to the form of taking said depositions are hereby waived; that each party reserves the right to object to any and all questions and answers on the ground of irrelevancy, incompetency, or immateriality, and to each of said depositions on any other competent ground; and such depositions, when taken, shall be forwarded by the officer taking the same to the clerk of said court at Salt Lake City, Utah." Each page of the answers to the interrogatories contained the name and notarial seal of the notary. Each of the depositions was signed by the witness, and a jurat attached, as follows: "Sworn to before me, this 8th day of March, 1894. George Einstein, Notary Public."

The certificate of the notary was in the following language: "City and County of New York—ss.: I, George Einstein, do hereby certify that I am a resident of the city of New York, and a duly-qualified notary public in and for the city and county of New York, of the state of New York. Meyer Homberger, Morris Koengsberger, and Isaac Speien appeared in person before me, and answered the interrogatories and cross interrogatories herein, as appears by the duly signed and sworn-to depositions hereto annexed. Dated New York, March 8th, 1894. George Einstein. [Seal.]"

A motion to suppress the depositions having been seasonably made before trial, and overruled, the objections were renewed at the trial on the following grounds: That

the certificate was insufficient, in not stating that the witnesses had subscribed the depositions in the presence of the notary, nor that their respective answers were read over to them, and by them declared correct, nor that the answers returned were the true answers of the witness. The objections were overruled, and this ruling, by appropriate assignment, is first presented for our consideration.

It is urged by appellant that, without a waiver, depositions cannot be taken except before a commissioner, and that the stipulation in this case was not broad enough to include such waiver, and can only be construed to be an agreement designating the commissioner to whom a commission may issue. In this we cannot concur with counsel for appellant. The stipulation, waiving all objections to the form of taking the depositions, is, in our judgment, sufficiently comprehensive to include the waiver of a commission. The objection to the certificate, however, presents a more serious question. The use of depositions in actions at law is in derogation of the common law, and the statutory authority, therefore, must be strictly pursued. The language of the statute is general, and only in terms requires the commissioner to administer an oath to the witness, and "take his deposition," and to certify the same to the court. 2 Comp. Laws, § 3946. Elsewhere in the statute the form of oaths in actions is prescribed, requiring a witness to swear that his evidence "shall be the truth, the whole truth, and nothing but the truth." A reasonable construction of the statute would seem to require the administration of an oath substantially as above to the witness before his examination, or reduction thereof to writing, and that the deposition should be read over to the witness before signing, or, at least, opportunity afforded him for the correction of his testimony, if desired. This much, at least, is necessary for the protection of litigants and the courts, and we think that the statute must be so read in the light of the general rules governing the subject. In *Amory v. Fellowes*, 5 Mass. 226, it is said: "The testimony of witnesses, whether viva voce or in writing, cannot be admitted in evidence unless there is regular evidence that it was given on oath duly administered." And it is stated as a general rule that the certificate should state that the deposition was read to the witness before signing. *Weeks*, Dep. § 328. That same author states that a deposition reduced to writing before the witness is sworn, or in the absence of the commissioner, is inadmissible. *Id.* §§ 312-497. See, also, *Stonebreaker v. Short*, 8 Pa. St. 157. It is imperative that the certificate of the officer should prove the essentials in the taking of the deposition. The certificate is an official document, and ought to be in such form

as to exclude doubt. The manner of executing the commission ought not to be left to inference, but should be plainly and explicitly stated. Weeks, Dep. § 328.

Tested by these rules, we are of the opinion that the certificate in this case was insufficient. The statement is that witnesses "appeared in person before me, and answered the interrogatories and cross interrogatories herein, as appears by the duly signed and sworn-to depositions hereto annexed"; but it does not appear whether the depositions were signed and sworn to before or after the answers were written. For all that appears, they may have been written out in the absence of the notary, and before the administering of the oath; in other words, that they are simply affidavits. Nor are we advised by the certificate that the oath required by the statute was administered.

Passing all these, however, the insuperable objection to the certificate is that it states nothing with certainty. The fact that the witnesses appeared and answered is made to depend upon the depositions themselves, to which reference is made for proof of a performance of the official duty of the commissioner. Since the certificate does not state the facts, and the stipulation presents no waiver, we hold the objections to the admission of the depositions on this ground to be well founded, and that the court erred in overruling the same.

It was disclosed by the depositions that the plaintiffs had had dealings with the firm of D. Alexander & Co., composed of Daniel and Julia Alexander, commencing in August, 1890, and thereafter a running account was maintained until December, 1891, when the firm executed a note to plaintiffs; that this note was renewed in April, 1892, and in August, 1892, the note in question was given; that plaintiffs did not know of the dissolution of the Alexander firm until October, 1892, and after the note was given. The defendant Julia Alexander objected to all of this evidence on the ground of irrelevancy and immateriality, because it tended to prove a cause of action against her, other than that stated in the complaint; that is, a cause of action founded upon an estoppel in pais. The court overruled the objection, and this ruling is also assigned as error.

As before stated, the complaint charged the defendants, Julia and Daniel Alexander, with making the note in suit as copartners. No other ground of liability was stated. The evidence offered and admitted tended to charge Julia Alexander with liability on the note, because the plaintiffs had no notice of the dissolution of the firm, which they were entitled to, as persons having had previous dealings with the copartnership. We are clearly of the opinion that the evidence tended to establish an estoppel in pais. The doctrine has well been referred to estoppel in pais, "that where one intentionally or negligently holds himself out or permits another

to hold him out as a partner of a firm, or when late partners continue to do business in the firm name after dissolution, and the representation has been innocently acted upon by others without the knowledge or notice of the truth of the matter, such party or parties will be held liable to such persons." Bigelow, Estop. (4th Ed.) 535. The question presented is one of pleading and proof. The defendant Julia is charged as an actual partner with actually making the note. A verdict is rendered against her upon proof of a different state of facts. She is held because notice of the dissolution did not reach the plaintiffs, and an estoppel thereby created. It is insisted by appellant that the facts constituting the estoppel upon which plaintiffs relied for a recovery should have been pleaded, and that the evidence offered was variant from the allegation of partnership at the time the note was executed. We think the contention is well founded. Under the Code, plaintiff is required to state the facts constituting the cause of action in ordinary and concise language. If the cause of action is based upon an estoppel in pais, it is necessary that the facts constituting the estoppel should be pleaded. The rule is elementary. Bliss, Code Pl. § 364. In *Rail v. Bank* (Tex. Civ. App.) 22 S. W. 865, action was brought against the bank upon a contract alleged to have been made through the bank's authorized agent. It was argued on appeal that the court should have charged the jury that, if the bank held out the alleged agent as having authority, it would be liable, but the Texas court of civil appeals said: "No such state of case was set up in his pleadings. * * * We understand the rule in this state to be that an estoppel, which is the principle involved, to be available, must be alleged." So in *Michigan*, in an action upon an acceptance, a recovery was suffered upon an estoppel arising from conduct. In reversing the case the court say: "Undoubtedly the jury based their verdict upon the ground of estoppel. The declaration is framed upon the basis of an absolute acceptance of the order. Plaintiff will not be permitted to recover upon the ground of an estoppel which is not set up in the pleadings. The estoppel constitutes a distinct cause of action, and cannot be taken advantage of, either as a ground of recovery or a defense, unless pleaded. The object of the declaration is to give the defendant fair notice of the case he is called into court to meet. A count charging him with the acceptance of a bill of exchange cannot be held to inform him that he will be called upon to meet a liability on the ground of estoppel." *Gooding v. Underwood*, 89 Mich. 187, 50 N. W. 818. These observations, in which we fully concur, are specially applicable here. Julia Alexander was charged upon a note which it was alleged she actually executed as a partner with Daniel. She was held in the verdict upon an estoppel raised against her the first time in the evidence.

The injustice is so apparent that no further discussion is necessary.

We think the court erred in admitting the testimony. The testimony in the trial disclosed the fact that the defendants were husband and wife; that they had been copartners in the business several years, commencing in 1886, under the firm name of D. Alexander & Co., and had from time to time purchased goods from the plaintiffs. Defendant Daniel Alexander testified that the firm was dissolved May 12, 1892, he continuing the business alone, under the same name, and assuming the indebtedness; that a written notice of dissolution was made, and signed by them, which was produced and put in evidence; that it was published in the Salt Lake Daily Tribune and Herald. Copies of these papers of the issue of May 13, 1892, were produced and put in evidence, showing the publication. He further testified that he mailed a copy of the Tribune of that date containing the notice to all his creditors, including plaintiffs, and that the notice was marked with blue pencil; that shortly after giving the note in question, and about August 24, 1892, he went to New York, and saw one of the plaintiffs, to wit, Meyer Homberger, and had a conversation with him, in which Homberger admitted receiving the paper, with the notice of the dissolution, and admitted that he knew of the dissolution, and knew that Mrs. Alexander was not a party to the note. He further testified that, for three years prior to giving the note, he was in the habit of going to New York twice a year, and remaining for some time, and was there some time in the spring before the note was given; that all the time while in New York he made plaintiffs' office his headquarters. Meyer Homberger, Morris Koengsberger, two of the plaintiffs, and Isaac Spelen, on behalf of plaintiffs, testified that plaintiffs were subscribers to Bradstreet's Commercial Agency from May to August, 1892, and that they received two books a year from said agency, but did not receive daily reports of the financial standing and changes in the firms and business houses having dealings with them, and that they did not receive the marked copy of the Tribune containing the notice of dissolution, and that they did not know of it at the time the note was given. Meyer Homberger denied the conversation in New York testified to by Daniel Alexander. Harold Pitt, on behalf of defendants, testified that he was manager at Salt Lake City for Bradstreet's Commercial Agency; that he knew of the practice of said agency at all its offices; that he saw the notice of dissolution published in the Salt Lake paper on May 13, 1892, and notified the general office in New York City by sending them a copy of it. He further testified that it was the custom of the agency at New York, when it received notice of any business change, to issue daily sheets showing the changes, and that these were furnished to

every subscriber, whether they were subscribers for one or two books. He produced and identified the books of the agency issued in March and July, 1892, being general revisions for the entire United States. In the book for March he identified the report on D. Alexander & Co., showing it a copartnership, and in the July book it was reported as D. Alexander being the sole proprietor. In this state of the evidence, defendants offered in evidence the entries in the two books above referred to, and they were rejected by the court; and also offered to show by D. Alexander that on the various occasions when he was in New York, both before and after the giving of the note, the daily reports of both commercial agencies, Dun's and Bradstreet's, were daily brought to the office of the plaintiffs, and that Meyer Homberger was in the habit of examining them. Various questions were put to the witness tending to elicit, and the offer was made to show, it, but they were all objected to by the plaintiffs and excluded by the court. These rulings are assigned as error. The ruling rejecting the entries in the book raises the question as to whether, when it is shown that the party sought to be notified is a subscriber to a publication, it is competent to show that notice of the dissolution was published in it. It is undoubtedly true that, as to parties who have had prior dealings with the firm, actual notice must be shown before they are charged with it. This is not denied by appellant, but this rule refers to the quantum of proof, and not to the manner of proving it. A person on trial for a crime must be shown to have actually committed the act charged, but it may be shown by circumstantial evidence, by showing circumstances from which it may be fairly presumed beyond a reasonable doubt. 1 Whart. Ev. § 675, says: "But it will be enough to enable the newspaper to go to the jury to prove that it was taken by the party on whom it was sought to prove notice, or that he habitually attended a reading room where it was, or was shown in some other way to have been furnished with the paper, or that the newspaper is one with which it is his duty to be familiar." And in *Wade on the Law of Notice* (section 506) the author says: "There seems to be no doubt that the mere fact that the prior dealer subscribes for and reads the paper containing the notice will not raise the legal inference of actual notice; and although it would not be proper to reject evidence of such publication, and the taking and reading of the paper by the dealer, still the jury could be instructed that the mere taking of the paper was not of itself actual notice." See, also, *Treadwell v. Wells*, 4 Cal. 260; 2 Bates, Partn. § 617; *Young v. Tibbitts*, 32 Wis. 79; *Lovejoy v. Spafford*, 93 U. S. 430.

In excluding this testimony we think the court erred. The burden of proving the notice was upon the defendant. Plaintiff Homberger

denied the conversation with Alexander in New York, as testified to by him. It was the testimony of one person against another. Publication at Salt Lake was shown, but plaintiffs might not see this. They denied receiving the paper claimed to have been sent them. It was impossible to show its receipt by direct testimony. The only publication with which plaintiffs were shown to be connected was rejected. We also think the court erred in rejecting the testimony offered from Daniel Alexander. It directly contradicted the testimony of plaintiffs and Spelen that they did not receive the daily reports. The testimony of Pitts tended to show that the notice of dissolution was published in these reports. The judgment should be reversed, and a new trial granted.

BARTCH and KING, JJ., concur.

(11 Utah, 378)

GILBERT v. BOARD OF POLICE & FIRE COM'RS OF SALT LAKE CITY.

(Supreme Court of Utah. April 27, 1895.)

CITY POLICE AND FIRE COMMISSIONERS—REMOVAL OF EMPLOYEES—QUASI JUDICIAL ACTS—REVIEW BY CERTIORARI—OFFICE OF WRIT—CONSTRUCTION OF STATUTE.

1. The acts of the board of police and fire commissioners of Salt Lake City in removing employes of the fire department, under Act March 8, 1894, which requires the board to prefer charges, give accused a hearing, examine witnesses, and decide the question on evidence, are judicial, so as to authorize their review by certiorari.

2. Act March 8, 1894, authorizing the police and fire commissioners of Salt Lake City to discharge employes of the fire department on summary proceedings quasi judicial in their nature, does not violate Organic Act, § 9, providing that the judicial power shall be vested in the supreme, district, and probate courts and in justices of the peace.

3. Comp. Laws 1888, § 3719, authorizes the issuance of a writ of review when an inferior tribunal exercising judicial functions has exceeded its jurisdiction, and there is no other adequate remedy; section 3725 provides that the review cannot be extended further than to inquire whether the inferior tribunal has regularly pursued its authority; section 3726 provides that the court, when a final return has been made, may either affirm, modify, or annul the proceedings below. *Held* that, the power thereby conferred being merely confirmatory of the common-law jurisdiction on certiorari, the appellate court may review the evidence to find if there is any to legally warrant the decision below.

4. Act March 8, 1894, § 6, authorizing the board of police and fire commissioners of Salt Lake City to adopt rules to govern the selection and appointment of persons "employed" on the police force or in the fire department, and section 9, providing that such rules shall specify the date when they shall take effect, and "thereafter" all selections shall be made according to such rules, does not authorize the board to require a person already employed to take the examination prescribed by it.

5. Under Act March 8, 1894, providing that no member of the fire or police department of Salt Lake City shall be dismissed unless charges have been previously preferred against the member, and the accused given an opportunity to be heard before the board of police and fire commissioners, a removal by such board, without any evidence to sustain the charges preferred, is void, and will be annulled on certiorari.

Appeal from district court, Third district; before Justice Samuel A. Merritt.

In the matter of the application of William Gilbert for writ of certiorari to review the action of the board of police and fire commissioners of Salt Lake City in discharging relator. From the judgment of the district court for relator, the board appeals. Affirmed.

E. D. Hoge and W. G. Van Horne, for appellant. Powers & Straup, for respondent.

BARTCH, J. The relator in this case was a member of the fire department in Salt Lake City, and his contention is that he was wrongfully removed from his position in that department by the board of police and fire commissioners on the 11th day of August, 1894. It appears from the record that he held the position for a period exceeding three years immediately prior to his removal; that the said board claimed the right to remove him under and by virtue of chapter 37, Sess. Laws 1894, and, in case he desired to be re-appointed, to compel him to undergo a competitive examination, as therein provided, in the same manner as applicants who were not members of said department at the time of the enactment of said chapter; that the appellant acknowledged that the relator was an efficient officer of long service; that the charges preferred against him as grounds for removal were that he was under the minimum height, had defective eyesight, and was over the maximum age; that a hearing was had on these charges after he had been suspended from service, but the appellant introduced no evidence to sustain them; that at such hearing the burden of proof was cast upon the relator to show that there was not sufficient ground for his removal; and that the charges were sustained, and the relator dismissed from service. After the relator was thus removed, he applied to the district court for a writ of certiorari commanding the appellant to certify and return to the clerk of said court all the proceedings concerning his suspension, dismissal, and discharge. At the hearing of the petition, after the return made in obedience to the writ, the court entered judgment that the decision of the board suspending and dismissing the relator from service be set aside, and declared the same to be of no force and effect. From this judgment the board appealed.

The first question to be considered on this appeal is whether the board was acting in a judicial capacity; for unless it was exercising judicial functions, and not simply performing ministerial duties, its action cannot be reviewed on certiorari. Counsel for the appellant contend that it was not in the exercise of judicial functions, and that, if it was, then, it is insisted, the act of the legislature conferring judicial power upon the board is void, as being in conflict with the organic act of this territory, which provides, in section 9 thereof, "that the judicial power of

said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace." The law which it is claimed is in conflict herewith if it empowers the board to exercise judicial functions is found in the legislative act approved March 8, 1894 (Sess. Laws, p. 33), and, so far as necessary to this decision, provides, in section 6, that, within a certain time after its appointment, the board "shall prepare and adopt such rules and regulations to govern the selection and appointment of persons employed on the police force or in the fire departments of said city as shall be adapted to secure the best service for the public, in each department"; and such rules may provide for competitive examination of applicants. Section 7, among other things, provides that "no officer or member of said departments shall be removed except for cause, and after public hearing before said board upon charges made in writing"; and in section 9 it is provided: "Such rules and regulations shall specify the date when they shall take effect; and thereafter all selections of persons for employment, or appointment, or promotion, either in the police or fire departments, * * * shall be made in accordance with such rules and regulations." Section 12 specifies the character of and provides how competitive examinations of applicants shall be conducted, and section 20 reads as follows: "Except in cases herein otherwise provided, no officer or member of said fire or police departments shall be dismissed except for cause, nor until after trial, and by an affirmative vote of three members of said board. The accused shall be furnished with a written copy of the charges against him at least ten days previous to the day of trial, and he shall have an opportunity to examine witnesses in his behalf, and all witnesses shall be examined under oath, and all trials shall be public." These are the several provisions of the law under which the board in this case proceeded to remove the relator. It is clear that the power here conferred is judicial in its nature, because, in order to effect a removal, the board is required to prefer charges, afford the accused an opportunity to be heard, examine witnesses, and decide the question upon evidence. All such proceedings are of a judicial character. The term "judicial," however, as applied to the actions of boards of this class, is not to be received in the sense ordinarily applied to courts of justice. The words "judicial power," when applied to such courts, mean the authority vested in the judges. Bouvier. In this sense these words are used in the organic act, and nowhere is there any provision in said act which prohibits the legislature from creating a ministerial board, and requiring of it the performance of judicial acts as incidental to its ministerial capacity. While such boards are essentially ministerial, and may be, to a certain extent, legislative, bodies, still they may be, and frequently are, endowed with quasi

judicial power to proceed in a summary way, and out of the course of the common law. A city council is such a body, and so likewise is a board of county commissioners, or county court, as denominated in this territory; and yet no one has pretended to question the power of such a body in such a proceeding, as being inconsistent with the organic act. Courts of justice may authoritatively declare what the law is. Such a board or body has no such power. Its judicial authority extends no further than is necessary to an orderly and proper management of the affairs over which it has control. We think the law is well settled that the legislature may authorize boards of this character to perform judicial acts, and that such acts may be reviewed on certiorari when there is no other plain, speedy, or adequate remedy provided; and it is equally well settled that, when the acts complained of are purely ministerial, certiorari ordinarily will not lie. *Robinson v. Supervisors*, 16 Cal. 208; *State v. Common Council of Duluth (Minn.)* 55 N. W. 118; *State v. Whitford*, 54 Wis. 150, 11 N. W. 424; *People v. Mayor, etc.*, of New York, 5 Barb. 43; *Merrick v. Township Board*, 41 Mich. 630, 2 N. W. 922; *Waugh v. Chauncey*, 13 Cal. 11; *Waterworks Co. v. Bryant*, 52 Cal. 132; *In re Fay*, 15 Pick. 243; *Herrick v. Carpenter (Iowa)* 6 N. W. 574; *Supervisors v. Briggs*, 2 Denio, 26. The acts of the board of police and fire commissioners complained of in this case were neither ministerial nor legislative, but judicial, in their nature, and therefore we are of the opinion, there being no other remedy for review provided by law, that certiorari is the proper and appropriate remedy.

The most important question raised in this record is whether, on a writ of certiorari, the court may extend its inquiry beyond the mere question of jurisdiction of an inferior tribunal, board, or officer, and determine whether such inferior tribunal, board, or officer proceeded in accordance with law. If, in a case like the one at bar, as is contended by counsel for the appellant, the court has no power on certiorari to examine the evidence or the proceedings for any purpose, then the court cannot inquire into the evidence to ascertain whether errors of law were committed during the progress of the trial. Nor can it consider whether the facts presented by the record warrant the judgment pronounced by the board, not even though such judgment, when tested by the law applicable to such facts, were found to be erroneous and unjust. Under this contention the sole question to be determined would be whether the judgment of the board was within its jurisdiction, and, if so, then such judgment would be deemed conclusive. In accordance with this view, the writ removes nothing from the inferior tribunal but the record, and, if the return contains the evidence, such evidence cannot be considered; and in such case the fact that the return contains the testimony, or other matter not properly a part of the record, does

not enlarge the power of review, nor authorize the examination into anything but the question of jurisdiction, and the court cannot look into the evidence to determine any question on its merits. Counsel is not without authority for this position when the review is sought on common-law certiorari. Such has often been declared to be the limit of review under the common-law writ, which it has been held our writ, in effect, is. *Goldring v. Jennings*, 1 Utah, 135. This doctrine is stated in a number of New York cases. In *Ex parte Mayor, etc., of Albany*, 23 Wend. 277, Mr. Justice Cowen, after discussing the office of the writ, and referring to numerous decisions in that state relating to the limit of review on common-law certiorari, says: "The amount of these is that we will not, in any case, on a common-law certiorari, go beyond the question of power, which is another word for jurisdiction; and in searching for power we will confine ourselves to matters properly introduced into the return." And further on, and in the same opinion, he says: "We cannot look into testimony on the merits, even when the return comes from a tribunal bound to act upon the general law of evidence." In *People v. Mayor, etc., of New York*, 2 Hill, 9, Mr. Justice Bronson, delivering the opinion of the court, said: "The writ of certiorari, when issued for the purpose of enabling this court to exercise its supervisory power over inferior tribunals, removes nothing but the record—or other entry in the nature of a record—of the proceedings in the court below; and, if the return contains anything more, it cannot be regarded." There are other cases in New York and elsewhere which declare the same doctrine. Some hold that, under the provision of statute, errors may be ground for reversal on certiorari, though not jurisdictional; and there is still another class of cases which holds that the proceeding on certiorari is in the nature of a writ of error, and that, after judgment, the whole proceeding of the inferior tribunal, including the evidence, may be brought up on certiorari, not only for the purpose of determining jurisdictional questions, but also for the purpose of reviewing errors of law occurring in the proceeding before the inferior tribunal, which may affect the merits of the case. And this now seems to be the settled doctrine in relation to inferior tribunals, boards, and officers exercising judicial functions, when there is no plain, speedy, or adequate remedy for review provided by law. The office of the common-law writ has been much enlarged by statute and decision in cases where there is no other proper remedy, and, in addition to determining questions of jurisdiction, errors in law affecting the substantial rights of the parties may now be corrected, and the testimony may be included in the return, and examined to determine whether there is competent evidence to warrant and justify the judgment of the inferior tribunal. Such enlargement of the writ, however, does not warrant the setting aside of a

judgment when it is based on conflicting evidence, nor when there are errors in the proceedings in matters not material as affecting the substantial rights of the party, and not violating any rule of law or affecting the jurisdiction; but where there is an entire absence of proof to support the judgment or decision or order, or where the adjudication made is entirely unauthorized by the proof, it will be set aside and reversed, even though the inferior tribunal had jurisdiction of the person or subject-matter, and so where the proceedings culminating in the judgment are manifestly erroneous, and in violation of those prescribed by law. The same rule applies to new jurisdictions created by statute, when the proceedings required are different from those of the common law. The examination of the evidence by the appellate court is not for the purpose of determining whether the preponderance thereof is on one side or the other, but to determine whether there is any testimony which will justify the judgment or finding of the inferior tribunal, as a legitimate inference, under the rules of law, from the facts proven, regardless of whether or not the appellate court would draw such inference from such facts. And this power of review on certiorari is recognized as the settled law in England, as well as in this country. The English courts have long exercised the power under this writ to review the record and proceedings of inferior tribunals, to determine questions of law arising therein, in cases where there was no other remedy for review.

In the time of Sir William Blackstone, in criminal causes, the writ was used "to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench"; and the writ of certiorari, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, superseded the jurisdiction of such inferior courts, and made all subsequent proceedings therein entirely erroneous, unless the court of king's bench remanded the record to the court below, to be there tried and determined. 4 Bl. Comm. 320, 321; 1 Bac. Abr. (6th Ed.) p. 559; 1 Tidd, Prac. (1st Am. Ed.) p. 397; *King v. Daman*, 2 Barn. & Ald. 378; *King v. Glossop*, 4 Barn. & Ald. 616. The power has been maintained with much zeal, as being founded in necessity as well as justice, for it is manifest that if a superior court were limited in its inquiry on certiorari to the mere question of jurisdiction, without reference to errors in law affecting the merits of the case occurring in the proceedings before the inferior tribunal, such inquiry would be of little use, and grievous wrongs could be inflicted without any possible redress. Dillon, in his commentaries on the law of Municipal Corporations (volume 2, § 739), says: "It is well settled in England that courts of superior and general jurisdiction will examine on certiorari the proceedings

of inferior or special jurisdictions or officers. * * * If the proceedings are in a common-law court of record, a writ of error is the proper remedy to correct or vacate them, if erroneous; otherwise the remedy is by certiorari. So, in this country the rule has been very generally adopted by the courts, where a new jurisdiction has been created by statute, and the inferior court, board, tribunal, or officer exercising it proceeds in a summary manner, or in a course different from the common law, that the circuit or district court of the state, or other tribunal exercising general original common-law jurisdiction, has, in the absence of a special remedy being given, an inherent authority to revise the proceedings of such inferior jurisdiction by certiorari." In *People v. Board of Police & Excise*, 69 N. Y. 408, Mr. Chief Justice Church said: "The office of a common-law certiorari has been very much enlarged by the later decisions in this state, but there is no authority holding that questions of fact from conflicting evidence, or conflicting inferences which may be drawn from facts, or matter of judgment or discretion in a case justifying their exercise, can be reviewed. Only errors in law affecting materially the rights of the parties may be corrected, and the evidence may be examined in order to determine whether there is any competent proof to justify the adjudication made." So in *People v. Board of Police Department*, 72 N. Y. 415, the court said: "It is now settled that the court, on a common-law certiorari to review the judicial action of boards, commissioners, or inferior officers, is not confined to the mere question of jurisdiction of the person and subject-matter, but will look into the proceedings, and, if the adjudication made is unsupported by any evidence, it will be reversed." In *Berry v. Lowe*, 10 Mich. 9, the supreme court of Michigan, on certiorari to a justice, the question arising from the evidence, said: "If the alleged error is a total want of evidence to prove some fact necessary to sustain the judgment, the court will look into the testimony to see whether there was such evidence or not. If there was, it will not weigh it or inquire into its sufficiency, but affirm the judgment. If the return shows no such evidence, and it appears all the testimony before the justice has been returned, the judgment will be reversed, on the ground that the justice erred in law in rendering the judgment he did without such evidence." In *Farmington River Water Power Co. v. County Com'rs*, 112 Mass. 206, Mr. Chief Justice Gray said: "A writ of certiorari (when not used as ancillary to any other process) is in the nature of a writ of error, addressed to an inferior court or tribunal whose procedure is not according to the course of the common law. After the writ has been issued, and the record certified in obedience to it, the court is bound to determine, upon an inspection of the whole record, whether the proceedings are legal or erroneous." In *State v. Dodge Co.*, 56 Wis. 70, 13 N. W. 680, Mr. Chief Justice Cole, de-

livering the opinion of the court, said: "On this common-law certiorari, which brings up for review the proceedings of an officer or board which acts in a summary manner out of the course of the common law in the exercise of quasi judicial powers, this court will look into the proceedings, not only for the purpose of ascertaining whether such officer or board acted according to law, and within its jurisdiction, but will also correct errors and irregularities in its proceedings." In *Harris v. Barber*, 129 U. S. 368, 9 Sup. Ct. 314, the supreme court of the United States, speaking through Mr. Justice Gray, said: "A writ of certiorari, when its object is not to remove a case before trial, or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law, is in the nature of a writ of error. Although the granting of a writ of certiorari rests in the discretion of the court, yet, after the writ has been granted, and the record certified in obedience to it, the questions arising upon the record must be determined according to fixed rules of law, and their determination is reviewable on error." *People v. Smith*, 45 N. Y. 772; *Inhabitants of Tewksbury v. County Com'rs*, 117 Mass. 563; *City of St. Paul v. Marvin*, 16 Minn. 102 (Gil. 91); *Inhabitants of Mendon v. County Com'rs of Worcester*, 5 Allen, 18; *Hyslop v. Finch*, 99 Ill. 171; *People v. Board of Police*, 39 N. Y. 506; *People v. Board of Assessors*, Id. 81; *Jackson v. People*, 9 Mich. 111; *Fall v. Paine*, 23 Cal. 303; *Rawson v. McElvaine*, 49 Mich. 194, 13 N. W. 513; *Iron Co. v. Schubel*, 29 Wis. 444. From an examination of the authorities, it is quite clear that the contention of counsel that in a case like the one at bar, where there is no other remedy provided by law, the review is limited to questions of jurisdiction, and that the court cannot look into the evidence for any purpose, rests on no sufficient foundation, and, if such were the law, then the board of commissioners could arbitrarily exercise the power of removal, however groundless might be the charges preferred against the officer, or erroneous the judgment. If the board had jurisdiction of the subject or of the person to be affected, wrongs committed would be remediless, and every person subject to its authority would be absolutely at its mercy. In *People v. Board of Police*, supra, Mr. Justice Woodruff, in delivering the opinion of the court, after reviewing a number of the more prominent cases on the writ of certiorari, and expressing a belief, in view of the great number of proceedings of a summary character in which powers are exercised affecting valuable rights, both of person and property, that this most useful writ had been confined within too narrow limits, said: "Let it be once established that when an officer or board of officers have jurisdiction of the subject or of the persons to be affected, and proceed in its exercise according to the prescribed forms or mode, their de-

termination is final, and beyond the reach of any review, whatever errors in law they may commit, and however clear it may be upon undisputed facts that their judgment, decision, or order is not warranted, and there is danger that much of injustice and wrong may happen without possibility of redress."

Nor are the views herein expressed regarding the office of a common-law certiorari, and the power of the court on such a writ, in contravention of the statute of this territory in relation to this subject. Section 3718, Comp. Laws Utah, 1888, reads as follows: "The writ of certiorari may be denominated the writ of review." It is apparent that the writ here designated is the common-law certiorari, and hence the power of the court under it is the same as at common law, except as narrowed or enlarged by statute. Section 3719, Id., reads: "A writ of review may be granted by any court, except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy, and adequate remedy." This section designates under what conditions and from what court the writ may issue. It may issue when there is no appeal or other plain, speedy, and adequate remedy. In the case at bar there is no pretense that the relator has any other remedy. Section 3722, Id., reads: "The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings, (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed." This section is simply declaratory of the common law, for, as has been seen, at common law, the record as well as the proceedings of the inferior tribunal are brought up in the return to the writ, and the inferior court is prohibited from proceeding further in the meantime. Such is the law declared in this statute. Section 3725, Id., reads: "The review upon this writ can not be extended, further than to determine whether the inferior tribunal, board or officer, has regularly pursued the authority of such tribunal, board or officer." It would indeed be a very narrow interpretation which would limit the review of courts under this section to the mere question whether the inferior tribunal, board, or officer had jurisdiction of the party or subject-matter, especially when considered in connection with the next section (3726, Id.), the only remaining one material here, and the language of which is: "If the return to the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as

may attend for that purpose, and may thereupon give judgment, either affirming, or annulling or modifying the proceedings below." Construing these two sections together, it is evident that in any case where the inferior tribunal, board, or officer has not regularly pursued its authority in the course of its proceedings, or has rendered judgment, or made an order in contravention of law when applied to the facts, the court may, after hearing the parties, render judgment as provided in the last section quoted. For this purpose the court may of necessity, and as a salutary restraint upon such inferior tribunal, board, or officer, require that the entire proceedings, including the evidence, be brought up in the return, and look into the testimony to determine whether there is any evidence which will warrant, as a matter of law, the judgment, decision, or order which is the subject of complaint. The power here conferred upon the court does not essentially differ from that exercised by the courts on common-law certiorari. It is simply affirmatory of the settled rule of law. Nor are the views expressed herein on this question of the power of a certiorari in conflict with the decision of this court in *Saunders v. Sioux City Nursery*, 6 Utah, 431, 24 Pac. 532. In *Golding v. Jennings*, 1 Utah, 135, we think the court confined the office of the writ within too narrow limits, and, so far as that case is in conflict with the rule herein declared, it is disapproved. We conclude, therefore, that in the case at bar the board, in its return to the writ, properly certified the whole proceeding had before it, including the evidence, and that the district court had power, and on appeal this court has power, to examine the whole evidence, to determine whether, as a matter of law, there was any proof before the board which could sustain its judgment discharging and dismissing the relator from service, as well as to determine whether it had jurisdiction of the party, and whether its proceedings were had in accordance with law.

Having thus determined that the record and proceedings of the board are properly before this court on appeal, the further question is made whether the appellant had authority to compel the relator to undergo a competitive examination as a condition to his continuing in the employ of the department. To determine this question, reference to the act approved March 8, 1894, again becomes necessary. Counsel for appellant insist that the word "employed," as used in section 6 of the act, in the sentence, "Said boards in the cities mentioned in this act, shall prepare and adopt such rules and regulations to govern the selection and appointment of persons employed on the police force, or in the fire department," etc., applied to all persons in the employ of either department mentioned in the act at the time of its passage, as well as to applicants for positions thereafter. Such a construc-

tion would compel all such employes, at the mere pleasure of the board, to submit either to a removal from service or to undergo the competitive examination provided for in the act for applicants who may be seeking employment; and it appears in this case that the board acted on such construction, for it demanded of the relator that he undergo such an examination as a condition precedent to his continuing in its employ. An examination of the entire act reveals no such legislative intent, and, if there is any doubt as to the meaning of the word "employed" in section 6, such doubt is removed by section 9, for in that section the legislature expressly provided that: "Such rules and regulations shall specify the date when they shall take effect; and thereafter all selections of persons for employment, or appointment, or promotion," etc., shall be made according to such rules and regulations. The provision is for selections to be made thereafter; that is, after the rules and regulations have been adopted. There was manifestly no intention to include among applicants for employment those who were already in the service. Nor was it necessary to so include employes to secure efficiency in either department, because there is ample provision in the act to secure the removal and dismissal of all those who may be unfaithful or incompetent. To compel persons who were in the employ of either department at the time of the passage of the act, and who continued therein, to submit to an examination, or, failing to do so, to suspend or remove them from service for such failure, is unwarranted under the law.

The remaining question is whether the appellant regularly pursued its authority in the proceedings had to remove the relator. The statute law applicable to this branch of the case is found in sections 7 and 20, hereinbefore referred to and quoted. These sections provide that no officer or member, either of the fire or police department, shall be dismissed or removed, except for cause, nor unless charges have been previously preferred against such officer or member in writing, and the accused given an opportunity to be heard. This is a salutary law founded in justice, is mandatory, and must have been strictly pursued, or else the judgment of the board is nugatory. A similar provision of a statute was construed by this court in the case of *People v. McAllister*, 37 Pac. 578, to which we refer, on this question of the removal of officers for cause, for our views on the question in this case. An examination of the record before this court on appeal shows that the relator, while in actual service in the fire department, was suspended; that submission to examination was made a condition precedent to reinstatement; that thereafter charges were preferred against him, as hereinbefore stated, but at the hearing the board introduced no evidence to sustain the charges; and the rec-

ord shows that, according to the evidence of the relator, he was in every way an efficient officer, and that the onus probandi was cast upon him to show that there was not sufficient grounds for his removal. An examination of the evidence in detail is unnecessary. Nor is further reference to the record necessary. It discloses a state of facts and a course of proceeding from which it is manifest that the board did not regularly pursue its authority, and there is no evidence in the record to sustain its decision and order suspending and discharging the relator from service. Such decision and order are therefore void as being in excess of jurisdiction, and the judgment of the district court must be affirmed. The judgment is affirmed.

SMITH and KING, JJ., concur.

(11 Utah, 399)

CLARK v. BOARD OF FIRE & POLICE COM'RS OF SALT LAKE CITY.

(Supreme Court of Utah. April 27, 1895.)

Appeal from district court, Third district; before Justice Samuel A. Merritt.

In the matter of the application of C. J. Clark for writ of review to review the action of the board of police and fire commissioners of Salt Lake City in discharging relator. From a judgment of the district court for relator, the board appeals. Affirmed.

E. D. Hoge and W. G. Van Horne, for appellant. Powers & Straup, for respondent.

BARTCH, J. The relator was a member of the fire department in Salt Lake City. He was removed from his position by the board of police and fire commissioners on the 11th day of August, 1894. The legal questions raised by the record in this case are precisely the same as those raised in the case of *Gilbert v. Board* (decided at this term) 40 Pac. 264. The facts are also similar to those in that case, except the charges preferred, which in this case are that the relator is above the prescribed age as fixed by the board; that he is troubled with rheumatism, and that the action of his heart is weak. The same proceedings were had by the board in this case as in the one above mentioned. The two cases were tried together in the lower court, and argued together on appeal in this court. We therefore refer to the opinion in that case for our decision of all the questions raised by the record in this; and on the authority of that case the judgment of the court herein must be affirmed. The judgment is affirmed.

SMITH and KING, JJ., concur.

(55 Kan. 134)

CLARK v. CLARK et al.

(Supreme Court of Kansas. April 30, 1895.)

SALE—EVIDENCE OF CONSUMMATION.

The testimony examined, and held to be sufficient to sustain the finding of the court that a sale of a stock of merchandise claimed to have been made was not consummated before the seizure of the merchandise at the instance of attaching creditors.

(Syllabus by the Court.)

Error from district court, Decatur county; G. Webb Bertram, Judge.

H. R. Marietta and 16 other creditors of Clark & Blake sued the latter in attachment. Isaac Clark interpleaded in said suits. There was judgment for plaintiffs in the attachment suits, and the interpleader brings error. Affirmed.

Teague Ray and John D. Hays, for plaintiff in error. Bertram & McElroy, for defendants in error.

JOHNSTON, J. This is a controversy over the ownership and possession of a stock of merchandise that had been owned and kept by Clark & Blake at Oberlin. They had been engaged in a general merchandise business, and had become financially embarrassed; their indebtedness being nearly \$30,000, which was largely in excess of the value of their property and assets. They entered into negotiations for a sale of their stock of goods to Isaac Clark and H. R. Marietta, and while negotiations were in progress the stock of goods was seized upon attachments by a number of the creditors of Clark & Blake; and among the attaching creditors was H. R. Marietta, who was to be a partner of Isaac Clark in the purchase of the same goods. Isaac Clark interpleaded in the attachment suits,—there being 16 of them,—claiming that he was the owner of the attached goods by virtue of a purchase of the same from the failing firm of Clark & Blake. All of the attachment actions were consolidated and tried together, and the principal controversy was between the attaching creditors and the interpleader. The court found from the testimony that Marion W. Clark, the senior member of the firm of Clark & Blake, had attempted to sell and transfer to Isaac Clark, his father, about \$10,000 worth of merchandise, out of a total stock of about \$14,000 belonging to the firm, but that the sale was never completed, and no delivery of the merchandise had ever been made. There was a further finding that the merchandise claimed by the interpleader was the property of Clark & Blake, and subject to the payment of their debts, and to the attachments that had been levied upon the stock. Isaac Clark complains of these rulings, and asks for a reversal.

While it appears to be conceded that the failing firm was indebted to Isaac Clark in the sum of \$1,712.12, they were attempting to transfer to Isaac Clark nearly \$10,000 worth of merchandise, who paid no money whatever upon the transfer, although it is claimed that he was to assume the payment of a part of the debts of the firm. There is sufficient testimony, however, to uphold the finding of the court that the sale of the goods was never in fact completed. The evidence of Blake, one of the failing firm, is to that effect, while Marietta, who was to be a partner of Isaac Clark in the purchase, disavowed the sale, and caused the goods to be attached upon a claim which he held against the firm. He did not join Isaac Clark in the interplea, claiming the goods. Indeed, Isaac

Clark himself, on the day the attachments were levied, treated the property as that of the firm, by agreeing to take a mortgage on the same to secure his claim against the firm. In the brief of counsel for plaintiff in error, they concede that there is a conflict in the evidence as to the consummation of the sale; and this concession necessarily requires an affirmance of the judgment, as the finding of the trial court upon conflicting evidence cannot be reviewed here. The judgment of the district court will be affirmed. All the justices concurring.

(55 Kan. 219)

FIRST NAT. BANK OF WASHINGTON v. CLARK.

(Supreme Court of Kansas. April 30, 1895.)

JUDGMENT LIEN—FILING JOURNAL ENTRY.

1. The act of congress entitled "An act to regulate the liens of judgments and decrees in the courts of the United States," approved August 1, 1888, rendered it necessary that a judgment creditor who had theretofore obtained a judgment in the circuit or district court of the United States for the district of Kansas should file an attested copy of the journal entry of the judgment in the office of the clerk of the district court of any other county than that in which the judgment was rendered, in order to thereafter maintain a lien on the lands of the judgment debtor in such other county, within a reasonable time after the passage of such act. The defendant in error, having failed to file a copy of the journal entry of such a judgment in the office of the clerk of the district court of Washington county, where the land in controversy is situated, for more than four months after the passage of the act, lost his lien, if any he had, by reason of such failure.

2. Whether the lien of a judgment of the circuit court or district court of the United States for the district of Kansas extended to lands in a county other than that in which the judgment was rendered, without compliance with section 419 of the Code of Civil Procedure prior to the passage of the act of congress of August 1, 1888, discussed, but not decided.

(Syllabus by the Court.)

Error from district court, Washington county; F. W. Sturges, Judge.

Action by the First National Bank of Washington against Warren S. Clark. From a judgment for defendant, plaintiff brings error. Reversed.

Joseph G. Lowe and Charles Smith, for plaintiff in error. Waggener, Martin & Orr, for defendant in error.

ALLEN, J. The plaintiff brought suit in the district court of Washington county against F. E. Vanhorn, Warren S. Clark, and others, to foreclose a mortgage executed on the 25th of January, 1888, by F. E. Vanhorn to John T. Elwood on a tract of land therein described, to secure the payment of \$2,000 and interest. The mortgage and the debt secured thereby were assigned by John T. Elwood to Nancy E. Elwood, and by Nancy E. Elwood to the plaintiff. It appears that John T. Elwood purchased the land in controversy at sheriff's sale on the 1st day of August, 1887, and conveyed the same to Vanhorn January 25, 1888, which is the date of the mortgage

sued on. On the 6th day of December, 1887, a judgment was obtained in the circuit court of the United States for the district of Kansas by Thomas E. Tootle against John T. Elwood and others for \$6,845. After two executions had been issued on this judgment, and returned unsatisfied, an execution was issued on the 3d of December, 1888, and on the 6th of that month was levied by the marshal on the lands in controversy, which he sold to satisfy said judgment to the defendant in error. No copy of the journal entry of the judgment rendered by the United States circuit court was filed in Washington county. Two questions are presented: First, whether a judgment of the circuit court of the United States, under the law as it stood prior to the passage of the act of congress of August 1, 1888, became a lien on all the lands of the judgment debtor within the territorial jurisdiction of the court, without compliance with section 419 of the Code of Civil Procedure of this state. Second, If such lien did exist, whether the act of congress above mentioned made it necessary thereafter to file for record a copy of the journal entry of a judgment of the circuit court of the United States theretofore rendered, in counties other than that in which the judgment was rendered, in order to preserve the lien on lands therein.

Section 419 of the Code of Civil Procedure provides: "Judgments of courts of record, of this state, and of courts of the United States, rendered within this state, shall be liens on the real estate of the debtor, within the county in which the judgment is rendered, from the first day of the term at which the judgment is rendered; but judgments by confession, and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which such judgment was rendered. An attested copy of the journal entry of any judgment, together with a statement of the costs taxed against the debtor in the case, may be filed in the office of the clerk of the district court of any county, and such judgment shall be a lien on the real estate of the debtor, within that county, from the date of filing such copy. The clerk shall enter such judgment on the appearance and judgment docket in the same manner as if rendered in the court of which he is clerk. Executions shall only be issued from the court in which the judgment is rendered." It will be observed that this section provides for docketing judgments of the United States courts in exactly the same manner as those of the state courts. The extent to which judgments of federal courts should become liens on the property of the judgment debtor was never defined by act of congress until the passage of the act of 1888, but it had been held by the federal courts that judgments of the United States circuit and district courts became liens on the debtor's property to the same extent as judgments of the state courts within their jurisdiction. It was also held that where provision

was made for docketing the judgments of the state courts in counties or districts other than those in which the judgments were rendered, and no such provision was made with reference to federal judgments, the lien of the federal judgments extended throughout the territorial jurisdiction of the court without so docketing in counties other than where rendered. *Massingill v. Downs*, 7 How. 760; *Williams v. Benedict*, 8 How. 107; *Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818; *Bank v. Bates*, 44 Fed. 546; *Hill v. Gordon*, 45 Fed. 276. The precise question whether, under a statute like that in force in Kansas, placing state and federal judgments on an exact equality with reference to the manner of obtaining and extent of a judgment lien, it was necessary that the judgment creditor, who obtained judgment in the federal court, should comply with the state law, and docket his judgment with the clerk of the district court of the county where the debtor's property was situated, has never been decided, so far as we are able to discover. The policy of the federal government has been to adapt the practice in federal courts in common-law actions to that prevailing in the state courts, and to place suitors in state and federal courts on an equal footing as to remedies. It may well be doubted whether the lien of the federal judgment extended beyond the county in which it was rendered, unless a copy of the journal entry was filed in the office of the district clerk of the county where the property sought to be affected by the judgment lien was located. It is not necessary in this case, however, that we should decide this question. In 1888 an act of congress was passed, which took effect on the 1st of August, containing the following provision: "That judgments and decrees rendered in a circuit or district court of the United States, within any state, shall be liens on property throughout such state, in the same manner, and to the same extent, and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done in a particular manner, or in a certain office, or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever, and only whenever, the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state." 25 Stat. 357. In the case of *Bank v. Bates*, supra, it was held that under this act the lien of a federal judgment extended only to lands of the judgment debtor in the county in which the court was held, unless the judgment was docketed elsewhere in accordance with the state statute. The judgment under which the defendant in error

claims was rendered prior to the passage of the act of congress above quoted, but execution was not levied on this property until the 6th of December following, nor had any copy of the judgment entry been filed in the office of the district clerk of Washington county. The state law requiring the docketing of judgments in counties other than where rendered is in the nature of a recording act, and for the purpose of imparting notice to persons acquiring title to the land. It is well settled that it is competent for the legislature, not only to require that instruments thereafter executed affecting the title to property shall be recorded in a particular manner, but also to require that instruments before executed shall also be so recorded, provided only a reasonable time for so doing is allowed. In *Plow Co. v. Witham*, 52 Kan. 185, 34 Pac. 751, it was held that "chapter 255, Laws 1880, regulating the recording of title notes, or evidences of conditional sales, applies to all instruments in writing or promissory notes therein referred to, whether in existence at the time that act went into force, or thereafter executed, with the limitation, however, that there must be a reasonable time after the statute went into force for the holders of such notes or instruments then in existence to comply with its provisions." See, also, *Jackson v. Lamphire*, 3 Pet. 280; *Burnes v. Simpson*, 9 Kan. 658. The statute of this state can have none the less force because passed long prior to the act of congress. In the most favorable view to the defendant in error, both acts must be treated as having been in full force and effect on the 1st of August, 1888. As the law stood then, and ever since, it was necessary, in order to make a judgment of the United States circuit court a lien on the lands of the judgment debtor prior to actual levy, that a copy of the journal entry should be filed with the clerk of the district court of Washington county. This was not done, and the land was not actually seized by the marshal until December 6th, more than four months after the passage of the act of congress. We are clearly of the opinion that this afforded more than ample time for compliance with the state statute, and that the lien of the federal judgment, if it ever had any (as to which we express no opinion), was lost before the execution was levied. It follows, therefore, that the court erred in holding that the plaintiff had no lien on the property in controversy. The judgment will be reversed, and the case remanded, for further proceedings in accordance with the views above expressed.

JOHNSTON, J., concurring. HORTON, C. J., not sitting.

(55 Kan. 200)

DEITZLER v. WILHITE.

(Supreme Court of Kansas. April 30, 1895.)
CONSTITUTIONAL LAW—OCCUPYING CLAIMANT'S
ACT—RIGHTS OF OWNER.

1. The constitutionality of the occupying claimant's act recognized and affirmed.

2. The defendant took possession under a void tax deed of a vacant lot, and erected a valuable house thereon. The lot without improvements had but a trifling rental value. With improvements it was worth \$12 per month. *Held*, that the plaintiff has no right, either under the occupying claimant's act, or the principles of equity, to rent for the improvements erected by the defendant accruing prior to the service of summons in the action.

(Syllabus by the Court.)

Error from district court, Lyon county; C. B. Graves, Judge.

Action by Anna M. Deitzler against J. M. Wilhite. From the judgment, plaintiff brings error. Affirmed.

The plaintiff in error, as plaintiff below, brought suit to recover a lot in Emporia, and also damages for the use and occupancy thereof. The record recites that, "a jury being waived, the court then heard the evidence on the question of title, reserving the issues made by plaintiff's second cause of action." And, after consideration, the court rendered judgment in favor of the plaintiff for the recovery of the lot. The defendant then asked the court to determine his tax lien, his title being based on a tax deed which the court held void, and further moved the court for an assessment, under the occupying claimant's act, of the value of the improvements made by him. A sheriff's jury having been waived, and all questions having been submitted to the court, findings of fact and conclusions of law were made, as follows: "(1) The defendant, while an occupant of the land in controversy, erected lasting and valuable improvements thereon prior to the commencement of this suit, which are of the value of \$1,565. (2) The net rents and profits of said land since the commencement of this suit, with the improvements thereon, up to June 13, 1889, the day of trial, are \$103.33. (3) The value of said land without any improvements is \$250. (4) The defendant and his grantors have paid taxes on said land, which, with the interest, penalties, and costs as allowed by law, amount to the sum of \$150.63 on said June 13, 1889. (5) Previous to April 1, 1885, said land had been wholly vacant and unimproved. On that day the defendant took actual possession thereof, and erected a residence thereon, which was completed on August 1, 1885, since which date he has occupied the same as a homestead. On August 6, 1888, this suit was commenced, and on the same day a summons was served therein on said defendant. (6) The fair rental value of said lot from April 1, 1885, to August 1, 1885, was \$1. The fair rental value thereof without improvements since August 1, 1885, is \$1 each year. The fair rental value thereof with the improvements from August 1, 1885, to August 6, 1888, was \$12 each month. The fair rental value thereof with improvements after August 6, 1888, the date of service of summons in this case, is \$10 per month, up to June 13th, the date of trial." Conclusions of law: "(1) The defendant is entitled to a

credit of \$1,505, the value of his improvements, and for the further sum of \$150.63, the amount of his tax lien, which aggregates the sum of \$1,715.63. (2) The plaintiff is entitled to a credit for rents and profits enjoyed by the defendant after service of summons in this suit, which amounts to \$103.33 up to June 13, 1889, the day of trial. (3) The plaintiff is entitled to the possession of said land upon payment of the sum of \$1,612.30, the difference between the credits above named. (4) If the plaintiff prefers to sell the land to the defendant, she may do so at the sum of \$250." Thereupon judgment was rendered in accordance with the court's conclusions of law.

Almerin Gillett, for plaintiff in error. T. N. Sedgwick, for defendant in error.

ALLEN, J. (after stating the facts). Two questions only are urged on our consideration: First. Is the plaintiff entitled to have \$12 per month, the value of the use and occupation of the lot, with the improvements, for the full time the property was occupied by the defendant, set off against the value of the improvements awarded the defendant? Second. Is the amount allowed the defendant for his tax lien excessive?

It is argued that the occupying claimant's law was not correctly construed by the trial court, and that, if such a construction as was given it is proper, then that it is unconstitutional. It is urged that the allowance to an unsuccessful occupying claimant of lands of the value of his improvements is equitable in its nature, although provided for by statute; that it is and must be governed by equitable principles; that courts of equity, before the enactment of any statute, lent their aid to mitigate the hardships of the common-law rule which gave to the owner of the land all improvements, without any compensation to the party placing them there; that courts of equity interfered only so far as to set off the value of the improvements against the plaintiff's claim for mesne profits, but never rendered a judgment for the excess if the value of the improvements exceeded the mesne profits. Our attention is called to the bill of rights, and especially to sections 2 and 18. We find no conflict between the occupying claimant's law and the bill of rights. The validity of such enactments has been so often and universally upheld by the courts everywhere that we do not deem citations of authorities on the point necessary. We think the provisions of the occupying claimant's law in accordance with sound equitable principles, and that no reason can be found in ethics why the occupying claimant should not have the full value of his improvements, as well when the value exceeds the mesne profits as when it does not. The substance of the plaintiff's claim is not merely that she is entitled to the value of the use and occupation of her property,—the bare lot,—which the court finds was one dollar per

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year, and concerning which the plaintiff makes no complaint, but she claims the rental value of the house constructed by the defendant, which, in equity and good conscience, never was her property at all. The equity, the ethics, of such a claim finds no favor with us. On the contrary, we think the claim grossly inequitable. The defendant's money paid for the improvements. No allowance could be made for interest on his investment, but he has had the use of it. We know of no sound reason why one should be charged for using his own property, no matter what the form of the action may be. If complaint were made that no allowance was made for the use and occupation of the plaintiff's lot, exclusive of improvements, the claim would address itself to a court of equity with great force. But no such claim is made. The amount, indeed, is too trifling to litigate. Although it is claimed that no trial was had on the plaintiff's second cause of action, which was for rents and profits prior to the commencement of the action, we think the record contains enough to show that the whole matter was tried and determined by the court; but we find no error in the conclusions reached.

As to the plaintiff's second claim, it is urged that taxes on the improvements placed on the lot by the defendant were allowed, and that it is certainly unjust that the plaintiff's property should be subjected to an additional burden, resulting solely from the act of the defendant, and especially so when the plaintiff is given no benefit whatever by an allowance for rent of such improvements. We are not prepared to say that the reasoning of counsel on this proposition is erroneous. In the case of *Uhl v. Small* (Kan. Sup.) 39 Pac. 178, we held that equitable considerations should not be overlooked nor ignored in determining the amount of a tax lien in favor of the holder of an invalid tax title. But counsel concedes that the record does not clearly present the question. In fact, it does not present it at all. There is nothing whatever giving us any light on the question when or on what the taxes were levied. The plaintiff was allowed for the value of the use and occupation of the lot and improvements after suit brought in accordance with the statute. There is nothing tending to show error in the court's computation of the taxes. The judgment is affirmed. All the justices concurring.

(55 Kan. 196)

KEYSTONE IRON-WORKS CO. v. DOUGLAS SUGAR CO. et al.

(Supreme Court of Kansas. April 30, 1895.)

MECHANICS' LIENS—PRIORITY—ERROR—TIME OF BRINGING.

1. The case of *Flint & Walling Mann'g Co. v. Douglass Sugar Co.*, 38 Pac. 566, 54 Kan. 455, in regard to the priority of liens, followed.

2. Upon the application of a lien holder, the judgment of the trial court giving one lien preced-

once over another was vacated, and a new trial granted, upon that issue alone. After the second trial the court ruled that the findings and conclusions first made as to priority of liens should stand, and gave judgment accordingly. More than a year after the first judgment was rendered, and within one year from the rendition of the second, the case was brought to the supreme court for a review of the ruling as to the precedence of liens. *Held*, that the proceeding was brought in good time, and that the same was not barred by the one-year statute of limitation.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by the Keystone Iron-Works Company against the Douglas Sugar Company and the Merchants' Bank of El Dorado, Kan. Judgment for defendants, and plaintiff brings error. Reversed.

Hamilton & Leydig, for plaintiff in error. Redden & Schumacher and Leland & Harris, for defendants in error.

JOHNSTON, J. This was an action to determine and enforce the liens of several lien holders upon the sugar factory built by the Douglas Sugar Company, and is a branch of a litigation which was before this court in *Flint & Walling Manuf'g Co. v. Douglass Sugar Co.*, 54 Kan. —, 38 Pac. 566. In this proceeding the controversy is between the Keystone Iron-Works Company and the Merchants' Bank of El Dorado, Kan. When the trial was had, the court, among other facts, found that in May, 1888, the Keystone Iron-Works Company contracted with the sugar company to furnish material and machinery for the sugar factory, and in pursuance of that contract there was furnished for the construction of the sugar factory material and machinery of the value of \$3,056.81. The construction of the sugar factory was begun in May, 1888, and the first of the material and machinery furnished by the Keystone Iron-Works Company was furnished about June 19, 1888. Before that time, and on the 9th day of June, 1888, the sugar company executed a mortgage upon the factory and premises of the company to N. F. Frazier, to secure the sum of \$10,600, with interest at 12 per cent. per annum after maturity, and two days later the mortgage was duly recorded in the office of the register of deeds. The mortgage so executed and recorded was duly assigned to the Merchants' Bank of El Dorado, Kan. The factory was completed about October 15, 1888, and in due time thereafter the Keystone Iron-Works Company filed its statement for a mechanic's lien. Although the material and machinery for which a lien was claimed were furnished in accordance with the original design, and were used in the construction, and became a part, of the sugar factory, in accordance with the original plan, and although the building was commenced before the execution of the mortgage, the court held that the mortgage executed after the commencement was paramount to the lien

for the material and machinery furnished by the Keystone Iron-Works Company.

This precise question was before the court in *Flint & Walling Manuf'g Co. v. Douglass Sugar Co.*, 54 Kan. —, 38 Pac. 566, where it was held that "the lien of parties who furnished machinery required and contemplated by the original plan of a structure erected for the manufacture of sugar, during the course of its erection, which went into and became a part of the sugar works, as originally designed, and which were fixed to and became a part of the realty, dates from the commencement of the building, and is superior to that of a mortgagee whose mortgage was executed after the commencement of the building, but before the machinery was actually furnished." Findings of fact and conclusions of law were announced by the court on January 15, 1890, and the Keystone Iron-Works Company applied for a new trial, and, in support of the same, oral and written evidence was produced. On February 1, 1890, the court granted the application for a new trial as to the time when the materials, fixtures, and machinery were furnished by the Keystone Iron-Works Company to the Douglas Sugar Company, and the judgment previously entered, adjusting the Keystone Iron-Works Company's lien, and fixing its priority, was vacated and set aside. Afterwards a new trial was had upon this issue, when the court found, as it did in the first instance, that the lien of the Keystone Iron-Works Company was subordinate to the mortgage lien of the Merchants' Bank of El Dorado. Immediately afterwards, and on September 9, 1890, the plaintiff in error filed another motion for a new trial, which was overruled, and the case was brought into this court for review on February 16, 1891. It is now contended that as the original judgment was rendered on January 15, 1890, and as the record was not filed in this court until February 16, 1891, more than a year had elapsed, and hence the plaintiff in error was not entitled to a review. We cannot consider or review the ruling of the court made in 1890, but the plaintiff in error does not ask a review of that ruling. The decision which was then made was in fact vacated upon application of the plaintiff in error, and, the ruling being in its favor, no review was desired. The question in dispute was the precedence of the several liens, and, as between the parties to this proceeding, the controversy was whether the mortgage lien was paramount to the mechanic's lien. The court first decided that the mortgage lien had priority over the mechanic's lien, but, on application of the plaintiff in error, that determination was vacated and set aside, and the question of priority was retried. The final decision was made on September 6, 1890, and at that time it was held "that the findings of fact and conclusions of law by the court reached in the original hearing

of this case last January were correct and should stand." It is contended that the determination by the court that the findings "should stand" indicates that the first order was not in fact set aside, but was only held in abeyance until the question was retried, and that the decision in September simply removed the suspension, and left the findings and judgment in force as of the date of January 15, 1890. The record does not fairly sustain this contention. According to the language employed by the court in its order, the decision on the priority was in fact set aside, and a new trial of the issue was had. There was involved in that issue the precise point which was in controversy between these parties in the original trial, and the final order and judgment were not made, from which proceedings in error could have been taken, until the case was finally decided, in September, 1890. The court then reinstated the finding and judgment originally made, and, as the proceeding in error was instituted within a year from that time, the case is properly here for review.

As the point of difference concerning the priority of liens has been determined in the case of *Flint & Walling Manuf'g Co. v. Douglass Sugar Co.*, 54 Kan. —, 38 Pac. 566, and as no reason is seen for disturbing the rule then made, it follows that the ruling of the district court cannot be sustained. The judgment of the district court will therefore be reversed, so far as it affects the priority of liens between the Keystone Iron-Works Company and the Merchants' Bank of El Dorado, and the cause will be remanded, with instructions to enter judgment awarding the plaintiff in error precedence over the mortgage lien of the bank, and that the claim and judgment of the plaintiff in error shall be paid out of the proceeds of the sale of the property, in accordance with that determination. All the justices concurring.

(55 Kan. 205)

MISSOURI PAC. RY. CO. v. KEYS.

(Supreme Court of Kansas. April 30, 1895.)

WATER COURSE—DIVERSION BY RIPARIAN OWNER
—SURFACE WATERS.

1. An owner of land has a right to change the channel, and divert the water in a stream flowing through his land, providing that he returns the water to the original channel before it reaches the land of the proprietor below; and when an owner, for the purpose of straightening a stream, cuts a ditch through his land, and over and along the highway, with the acquiescence and common consent of all, and turns the water of the stream therein, it will be governed by the same rules, in the matter of interference and obstruction, as a natural water course.

2. Waters which have overflowed the banks of a stream during a freshet, in consequence of the insufficiency of the channel to hold and carry them off, are surface waters, to be treated as a common enemy, against which any landowner affected may protect himself.

3. While a landowner cannot obstruct a water course, or divert a stream of water so as

to cause injury to another without being responsible therefor, he has the right to obstruct and hinder the flow of mere surface water upon his land from the land of other proprietors,—and he can even obstruct and turn the same back upon the land of his neighbor, without incurring liability for injuries caused by such obstruction.

(Syllabus by the Court.)

Error from district court, Wilson county; L. Stillwell, Judge.

Action by John B. Keys against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

John B. Keys brought an action to recover damages resulting from the alleged obstruction of a water course by the railway company. The trial was had by the court without a jury, and the following findings of fact and conclusions of law were made:

"(1) The plaintiff, John B. Keys, is, and has been for more than five years last past, the owner and occupant of the southeast quarter and the south half of the northeast quarter of section No. 31, in township No. 30, range No. 16, in Wilson county, Kansas; said premises being excellent farming land.

"(2) In the year 1886 a certain railroad corporation, known as the Verdigris Valley, Independence & Western Railway Company, constructed a line of railroad which passes through Wilson county, Kansas; and said railroad was constructed along the west of section 32, in the aforesaid township and range, and close to the east line of aforesaid section 31, but no part of the roadbed was located upon said section 31. Said railroad passed into the hands of the defendant, the Missouri Pacific Railway Company, some time in the year 1886, and has been ever since controlled and operated by said defendant company.

"(3) The said railroad, where it passed the plaintiff's premises, runs nearly due north and south, down the valley of Fall and Verdigris rivers. There is a public highway, also running north and south, which is on the west side of said line of railroad, and the east side of the plaintiff's premises. This highway existed prior to the railroad. About two miles west of said railroad, and extending substantially north and south, is a range of high hills, which form a continuous and extended ridge. The slopes and summits of these hills are covered with grass, but destitute of timber. In the gorges, however, between the hills, are groves and clumps of trees of native timber. There are three small branches or streams which have their sources in three different gorges among these hills, and flow northeast and east, and unite in one stream a little east of the house of a man named Squires, forming a stream known as 'Crow Creek.' This stream, from the point of confluence, as above stated, flows substantially in an eastern direction until it reaches plaintiff's premises. It strikes the southeast quarter of section 31, on the western side.

about the center; and from there it originally flowed slightly northeast, then turned to the southeast, and flowed into Verdigris river.

"(4) Some time before the construction of the defendant railroad, the plaintiff, Keys, dug a large ditch for the purpose of straightening the course of the stream where it crossed his premises. He commenced this ditch on the west side of the southeast quarter aforesaid, where the stream struck it, and dug it due east, about twelve feet wide and three feet deep, down the center of the quarter section, to the eastern line, until it again connected with the original channel of Crow creek. The original channel of Crow creek, where it first struck plaintiff's premises on the west, and from thence flowed northeast, and thence southeast, in a circuitous course, is completely filled up; and water no longer flows there, unless it is water backed up from the railroad, as hereafter stated. The railroad grade of defendant's railroad, along the east side of plaintiff's premises, is about three or four feet high, and in times of heavy rains it dams up the mouth of plaintiff's ditch where it emerges from his premises, fills it with mud and sediment, and the accumulated water backs up from the railroad grade, and overflows nearly all of plaintiff's said premises, and destroys his growing crops.

"(5) Before the construction of the defendant's railroad, in time of high water, and when Crow creek overflowed the ditch plaintiff had constructed, it flowed over the public highway, east of plaintiff's premises (the same being lower than the land on the west), and through openings under said highway, and made its escape into the original channel of said creek, and from thence on into Verdigris river. There are four openings under the track of the defendant railroad, located as hereafter stated, to admit the passage of water flowing from the west. The first opening is about thirty rods north of the south line of plaintiff's premises, and is six feet wide and a foot and a half deep. The second opening is opposite the south line of plaintiff's premises, is ten feet wide, and two feet deep. The third opening is a few rods south of the second opening, is six feet wide, and one foot and four inches deep. The fourth opening is three hundred and six feet south of the third opening, and is forty feet wide and four deep. The size and location of these openings are such, taking into consideration the height, length, and general conformation of the railroad grade, that said openings are inadequate to carry off the water flowing down Crow creek in times of heavy rains, and therefore it backs up on plaintiff's premises, as before stated.

"(6) The slope of the land that is drained by Crow creek is to the northeast and southeast. Said creek affords the natural outlet for the water which falls on at least a section of land. It is fed by springs at different places before reaching the railroad. In the dry season of the year, it goes dry in some

places; in others, the water runs the entire year. The water has always been accustomed to run in the creek, so far as the recollection and observation of the witnesses extend (which, so far as the facts in this case are concerned, reach back to 1808, when the county was first settled). The stream has natural banks, it has cut a way through the turf, and has a well-defined channel. From the point of confluence of the three small streams on the Squires farm, and down the course of the stream, in numerous places, native forest trees grow along its banks, such as cottonwood, elm, and sycamore, etc. At one point, about midway between Squires' farm and plaintiff's premises, there is an extensive belt of young willow along the banks; the belt being two or three hundred yards long, about three or four rods wide, and the trees being between fifteen and thirty feet high. At various places along the stream can be seen bunches of drift, lodged high up on the banks and the adjoining undergrowth, indicating that in times of heavy rains the creek is the natural outlet for a large volume of water. The said stream of Crow creek is a natural water course.

"(7) It was agreed upon the trial of this action that the court might take a personal view of plaintiff's premises, the railroad of defendant at and near said premises, the aforesaid stream of water, and all other matters and things relating to the foregoing which could be seen, and might aid the court in deciding the cause. Thereupon, on the afternoon of the 22d day of May, 1890, and during the May term of the Wilson county district court, the court went to the place where the foregoing objects could be seen, and the same were pointed out and identified by the counsel of the respective parties. That being done, the court personally, and on foot, investigated the sources of Crow creek, and followed said stream from Squires' farm to and across plaintiff's premises, down the railroad, and over and across the railroad, for some distance in a southeasterly direction. The length of the stream from the point of confluence, on Squires' farm, to where it reaches the railroad, taking into consideration its windings and sinuosities, is about two or two and one-half miles.

"(8) During the year 1888, in consequence of the failure of the defendant company to provide sufficient passageways for the waters of Crow creek, as hereinbefore stated, the waters of said creek overflowed plaintiff's premises, and he thereby sustained injury to his crops of wheat and corn as follows:

To his wheat	\$ 60 00
To his corn	69 00

Total for 1888 \$129 00

"(9) During the year 1889 the plaintiff sustained injuries to his wheat and corn, in the manner and by reason of the facts above stated, as follows:

To his wheat	\$150 00
To his corn	75 00
Total for 1889	\$225 00
Total loss and damage for said two years	\$354 00

"(10) Some time during the year 1887 the defendant company, through its proper officers, had notice and knowledge that the openings under its roadbed were insufficient and inadequate to afford a sufficient outlet for the waters of said Crow creek.

"(11) This action was commenced on the 28th day of December, 1889, and no damages have been allowed the plaintiff for any injury to his crops that occurred more than two years prior to the commencement of this action.

"(12) There is no proof that the defendant company entered into a contract with the Verdigris Valley, Independence & Western Railway Company to construct the line of railroad now controlled and operated by the defendant company, and which runs by plaintiff's premises.

"(13) Prior to the construction of said railroad, said Verdigris Valley, Independence & Western Railway Company duly obtained the right of way for said road through Wilson county, Kansas, by virtue of condemnation proceedings duly and regularly had, and in accordance with law. A very small tract of plaintiff's land, in the extreme southeast corner of his premises, was appropriated by these proceedings, and he was allowed \$8 as the value of the land so taken, and 5 cents as damages to land not taken.

"And from the foregoing findings of fact the court deduces the following conclusions of law: The plaintiff is entitled to recover of the defendant the sum of \$354, his damages as aforesaid sustained, and the costs of the action, for which judgment will be rendered."

A motion for a new trial was made and overruled, and judgment was awarded in favor of Keys for the sum of \$354. The railway company alleges error.

J. H. Richards, C. E. Benton, and S. S. Kirkpatrick, for plaintiff in error. Sutherland & Young, for defendant in error.

JOHNSTON, J. (after stating the facts). In his petition, Keys averred that, ever since the settlement of the section of the country in which his farm is situate, there has been a distinct natural water course running in an easterly and northeasterly direction through his land, which conducted large quantities of water from the hills lying west and northwest of his land, and that prior to the building of the railroad the water passed freely and unobstructedly eastwardly from plaintiff's land along the water course, but since the building of the railroad, and owing to the incomplete, inadequate, and improperly located openings for the passage of water coming down the natural water course

across the right of way of the railway company, and beneath its tracks, the water had accumulated and remained in great quantities over the plaintiff's land, damaging and destroying his crops, for which he asked judgment in the sum of \$1,990. It appears that the plaintiff's land is situate in section 31, while the railroad is constructed on section 32. Between sections 31 and 32 there is a highway; and immediately east, and running parallel with the highway, the railroad was constructed. The water course which came from the hills on the west was known as "Crow Creek"; and, while there was some controversy as to the character of the stream, the testimony is sufficient to show that it should be treated and regarded as a natural water course. The creek formerly meandered through Keys' farm in an easterly and northeasterly direction, being somewhat crooked, and flowed out across the section line into section 32, until it found its outlet in the Verdigris river. For the purpose of straightening the course of the creek through his premises, Keys dug a large ditch directly east through the center of his land, which carried the water into the highway; and from that point he dug two ditches in a southerly direction along the highway, until they reached the original channel of the creek. After this new channel was made, the original channel of the creek through plaintiff's premises, and which passed across the highway, and under the point where the railroad was built, was completely filled up, and water no longer flowed there. This was the situation when the railroad was built. It was constructed parallel with the ditches that were dug in the highway, and not across the artificial channel which was dug through Keys' premises. Some claim is made by the railway company that the artificial channel through Keys' land is not to be treated as a water course, and that the obstruction of the same would give no right of action for the resulting injury. It appears that the ditch was dug, not merely for the drainage of the land, but as a channel for the flow of the water of a natural water course. It had remained open, and had been treated as a water course, for a number of years before the construction of the railroad, and therefore is to be governed by the same rules as other water courses. Keys, as the owner of the land, had a right to change the channel, and divert the water of Crow creek, provided he returned the water to the same channel before it reached the land of the proprietor below. It appears, however, that Keys did not return the water to the channel of Crow creek upon his own land, but carried it out into the highway, and conducted it down the highway, in ditches, to the original channel. It is true, as contended, that he has no right to divert the water of the stream from its channel, and precipitate it, in a body, upon the adjoining land, to the injury of the owner. The pro-

prietor of the adjoining land would have the right to erect an embankment across the course of the water, and thus keep it off his land; and the party who had wrongfully diverted the water of the stream could not complain if the embankment thus made would have the effect of turning the water back upon his own land. No complaint, however, is made by the public authorities in charge of the highway by reason of the diversion of the stream, and the discharge of the water into the highway; and if the ditches dug were reasonably sufficient for the purpose, and there has been acquiescence and consent to such diversion by the public authorities, the railway company cannot complain for them, or derive any advantage from the change of the channel in the lands above its right of way. The turning of the stream from its original channel gave the railroad company no right to interrupt or obstruct the new channel, and if it was interrupted or obstructed, to the injury of an upper landowner, he is entitled to recover for any damages he may suffer in consequence of such obstruction. The railroad, however, was not built across the ditch upon Keys' land, nor does it appear from the findings of the court that it was built across the ditches constructed by him in the public highway. As we have seen, the highway lay between Keys' land and the right of way of the railroad company; and we do not understand that the ditches or water course were crossed or changed by the company, in the building of its road. The case appears to have been decided upon the theory that it was the duty of the railroad company to make an opening through its embankment to carry off the water which might overflow the ditches which Keys had constructed, and, because it failed to make an opening which would discharge the overflow in a body upon the land below, the company was held liable. The court found that in time of high water, before the construction of the railroad, when there was an overflow of the stream, it flowed over the public highway, through openings under the highway, and made its escape into the original channel, and thence into the Verdigris river. The court finds, as the cause for the injury, and as a basis for the recovery which was allowed, that "the railroad grade of defendant's railroad along the east side of plaintiff's premises is about three or four feet high, and in times of heavy rains it dams up the mouth of plaintiff's ditch where it emerges from his premises, fills it with mud and sediment, and the accumulated water backs up from the railroad grade, and overflows nearly all of plaintiff's premises, and destroys his growing crops." As we have seen, the railroad was not constructed over the ditch which emerges from plaintiff's premises, nor did that ditch reach the right of way of the railroad, upon which its grade was constructed. There was no duty

resting on the railroad company, or any proprietor of the lower land, to provide an outlet for the overflow of Crow creek, or of the ditches into which it was turned. In changing the channel of the creek, it was the duty of Keys to make the new channel sufficient, not only for the ordinary flow of water in the stream, but also for such as might be reasonably expected to occur. The overflow of the stream where it emerged from Keys' land, and which spread out over the highway, and crossed the land upon which the railroad was built, was not confined to any channel, and had none of the characteristics of a water course. It was practically surface water, which is regarded as an outlaw, against which any landowner affected may fight. "The simple fact that the owner of one tract of land raises an embankment upon it which prevents the surface water falling and running upon the land of an adjoining owner from running off said land, and causes it to accumulate thereon, to its damage, gives to the latter no cause of action against the former. Nor is the rule changed by the fact that the former is a railroad corporation, and its embankment is raised for the purpose of a railroad track, nor by the fact that a culvert could have been made under said embankment sufficient to have afforded an outlet for all such water." *Railroad Co. v. Hammer*, 22 Kan. 763. See, also, *Railroad Co. v. Steck*, 51 Kan. 737, 33 Pac. 601; *Railroad Co. v. Renfro*, 52 Kan. 237, 34 Pac. 802. While a landowner cannot obstruct a water course, or divert a stream of water, so as to cause injury to another, without being responsible therefor, it is well settled, under the common law, which prevails in this state, that an owner has the right to obstruct and hinder the flow of mere surface water upon his land from the land of other proprietors, and he can even turn the same back upon the land of his neighbor, without incurring liability for injuries caused by such obstruction. Under this rule, Keys had no right to have the surface water flow cross the right of way of the railroad company; but, on the contrary, it had a right to protect itself by building an embankment without openings or water ways, in order to prevent the water crossing its right of way, and any injury caused thereby is *damnum absque injuria*. *Pettigrew v. Village of Evansville*, 25 Wis. 236; *Hoyt v. City of Hudson*, 27 Wis. 656; *O'Connor v. Railway Co.*, 52 Wis. 526, 9 N. W. 287; *Turner v. Inhabitants of Dartmouth*, 13 Allen, 291; *Bowlsby v. Speer*, 31 N. J. Law, 351; *Swett v. Cutts*, 50 N. H. 430; *Preston v. Hull (Iowa)* 42 N. W. 305; *Morris v. Council Bluffs*, 67 Iowa, 343, 25 N. W. 274; *McCormick v. Railroad Co.*, 57 Mo. 433; *Abbott v. Railway Co.*, 83 Mo. 271; *Jones v. Railroad Co.*, 84 Mo. 151; *Schneider v. Railway Co.*, 29 Mo. App. 68; 24 Am. & Eng. Enc. Law, 903.

As the recovery of the plaintiff below was

largely based upon the failure of the railway company to provide openings for the flow of surplus water, it cannot be sustained. The judgment of the district court will be reversed, and the cause remanded for another trial.

ALLEN, J., concurring. HORTON, C. J., not sitting.

(55 Kan. 225)

NUTE et al. v. AMERICAN GLUCOSE CO.
(Supreme Court of Kansas. April 30, 1895.)
APPEAL—RECORD—BILL OF EXCEPTIONS—ACTION ON CONTRACT.

1. The ruling of the court on an objection to the introduction of any testimony on the ground that the petition does not state facts sufficient to constitute a cause of action is a proceeding which it is the duty of the clerk to enter on the journal. The action of the court is thereby made a part of the record, and, if exception is noted on the journal, may be reviewed in this court without the allowance of a bill of exceptions, or making a case for this court.

2. The petition and copy of contract thereto attached are too long to incorporate in the syllabus, and it is impracticable to summarize them. On consideration, this court finds that the petition states a cause of action under the contract, and that the trial court erred in sustaining an objection to the introduction of any testimony thereunder.

(Syllabus by the Court.)

Error from district court, Leavenworth county; Robert Crozier, Judge.

Action by John W. Nute and others against the American Glucose Company. Judgment for defendant, and plaintiffs bring error. Reversed.

The plaintiffs in error brought suit to recover damages under a contract for the sale of what is termed "sugar-meal feed," to be produced at the defendant's factory in Leavenworth. When the case was called, after impaneling a jury, an objection was made to the introduction of any testimony, on the ground that the petition does not state a cause of action. This objection was sustained by the court, the jury discharged, and a judgment rendered in favor of the defendant for costs. Attached to the plaintiff's petition is a copy of the contract sued on, which reads as follows: "This agreement, made this 9th day of October, A. D. 1889, by and between the American Glucose Company, a corporation existing under and by virtue of the laws of the state of New Jersey, and having its principal office at Buffalo, N. Y., party of the first part, and the Sugar-Meal Company, a partnership consisting of John W. Nute, L. E. Wicks, and P. Thompson, partners doing business under the firm name of the Sugar-Meal Company, at Kansas City, Mo., party of the second part, witnesseth: That the party of the first part agrees to furnish to the party of the second part the entire quantity of sugar-meal feed produced by its factory at Leavenworth, Kansas, from the morning of October 10th, A. D. 1889, to

the morning of April 1st, A. D. 1890, the said sugar-meal feed to be of the same character as that usually produced at the said factory, and to receive therefor from the party of the second part seventeen and one-half (17½) cents per barrel of two hundred (200) pounds in full payment for same. The party of the first part agrees to dispose of any part of the said feed which the party of the second part is obligated to take or pay for hereunder, but which it may be unable to dispose of, without cost to the said party of the second part; such feed to be run into the sewer, or otherwise destroyed, by the party of the first part. But any feed in excess of the quantity which the party of the second part is obligated to take or pay for hereunder, and which it shall not take or pay for, may be disposed of by the party of the first part, for its own use and account, in any market not covered by, or not in any way interfering with the arrangements of the party of the second part for the sale of such feed. The party of the first part agrees to load all cars for the party of the second part, and to deliver the same at any railroad in the city of Leavenworth, Kansas, as has been customary heretofore; to ship the feed, and make out bills of lading, as it may be directed by the party of the second part; mail duplicate bills of lading to any address given by the party of the second part; and to attach original bills of lading to its drafts upon the party of the second part for the value of the feed contained in the cars for which such drafts are made. The party of the first part agrees to furnish a man to sell and deliver feed at its said factory to the retail trade in Leavenworth during the life of this contract. The party of the first part agrees to give the party of the second part the preference over all other competitors for its entire production of sugar-meal for the year from April 1st, 1890, at equal prices and terms. The party of the second part agrees to take the entire production of sugar-meal feed of the said factory of the party of the first part from October 10th, A. D. 1889, to April 1st, 1890, but not exceeding three thousand barrels, of two hundred pounds each; that is to say, all the feed produced from twenty-two thousand five hundred bushels of corn, in any one week, and to pay for the same seventeen and one-half (17½) cents per barrel of two hundred pounds, delivered on cars at Leavenworth, Kansas, and to furnish the party of the first part with all requisite shipping directions for same. The party of the second part agrees to honor all drafts made upon it by the party of the first part for feed shipped for account, and by the direction of the party of the second part, when presented at its office in Kansas City, Mo., with original bills of lading for the feed covered by such drafts, and also for any part of the feed which it is obligated to take weekly under this contract, but which it shall not have

instructed the party of the first part to ship, and which shall not have been furnished it for its retail trade by said party of the first part. The party of the second part agrees that in the event of the party of the first part making drafts upon other parties by direction of the party of the second part, then the party of the second part will bear all expenses of collecting the same, and that it will pay the drafts of the party of the first part for the amount of any such drafts dishonored, upon presentation with such dishonored drafts attached, and that the party of the first part shall not be in any way responsible to it for the failure of other parties to honor such drafts, nor for the failure of banks or other parties to whom drafts may be sent for collection to collect and turn over to the party of the first part the proceeds of such drafts. The party of the second part agrees to pay the party of the first part the sum of thirty (30) dollars per month for the services of the man furnished by the party of the first part to sell and deliver feed to the retail trade in Leavenworth, the same to be paid at the end of each month. The party of the second part agrees to assume all the outstanding retail tickets for feed sold by the party of the first part prior to the taking effect of this agreement, but not exceeding twelve hundred (1,200) barrels in quantity, for the sum of twenty (20) cents per barrel of two hundred pounds. The party of the second part further agrees to furnish the party of the first part a good and sufficient bond, in the sum of two thousand (2,000) dollars, for the full and faithful performance of its obligation under this contract; such bond to be approved by, and acceptable to, the party of the first part. It is mutually understood by and between the parties hereto that a barrel of feed is intended to represent and contain such portion of the residuum from seven and one-half (7½) bushels of corn ground in the said factory of the party of the first part as it has been customary for the party of the first part to sell to its retail trade and out of town customers as its sugar-meal feed, and that the party of the first part shall receive, and the party of the second part shall pay, seventeen and one-half cents for such portion of the residuum from each seven and one-half bushels of corn ground by the said factory of the party of the first part, but not exceeding twenty-two thousand five hundred bushels of corn in any one week, unless the party of the second part shall receive in such week the feed product of more than twenty-two thousand five hundred bushels of corn, which, until the exact rate of production shall be established as hereinafter provided, shall be deemed to be one barrel of feed for each seven and one-half bushels of corn ground. Settlement shall be made as follows: The party of the first part shall draw sight drafts, with bills of lading attached, upon the party of the second part, or parties

designated by it, for each day's shipments of feed by the party of the first part for account of the party of the second part. These drafts shall be credited to the account of the parties of the second part upon the books of the party of the first part. All moneys received from retail sales of the party of the second part at Leavenworth shall be turned over to the party of the first part by the agent or employé of the party of the second part, and shall also be credited to the party of the second part, together with all other moneys received by the party of the first part for account of the party of the second part from all other sources whatsoever. There shall also be credited to the party of the second part twenty cents for each barrel of feed delivered by it on tickets previously sold by the party of the first part, and assumed by the party of the second part, as hereinbefore provided. There shall also be charged to the account of the party of the second part all expenses incurred in the collection of drafts, and also any draft returned dishonored. There shall be charged to the account of the party of the second part, as it is shipped, and at seventeen and a half cents per barrel of two hundred pounds, the number of barrels of feed shipped for the account of the party of the second part. There shall also be charged, at seventeen and a half cents per barrel of two hundred pounds, all feed delivered on retail sales at Leavenworth of the parties of the second part, and all feed delivered on tickets of the party of the first part assumed by the party of the second part, as hereinbefore provided. There shall also be charged to the party of the second part, at the end of each week, at seventeen and a half cents each, a sufficient number of barrels of feed to bring the total quantity charged for such week up to three thousand barrels: provided, however, that the total quantity so charged shall in no week exceed one barrel for each seven and a half bushels of corn ground in the said factory of the party of the first part during such week. Statements of each week's transactions, showing the balance due to the other party, shall be rendered to the party of the second part by the party of the first part as soon after the end of such week as practicable; and the balance, if any, due to the party of the first part shall be paid within three days after rendering of such statement, by check of the party of the second part, and, if not so paid, the party of the first part shall have the right to make drafts for the amount upon the party of the second part. If the balance shall be shown to be due the party of the second part, it shall be deducted from the first draft thereafter made by the party of the first part upon the party of the second part. At the end of each month in which the party of the second part shall take all the feed produced at Leavenworth by the party of the first part, it shall be ascertained what number of bush-

els of corn produced each barrel of two hundred pounds of feed produced in such month by the party of the first part. If it shall be ascertained that less than seven and a half bushels of corn produced such barrel of feed, the difference shall be made good by the party of the first part to the party of the second part on all feed charged the party of the second part since the previous test was made. If all the feed charged the party of the second part has been paid for according to the terms of this agreement, then such difference shall be made good by check of the party of the first part to the party of the second part. If any feed charged the party of the second part shall not have been paid for, then this difference, or so much of it as may be equal to the amount due from the party of the second part to the party of the first part, shall be credited to the party of the second part; and the remainder, if any, shall be paid to the party of the second part by check of the party of the first part. If it shall be ascertained that a greater number of bushels of corn than seven and one-half was required to produce such barrel of feed, then the difference shall be made good to the party of the first part by check of the party of the second part. It is understood that delivery of the feed covered by this contract is to be made upon cars at Leavenworth, Kansas, or at its factory, as directed by the party of the second part, and that, in estimating the quantity of feed shipped, the weights of the railroad company over which it is shipped shall be taken; and for the amount of corn ground in its factory, and the quantity of feed delivered to retail trade, the books and records of the party of the first part shall be deemed conclusive. Although the term "barrel of feed" is used in this contract, it is understood that the feed is sold and bought, and is to be delivered and paid for by weight, at the rate of seventeen and a half cents for each two hundred pounds. The party of the second part shall have the right, at any time, to furnish a man to attend to its retail trade, and to any other of its interests, at and around the said factory of the party of the first part; and, upon its giving the party of the first part notice of its desire so to do, the party of the first part shall be released from furnishing, and the party of the second from paying for, the services of the party previously furnished by the party of the first part for such service. It is further mutually agreed that in case of the suspension of the manufacture of feed, in whole or in part, in the factory of the party of the first part, by reason of fire or explosion, or accident of any kind, in the said works, or the machinery contained therein, the party of the first part shall not be liable in damages to the party of the second part for failure to deliver feed during such suspension of the production of feed. It is further mutually agreed that the party

of the second part shall have the right to extend this agreement to the first day of June, A. D. 1890, or to the first of July, A. D. 1890, by giving written notice thereof to the party of the first part on or before March first, 1889." The petition alleges that the defendant furnished 83,890 barrels of sugar-meal feed under the contract, and that on or about the 15th day of January, 1890, it closed its works at Leavenworth, and failed and refused to furnish any feed thereafter, and that such failure was not occasioned by fire, explosion, or accident. It is alleged that the plaintiffs entered into the contract for the feed for the purpose of reselling it, and that they expended a large sum of money in establishing agencies and building up a trade, which was well known to the defendant, and that they made a net profit of 15 cents a barrel. They ask judgment for \$8,537.98 damages.

Lucien Baker, Elijah Robinson, and Stuart Carkener, for plaintiffs in error. John H. Atwood and L. B. & S. E. Wheat, for defendant in error.

ALLEN, J. (after stating the facts). A motion is made to dismiss the petition in error on various grounds, none of which, however, are tenable. We find the petition in error sufficient, and, while the clerk's certificate contains some things that are unnecessary, it is not defective. It is also insisted that the only error complained of is in sustaining an objection to testimony, and, as there is no bill of exceptions in the case, that the error has not been made to appear of record. An objection to the introduction of any testimony on the ground that the petition does not state facts sufficient to constitute a cause of action raises only an issue of law. *Dodge City Water-Supply Co. v. City of Dodge City*, 55 Kan. —, 39 Pac. 219. It was held in the case cited that no motion for a new trial was needed for the purpose of reviewing the ruling of the court on such an objection. Rulings of the court on issues of law are properly entered on the journal, as was done in this case, and no bill of exceptions is necessary. Section 705 of the Code provides: "On the journal shall be entered the proceedings of the court of each day, and all orders of the judge in vacation or at chambers, and also all judgments entered on confession or default." Very clearly, a ruling of the court on such an objection, which completely disposes of the case, and ends the trial, is a proceeding that is required to be entered on the journal.

The main question in this case is whether the defendant company was bound to operate its factory at Leavenworth from October 10, 1889, to April 1, 1890, unless prevented by fire, explosion, or accident. Many authorities are cited, and many general rules are quoted, on the subject of the construction of contracts. It would be a tedious and boot-

less task to enter into an extended consideration of the many rules to which our attention is called, which it is claimed should be observed in determining the effect of this contract. All of them amount to but little more than the proposition that it is the duty of the court to ascertain, from the language made use of by the parties, what their agreement really was, and give it effect according to their mutual intentions. We do not think it necessary, either, to discuss at length the question as to how far oral evidence might be introduced for the purpose of establishing a cause of action under the plaintiff's petition. Generally speaking, the only purpose of such testimony, as an aid to the construction of a contract, is to afford the court information concerning the subject-matter of the contract, and the situation of the parties, so that it may view the instrument in the light of such knowledge as the parties themselves had of surrounding circumstances. Such evidence is not to be received, however, for the purpose of supplying defects or omissions in the contract where there is no claim made that it does not truly embody the agreement of the parties. In this case the plaintiffs rely on the written agreement as the foundation of their cause of action. They must stand or fall by its terms. For the defendant, it is contended that the contract is drawn with great care and attention to detail; that nothing is to be inferred that is not expressed; that where the parties have carefully considered the agreement into which they have entered, have selected the terms used after careful consideration, have minutely provided for many contingencies, that no room is left for implication, and no presumptions should be indulged in which will have the effect of imposing on either party a burden which he has not expressly assumed. It is said that nowhere in the contract can there be found an express agreement by the defendant to operate its factory during the time covered by the contract; that the defendant contracted to sell no more sugar-meal feed than should be produced in its Leavenworth factory; that the only limitation with reference to quantity is that of 3,000 barrels per week, more than which quantity the plaintiff was under no obligation to take, but that the defendant was not bound to produce 3,000 barrels per week, nor any other quantity; that it appears that corn-meal feed was but a by-product of minor importance in its factory, a barrel being the amount produced from $7\frac{1}{2}$ bushels of corn, for which, under the contract, the plaintiffs were to pay but $17\frac{1}{2}$ cents; that it cannot be presumed that the defendant would have obligated itself to continue to operate its factory merely for the purpose of complying with its contract for this comparatively insignificant product. It must be conceded that there is much force in this reasoning. To the trial court it appeared convincing. We are not, however, satisfied with it. The defendant was operat-

ing a factory at Leavenworth. This contract is for a very definite period,—from the morning of one day to the morning of another day named. The only hint of a possible stoppage or suspension of the factory is that contained in the following paragraph: "In case of the suspension of the manufacture of feed, in whole or in part, in the factory of the party of the first part, by reason of fire or explosion, or accident of any kind, in the said works, or the machinery contained therein, the party of the first part shall not be liable in damages to the party of the second part for failure to deliver feed during such suspension of the production of feed." If it was not intended to bind the defendant to operate its factory, or to produce feed, this section would seem to be entirely meaningless. To break the force of the inference naturally arising from this provision, it is ingeniously argued by counsel that this provision was not made for the purpose of exempting the defendant from liability for failure to produce feed, but to relieve it from the necessity of delivering feed which had been theretofore manufactured. We are impressed rather with the ingenuity of the argument than with its force. We do not think that the word "deliver" is to be singled out as the one on which the whole meaning of the paragraph turns, but that the fair and reasonable interpretation of the clause is that if the defendant was prevented from manufacturing feed by fire, explosion, or accident, the plaintiffs should not recover damages because the defendant was prevented by such misfortune from complying with its contract. The contract, in its general scope, does not contemplate the production and storage by the defendant of the feed, but rather that it shall be promptly disposed of; and the necessity for so doing is recognized by that provision of the contract under which the defendant agrees to run into the sewer, or otherwise destroy, whatever the plaintiffs should be unable to use. By the terms of the contract, as construed by the defendant, if no feed was produced, the defendant was not bound to deliver. Its obligation to deliver depended entirely on production. It is provided in the contract that the defendant shall furnish a man to sell and deliver feed at its factory to the retail trade in Leavenworth "during the life of this contract," and that the plaintiffs shall pay him \$30 per month. The plaintiff assumed all outstanding retail tickets issued by the defendant, not exceeding 1,200 barrels. Can it be said that the defendant was under no obligations to produce even this? Provision was carefully made for shipments, for drafts on consignees, and for monthly settlements. Beyond all question, the plaintiffs were obligated to take and pay for 3,000 barrels per week, if so much was produced, whether they succeeded in selling the same to customers, or allowed the defendant to run it into the sewer. Beyond that quantity, they were

privileged to take whatever the factory produced, but were not bound to do so. It is evident from the terms of the contract that it would be necessary for the plaintiffs to incur expense, and to make needed arrangements for the sale of this product. The provisions with reference to the quantity show that the parties did not contemplate that the whole product could be advantageously disposed of. The defendant was assured, however, of a market for 3,000 barrels per week. Is it possible that the plaintiffs were not assured of any supply whatever, and that, after having incurred any amount of expense that might be necessary in finding a market for the product, it was entirely optional with the defendant whether it would operate its factory at all, or not? At the time the contract was entered into the defendant was operating its factory, and continued to so operate it until about the middle of January following. If it was bound to operate it one week, it was bound to operate it the full time. But it is said that a product of one barrel per day would have been a full compliance with the contract, and that, even if it be conceded that an obligation rested on the defendant to operate its factory, still substantial damages cannot be awarded, because the defendant was not bound to more than a nominal compliance with the contract. On the other hand, the plaintiffs claim that they are entitled to have their damages assessed on the basis of 3,000 barrels per week; that, if the defendant had operated its factory, they were bound to take so much, and had the privilege of taking more, if produced; that the measure of their damages ought to be the amount they could have been compelled to pay for. The contract will not bear this interpretation. It is perfectly clear that the defendant was not bound to produce 3,000 barrels per week. We think the defendant was bound, however, to operate its factory in good faith; that the contract clearly contemplated that it should do so. If it had so operated, it would have produced a substantial quantity of feed. How much would have been so produced, we are in no position to determine. Such a factory, however, cannot be operated in good faith, and in a reasonable manner, without incurring great expense, and making a corresponding output. It would be folly to operate a large establishment merely for the purpose of making a nominal product. On the other hand, it is clear that the defendant did not bind itself to make the largest possible output. We think the plaintiffs are entitled to recover such damages as they are able to show resulted to them from the failure of the defendant to operate its factory in a reasonable manner, but that such damages should be computed on the least quantity that would have been produced in case the factory had been operated in good faith. The court erred in sustaining the objection to any testimony. The judgment is reversed, and the case re-

manded for further proceedings in accordance with the views above expressed. All the justices concurring.

(55 Kan. 164)

In re MUTCHLER.

(Supreme Court of Kansas. April 30, 1895.)

LARCENY—WHEAT CONSTITUTES—FELONIOUS INTENT.

If one hires a team and buggy of another, pretending that he wants them to drive to a certain place, and to be gone a specified time, when in fact he merely intends to take them for a ride to another or more distant place, and then leaves them for the owner, at such place, to get again, with no intention to permanently use the team, or to deprive the owner of them entirely, and subsequently, in accordance with his original intention, only retains the team four or five hours, and then puts them in a stable at the place where he has driven them, for the owner, and at once sends a letter to a friend at the place where the owner resides, of what he has done with the team, and to give notice to the owner thereof, and such notice is given, but somewhat delayed, *held*, that the party hiring the team is not guilty, under the circumstances, of larceny of the property.

(Syllabus by the Court.)

Proceedings in habeas corpus by F. H. Mutchler. Petitioner discharged.

A petition for writ of habeas corpus was filed in this court on March 21, 1895, on behalf of F. H. Mutchler, who is charged with grand larceny committed in Johnson county, in this state, on the 5th of January, 1895. The petition, among other things, shows that he was arrested in January, 1895, and on the 5th of February, 1895, had a preliminary examination before a justice of the peace at Olathe, in Johnson county, who found that the crime of grand larceny had been committed, that there was probable cause for believing the petitioner guilty thereof, and requiring him to enter into a recognizance in the sum of \$600 for his appearance at the district court in Johnson county to answer to the crime alleged against him, and in default thereof to be committed to the county jail of that county. The petitioner, being unable to give the recognizance, was committed to jail, and is confined therein by the jailer of Johnson county. The petitioner was required to give notice of his application for writ of habeas corpus, and the case was assigned for hearing at the April sitting of the court for 1895. The case was heard upon a certified copy of the evidence introduced upon the preliminary examination, and a stipulation, signed by the attorneys of the petitioner and the county attorney of Johnson county, as to what other evidence could be offered against the prisoner.

Parker & Hamilton and S. D. Scott, for petitioner. F. R. Ogg, for respondent.

HORTON, C. J. (after stating the facts). The petitioner alleges that he should be discharged from imprisonment because the evidence fails to show the commission of any offense on his part. In re Eberle, 44 Kan. 472, 24 Pac. 958. It appears that on Tuesday, the

5th of January, 1895, at Spring Hill, in Johnson county, M. S. Johns obtained of S. B. Swarts, a livery man, a team of horses, with harness, buggy, and robe, saying he wanted the team to go to the Hutchinson schoolhouse. This place was a half a mile north, and four miles east, of Spring Hill. Soon afterwards, F. H. Mutchler came to the barn, and asked how much the team would cost if they were back at 1 o'clock on that day. Swarts answered, \$1.50. Mutchler made arrangements for the payment of that amount. Dr. Stevens, of Spring Hill, was present at the conversation. Thereupon, the team was furnished, and Mutchler and Johns got into the buggy and drove away. Instead of going to the Hutchinson schoolhouse, the team was driven to Martin City, in Missouri, about 15 miles from Spring Hill. They reached there about noon of the day they left Spring Hill. Johns put the team in the stable; ordered the horses rubbed down and fed. He then wrote a letter to Dr. Stevens, at Spring Hill, requesting him to inform Swarts his team was at Martin City. This letter was placed in an envelope addressed to Dr. Stevens, at Spring Hill. It was properly stamped and mailed at the post office at Martin City, Mo., about 1 o'clock of January 5th. It was received at Spring Hill the same day. It was delivered to Mrs. Stevens on Monday evening, January 7th. She turned it over to Swarts the same evening. The team was found at Martin City on Tuesday morning, the 7th of January, by William Mullinson, the son-in-law of Swarts, who brought them back to Spring Hill on the same day. While neither Johns nor the petitioner intended to go to the Hutchinson schoolhouse when they obtained the team, they had no purpose at that or any other time to steal the property, or to deprive the owner entirely of the same. They merely intended to take the team for a ride, and then leave the property for the owner to get again. They only had possession a few hours. When they had driven to Martin City, Johns put the team in the stable, for the owner, and notified Dr. Stevens, at Spring Hill, where the team was, and requested him to inform Swarts what they had done. If the property had not been left at Martin City for the owner, and if no notice had been sent to him thereof, the making a different use of the property from that contemplated by the hiring would furnish some evidence that the original intention was felonious, and that the hiring was a mere device to obtain the possession from the owner, and an opportunity to steal the property. *State v. Woodruff*, 47 Kan. 151, 27 Pac. 842. The conduct of the parties at Martin City rebuts the presumption that Mutchler meant to deprive Swarts of the property. "A felonious intent means to deprive the owner, not temporarily, but permanently, of his own property, without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner." Upon the facts, there was no felonious intent existing in the mind

of Mutchler at the time of the original taking, nor was there any subsequently superadded felonious intent on his part. The petitioner will be discharged. All the justices concurring.

(55 Kan. 167)

CITY OF ROSEDALE v. GOLDING.

(Supreme Court of Kansas. April 30, 1895.)

DEFECTIVE BRIDGE—LIABILITY OF CITY.

1. A bridge which had been built and maintained by the county was wholly within the corporate limits of a city of the third class, and, there being no proper guards on either side of the same, a person passing over it was, without fault on his part, thrown off the bridge and injured. *Held*, that the bridge formed a part of one of the public streets of the city, and that it was the duty of the city to keep the bridge in such a condition as to be reasonably safe for persons traveling over the same, and that it is liable in damages for an injury resulting from a neglect to perform this duty.

2. The evidence examined, and found to be sufficient to sustain the verdict and judgment. (Syllabus by the Court.)

Error from district court, Leavenworth county; Robert Crozier, Judge.

Action by Patrick Golding against the city of Rosedale for injuries to his minor son. Plaintiff having died, Sarah Golding, his administratrix, was substituted as plaintiff. Judgment for plaintiff, and defendant brings error. Affirmed.

Van Syckel & Littick, for plaintiff in error. Byron Sherry and Roland Hughes, for defendant in error.

JOHNSTON, J. In July, 1886, John Golding, who was about 17 years of age, resided with his father and mother in Rosedale, and worked in a packing house in Armourdale. On one of the principal streets of Rosedale there was a bridge which spanned Turkey creek, and the boy passed over this bridge in going to and from his work. On the evening of July 1, 1886, while riding a pony over the bridge, on his way home, he met a team, and, in passing, a trace or some other part of the harness of the other team touched the pony, causing him to flinch and jump aside, so as to precipitate the boy and pony off the edge of the bridge, down into the creek, a distance of about 12 feet. The boy suffered severe and permanent injury from the fall. An action was brought by his father, Patrick Golding, to recover for medical and surgical attendance, hospital charges, loss of the pony, and for the loss of the services of John Golding from the time of his injury until he reached majority. Patrick Golding died soon after the commencement of the action, and Sarah Golding was appointed administratrix of his estate, and the action against the city was duly revived in her name. The right of recovery was based on the neglect of the city in permitting the bridge to remain without proper guards or railings on the sides of the same, and that it was therefore not in a reasonably

safe condition for the use of the public. Upon the trial the jury returned a verdict in favor of plaintiff, and against the city of Rosedale, in the sum of \$2,336. The only serious contention of the city in the trial court was that the bridge had been built and maintained by the county, and that, therefore, no liability could arise against the city for injuries resulting from its defective condition. While the bridge had been built by the county, it formed a part of one of the principal streets of the city. It was the duty of the city to keep and maintain the streets and the bridges thereon in such a condition as to be reasonably safe for persons traveling upon and over the same, and it is liable in damages to any one who suffers injuries resulting from a neglect to perform this duty. The fact that the bridge was in this instance built by or had been maintained at the expense of the county does not relieve the city from the obligation to keep a bridge which is upon one of the public streets within its corporate limits in a reasonably safe condition for the traveling public. A claim is made that there was no testimony showing the location of the bridge, but we find, upon an examination of the record, that there is abundant proof to show that it was within the corporate limits of Rosedale, and "a bridge situated wholly within the limits of the city is, with its approaches, a part of the public streets, and as such within the scope of the city's duties and liabilities." *City of Eudora v. Miller*, 30 Kan. 494, 2 Pac. 685. See, also, *Commissioners of Shawnee Co. v. City of Topeka*, 39 Kan. 197, 18 Pac. 161. It is clear that the city was negligent in failing to place a guard or rail along the side of a high bridge that was 60 feet long. There is a claim that the boy was guilty of contributory negligence because he knew or should have known of the dangerous condition of the bridge, but, under the testimony, it cannot be said as a matter of law that he was guilty of negligence in crossing the bridge. That question was submitted to the jury under proper instructions, and, they having found that the city was negligent and the boy without fault, the finding is conclusive. The claim that the verdict is excessive is not sustained by the record, and the other questions which the plaintiff in error seeks to raise were not before the district court, and therefore are not reviewable in this court. The judgment of the district court will be affirmed. All the justices concurring.

(55 Kan. 147)

In re LANDRETH (two cases).

In re BRADLEY.

(Supreme Court of Kansas. April 30, 1895.)

COMMITMENT FOR MISDEMEANOR—PAYMENT OF FINE AND COSTS—RECOMMITMENT.

1. Where a defendant has been convicted of a misdemeanor before a justice of the peace, and adjudged to pay a fine and the costs of the pros-

ecution, and to be committed until the fine and costs are paid, such judgment is not satisfied or discharged by the payment to the sheriff, having legal custody of the defendant, of the fine only, even if the justice, in issuing the warrant of commitment, accidentally omits therefrom the amount of the costs.

2. In such a case, if the defendant pays the fine, and is set at liberty, the justice may issue another warrant for his commitment, and he may be imprisoned thereunder until the judgment rendered by the justice is fully complied with.

(Syllabus by the Court.)

Separate petitions by William Landreth, George Landreth, and John Bradley for writs of habeas corpus. Writs refused, and petitioners remanded to custody.

W. H. Nipps, Geo. W. Stinson, and N. B. McCormick, for petitioners. W. H. Pratt, for respondent.

HORTON, C. J. The same question is involved in all of these cases. Each of the petitioners was convicted on the 22d day of March, 1895, in Phillips county, before a justice of the peace, of petty larceny. Each was fined a certain sum of money, and adjudged to pay the costs of the prosecution, and to be committed to the jail of that county until the fine and costs were paid. The justice of the peace before whom the convictions were had on the 22d of March, 1895, issued his warrant of commitment to a constable of his township, commanding him to take and commit the petitioners to the jail of that county, and there to remain until the judgment rendered against them should be complied with. He accidentally omitted to insert in the commitment the amount of the costs. Subsequently the petitioners paid the fines, and were released from custody by the sheriff. On the 25th of March, 1895, the justice of the peace issued another warrant, commanding the sheriff of his county, to arrest and commit the petitioners to the jail of the county until the judgments against them were fully complied with; that is, until all the costs were paid. Under the alias or new commitment, the petitioners were again arrested and committed to jail.

It is insisted that, as the petitioners were set at liberty by the sheriff, the judgment on which the commitment was issued was in law discharged, and that no subsequent commitment could be issued thereon. It is well settled that where a defendant is arrested, upon a ca. sa. in a civil action, and discharged by the direction or consent of the plaintiff, it is in law a discharge of the debt. This proceeds on the idea that the creditor has received a satisfaction by having once his debtor in execution. *Bryan v. Simonton*, 1 Hawks, 51. But this is not the law in a criminal cause. The officers charged with the public duty of collecting fines and costs adjudged against criminals occupy a different relation to such defendants than a creditor to his debtor. In this case the judgment was that the petitioners should be imprisoned until the fines and costs were paid. The judgment has never been satisfied. The costs remain unpaid. A mistake of a jus-

tice in taxing costs or in entering them upon his record or commitment is no release or discharge thereof. If a prisoner, after his conviction of a misdemeanor, escapes before his term of imprisonment expires, with or without the consent of the sheriff in whose custody he has been placed, he is not thereby legally set at liberty. He may be retaken and imprisoned again. Where the sheriff has, at the time of the return to a writ of habeas corpus, a good warrant from the committing justice, it is immaterial how many defective or bad ones he has. When the justice discovered that he had issued a defective commitment, it was his duty to issue a good one. Until the judgment rendered by the justice has been complied with, the petitioners are not entitled to their discharge. If the sheriff has collected any illegal fees, they should be credited upon the costs. For the new warrant of commitment, the justice is not entitled to any fees from the petitioners, because he should have included in the original commitment all of the costs taxed by him. The petitioners will be remanded. All the justices concurring.

(55 Kan. 154)

STATE ex rel. JOHNSON v. ALBERT.

(Supreme Court of Kansas. April 30, 1895.)

RIGHT TO OFFICE—DEATH OF SUCCESSOR—HOLDING OVER.

The election of a probate judge for the ensuing regular term, and his qualification by giving a sufficient bond, which is duly approved, and by taking and subscribing the proper official oath, deprive the incumbent of the right to hold over after the expiration of his term; and the death of the judge elect after such qualification, and before the expiration of the incumbent's term, does not revive the right to hold over, which was extinguished by such election and qualification.

(Syllabus by the Court.)

Quo warranto proceedings, on the relation of C. A. Johnson, against H. T. Albert. Judgment for relator.

This is an original proceeding instituted in this court to determine the right to the office of probate judge of Cowley county. It appears from the pleadings and the agreed facts that the defendant, H. T. Albert, was duly elected to the office of probate judge in November, 1892, duly qualified, and entered on the discharge of the duties of his office on January 9, 1893; that, at the regular election held in 1894, D. D. Parry was elected as his successor in office for the ensuing regular term; that, after the result of the election had been duly ascertained and declared, Parry executed, and filed in the office of the county clerk, a bond, which was approved by the county clerk, and took and filed therewith the oath of office prescribed by law on the 5th day of December, 1894. On the 4th day of January, 1895, D. D. Parry died. On the 10th day of January, 1895, the relator, C. A. Johnson, was appointed by the governor to fill the vacancy caused by the death of said Parry; and on the next day, having accepted his appointment, he

filed his bond and took the oath of office as probate judge. On the 14th day of January, before the hour of 12 o'clock, and before Gov. Morrill had taken the oath of office, Gov. Lewelling again appointed the relator, who tendered a second bond, which the county clerk refused to approve. On the same day the relator demanded possession of the office, which was refused.

John A. Eaton, for plaintiff. Madden & Buckman and J. C. Pollock, for defendant.

ALLEN, J. (after stating the facts). The only substantial controversy in this case is as to whether the election and qualification of D. D. Parry as the successor in office of the defendant, and his death after such election and qualification, and before the expiration of the defendant's term of office, caused a vacancy, after the expiration of the term for which the defendant was elected, which might be filled by the governor by appointment. The constitution provides, in article 3, § 11: "All the judicial officers provided for by this article shall be elected at the first election under this constitution, and shall reside in their respective townships, counties or districts during their respective terms of office. In case of vacancy in any judicial office, it shall be filled by appointment of the governor until the next regular election that shall occur, more than thirty days after such vacancy shall have happened." Section 12: "All judicial officers shall hold their offices until their successors shall have qualified." The constitution fixes the time for holding general elections, but does not provide when the term of office of a person elected shall commence. Paragraph 2718 of the General Statutes provides, "The regular term of office of all state, district and county officers, and of the justices of the supreme court, shall commence on the second Monday of January next after the election, except as otherwise provided by law." The plaintiff claims that the election and qualification of Parry definitely fixed the limit of Albert's tenure of office, and created a vacancy at the end of his regular term. The defendant urges that at the time of the death of Parry the defendant was the duly elected, qualified, and acting probate judge; that he was lawfully filling the office at that time; that an office having an incumbent legally entitled to discharge its duties, and actually so doing, cannot be said to be, in any sense, vacant; that the appointment made by Gov. Lewelling on the 10th day of January was made when no vacancy existed, and is therefore inoperative.

The view we take of this case renders it unnecessary to consider either the effect of the subsequent appointment on the morning of the 14th of January, or the nice question discussed as to whether the constitutional limit of the term of a probate judge to two years means that the term shall be exactly two calendar years, and must always expire

on the same day of the month. Albert's term of office commenced on the 9th of January, 1893; and the appointment, having been made on the 10th of January, 1895, was made after the expiration of two calendar years. Without considering the question which has been somewhat argued by counsel, with reference to an alleged conflict between the terms of office fixed by the constitution, and the statute above quoted, making the terms always begin on the same day of the week, we shall decide this case as though the statute were valid, and the regular term of office of the defendant continued until the 14th of January.

Under the constitution, judicial officers hold their offices until their successors have qualified. The term "qualify," used in this connection, has a well-defined meaning. It means to take such steps as the statute requires before a person elected or appointed to an office is allowed to enter on the discharge of its duties. In this case, it means to file a sufficient bond, to be approved by the county clerk, and take and subscribe the official oath, these being the only prerequisites required of the person elected or appointed. The successor of the defendant had been elected and qualified. He was, then, entitled to take possession of the office on the second Monday in January; and at that time, had he lived, the right of the defendant to occupy would have terminated. The rights of the parties became fixed when Parry qualified. Although the defendant had the right to fill out his unexpired term, he had a right to nothing more. Parry's right to occupy the office thereafter had become full and complete. Nothing whatever remained to be done but to assume and enter on the discharge of its duties when the day should arrive. Parry died. This event, however, conferred no new right on the defendant. The election and qualification of Parry had put an end to his right to hold over. The argument that an appointment to fill a vacancy cannot be made while there is a person in possession of the office, entitled to discharge its duties, may appear specious at first blush, but, on anything like close consideration, will readily be found fallacious. Whenever it is definitely ascertained that a vacancy will certainly occur, it may be filled by appointment. A vacancy occasioned by the death of an incumbent is, of course, not known until the death occurs, but vacancies caused by resignation are usually made and accepted in advance of the time the resignation is to take effect. In the case of *State v. Seay*, 64 Mo. 89, a question substantially identical with that presented in this case was under consideration. It appeared that in November, 1868, Gale was elected judge of the Ninth judicial circuit; his term of office commencing on the first Monday in January, 1869. In November, 1874, McCord was duly elected as his successor, received his commission, and took

the oath of office. On the 2d of January, after he had qualified, but before the expiration of Gale's term, he died. The governor issued a writ for an election to fill the vacancy. The opinion concludes: "By the terms of the constitution, Gale's term was to cease when a successor should be elected and qualified. His successor, McCord, was duly elected and duly qualified, and, when that occurred, Gale's right to hold over ceased; and the death of that successor before his term commenced did not revive a right in Gale which ceased when McCord qualified." In *State v. Bemenderfer*, 96 Ind. 374, it was said: "It cannot be legally possible that when the right to an office has once been destroyed, or terminated, the subsequent death of the person who had been elected, and who had duly qualified, revives the right which the election and qualification had put an end to, for the right to hold over exists only in cases where there is no legally elected and qualified successor. When the rights of the successor vest, those of the incumbent terminate, and they do vest after election and qualification according to law." The case of *State v. Hopkins*, 10 Ohio St. 509, goes further, holding that a vacancy arises on the death of the person elected before qualification. See, also, *Mechem*, Pub. Off. § 401. The general current of authorities would seem to be to the effect, however, that, where the death of the successor elect occurs before he qualifies, the incumbent holds over. We are clearly of the opinion that there was a vacancy occurring at the end of the regular term of the defendant, which the governor might fill by appointment; and the relator, having been duly appointed and qualified, was entitled to the possession of the office on the 14th day of January, 1895. Judgment of ouster, and for delivery of the possession of the office to the relator, will be entered. All the justices concurring.

(55 Kan. 162)

GLASS v. HUTCHINSON.

(Supreme Court of Kansas. April 30, 1895.)

COUNTY ATTORNEY—BOND—SUFFICIENCY IN AMOUNT.

Where the bond of plaintiff, as county attorney, was fixed by the county board at \$1,000 and his successor elect duly gave bond in like sum, and it does not appear that any order of the county board fixing a larger sum was ever made, such bond will be deemed sufficient in amount; until a larger one is ordered by the board.

(Syllabus by the Court.)

Quo warranto proceedings by W. S. Glass against Edward Hutchinson. Judgment for defendant.

W. S. Glass, in pro. per. Edward Hutchinson, in pro. per.

ALLEN, J. The main question involved in this case is substantially identical with that in the case of *State v. Albert* (just decided) 40

Pac. 286. The plaintiff was elected county attorney of Marshall county in 1892. In 1894 J. W. Coon was elected as his successor. On the 30th of November, 1894, he gave an official bond, and took the oath of office, and died on the 2d of January, 1895. The district judge thereupon appointed the defendant to fill the vacancy. The main contention in this case, also, is as to whether the death of the plaintiff's successor elect after qualification created a vacancy which might be filled by appointment. That question has been settled by the case of *State v. Albert*. One further point is urged in this case: The statute requires a county attorney to give bond in a sum not less than \$1,000, to be fixed by the county board. Coon gave a bond in the sum of \$1,000, but it appears that no order was made by the county board fixing the amount. After the plaintiff was elected, he requested the county board, while in session, to fix the amount of his bond, and the chairman answered that \$1,000 would be sufficient. No order was entered of record, nor does it appear that a larger bond was required by the county board at any time. Under these circumstances, we think a bond, duly approved by the county clerk, in the sum of \$1,000, met the requirements of the law until such time, at least, as the county board should require one for a larger amount. Judgment will be entered for the defendant. All the justices concurring.

(55 Kan. 186)

KANSAS CITY, FT. S. & M. R. CO. v. BERRY.

(Supreme Court of Kansas. April 30, 1895.)

MOTION FOR NEW TRIAL — TIME OF FILING — REFUSAL TO RECEIVE VERDICT — SUBSEQUENT RECEIPT UNDER SUPREME COURT MANDATE — INTEREST.

1. A general verdict in favor of the plaintiff, and answers to special questions supporting such general verdict, were returned by the jury, which the court declined to receive or record, but permitted to be filed, in order that the whole proceedings in the case might appear on the record. The court then directed the jury to render a general verdict in favor of the defendant, which was done, and thereupon judgment was entered against the plaintiff for costs. The case was then brought to this court, which reversed the judgment, and directed judgment in favor of the plaintiff for the amount found by the jury. *Held*, that the verdict is to be treated as having been first received when the mandate of this court was presented to the district court, and that the defendant might within three days thereafter, and at the same term, file a motion for a new trial for errors of law occurring at the trial.

2. A motion for a new trial having been filed and overruled, the action of the court can only be reviewed on a transcript of the whole record, or a case made showing so much of the proceedings of the court as are necessary to present the errors complained of. None of the proceedings of the court at the trial being shown in the case attached to the petition in error, the ruling of the court on the motion for a new trial is conclusive.

3. As the trial court refused to treat the verdict in favor of the plaintiff as a verdict until required to do so by the mandate of this court, the liability of the defendant did not become fixed until after the judgment was rendered by direction

of this court, and no interest accrued thereon prior to the time the mandate of this court was presented and acted on by the district court. It was error to allow interest from the time the verdict was brought in by the jury.

(Syllabus by the Court.)

Error from district court, Bourbon county; J. S. West, Judge.

Action by Helen A. Berry against the Kansas City, Ft. Scott & Memphis Railroad Company. Judgment for plaintiff, and defendant brings error. Modified.

Wallace Pratt, C. W. Blair, and I. P. Dana, for plaintiff in error. E. F. Ware, for defendant in error.

ALLEN, J. The facts in this case as it was first presented to this court appear in 52 Kan. 759, 34 Pac. 805. This court, on the case then submitted, held that the district court erred in refusing to receive and enter the verdict of the jury, and directed that judgment be entered in favor of the plaintiff for the amount of the verdict. A mandate was duly issued, and filed in the district court of Bourbon county; and on the 16th day of May, 1894, it was presented to the court, with a motion for judgment thereon. Thereupon the defendant filed a motion for a new trial on various grounds. This motion was overruled, and the defendant excepted. A journal entry incorporated in the case made recites: "Now, on this May 16, 1894, came on to be heard the above-entitled cause on plaintiff's motion for judgment on the supreme court's mandate filed here May 9, 1894, the plaintiff appearing by her attorney, E. F. Ware, and defendant by its attorney, I. P. Dana. Defendant asked the court to allow it a reasonable time before rendering any judgment in plaintiff's favor to file here a transcript of the testimony introduced at the trial of the cause in January, 1890, and a transcript of the charge given by the judge to the jury at that trial, and also asked the court for leave to present to it for review errors of law which occurred at said trial, each of which requests and applications the court refused and overruled, and to each such ruling of the court defendant at the time duly excepted and excepts. Thereupon, arguments having been heard on plaintiff's said motion, the court doth order, adjudge, and decree: First. That the judgment heretofore rendered herein on January 18, 1890, which is recorded in Journal P, at page 433, of the records of this court, be set aside and held for naught; said judgment being the one rendered in favor of the defendant, and against the plaintiff, for costs. Second. That the plaintiff have and recover of and from the defendant the sum of \$5,000, the amount named in the verdict of the jury in favor of plaintiff filed January 18, 1890, together with six per cent. interest thereon from the date of said verdict, being a total sum of sixty-two hundred and ninety-eight (\$6,298) dollars." Twenty-

five days was given the defendant to make and serve a case for this court. The defendant then filed a motion for rehearing, which was overruled.

Counsel for plaintiff in error argue with great earnestness and force that the general verdict in favor of the plaintiff for \$5,000 and the special findings of fact were never recognized by the trial court as verdicts until after the mandate of this court was presented directing that they be received and filed, and judgment entered thereon; that, at the time of the trial, the court refused to receive or recognize these verdicts as verdicts, but directed a general verdict in favor of the defendant, on which it entered judgment; that, however much the court might have erred in the conduct of the trial, however unsupported by law or the facts the verdict on which this court directed judgment to be entered might be, the defendant, having a verdict in its favor, and a judgment thereon, not only was not called on to file a motion for a new trial, but that there was absolutely no foundation for any such motion. It is further insisted that vitality was first given to the verdict by the order and judgment of this court, and that not until its mandate was presented to the district court did the verdict of the jury have any force as a verdict; that the defendant was then, for the first time, called upon to challenge its correctness or the proceedings of the court at the trial. These views impress us as sound. The defendant was under no obligation to recognize a verdict as valid which the court refused to receive or act upon. This court held that the district court erred in refusing to receive the special findings and the general verdict in favor of the plaintiff, and in refusing to treat them as verdicts, and directed that they should be so received and treated. We think the defendant then had a right to file a motion for a new trial within the statutory time after the mandate of this court was presented; that it was then the duty of the court to pass on the motion for a new trial; and that, on such motion being overruled, the defendant had a right to make a case, and present to this court any errors occurring at the trial. If this were not so, the defendant would be utterly without remedy, no matter how many or serious the errors of law occurring at the trial might have been. On examining the record, however, we find nothing to avail the defendant in attacking the verdict. A motion for a new trial was duly presented, overruled by the court, and an exception to such ruling taken by the defendant. The defendant asked time to file in that court a transcript of the testimony introduced at the trial, and of the charge to the jury, and for leave to present errors of law which occurred at the trial. These requests were refused, and properly so. Of course, on the motion for a new trial, the defendant had the right to present to the court for review errors of law which occurred at the trial; but there is nothing in the record showing that the defendant was prevented

from calling the attention of the court to any and every matter proper to be considered on the motion for a new trial. The defendant had no right to take time to obtain a transcript of the testimony and charge of the court to be filed in the district court. All errors of law or in the proceedings at the trial could be presented without it. Time was in fact given the defendant to make a case, but neither the pleadings, original journal entry, evidence, nor charge of the court are contained in the case. There is absolutely nothing in the case before us showing anything about what was done at the trial. We, therefore, are not called on to consider any question with reference to the correctness of the verdict which was not finally disposed of on the former hearing of this case.

Another question is, however, fairly presented by the record. The court not only entered judgment for \$5,000, the amount of the verdict, but added thereto interest from the date of its return by the jury. The question as to whether interest may be allowed on verdicts prior to judgment has been fully discussed, and authorities are cited on both sides. In support of the ruling of the court are cited the cases of *Gibson v. Cincinnati Enquirer*, 2 *Flip.* 88, *Fed. Cas. No. 5,391*, and *Griffith v. Railroad Co.*, 44 *Fed.* 574; and against it *Kelsey v. Murphy*, 30 *Pa. St.* 340; 11 *Am. & Eng. Enc. Law*, 379, 380, 391; *Bowman v. Wilson*, 2 *McCrary*, 394, 12 *Fed.* 864; *In re Rebecca Clyde*, 12 *Blatchf.* 403, *Fed. Cas. No. 11,622*; *Hamer v. Kirkwood*, 25 *Miss.* 95; *Reece v. Knott*, 3 *Utah*, 451, 24 *Pac.* 757; *Redfield v. Iron Co.*, 110 *U. S.* 174, 3 *Sup. Ct.* 570; *Railroad Co. v. Gabbert*, 34 *Kan.* 132, 8 *Pac.* 218; *Simmons v. Garrett*, *McCahon*, 82; *Association v. Hitchcock*, 4 *Kan.* 36; *Wilson v. Means*, 25 *Kan.* 83. In some states interest on verdicts is expressly allowed by statute, but not in this state. We think the general rule to be gleaned from the authorities is that, where delay in entering judgment on the verdict is occasioned by the act of the party against whom it is rendered, interest is allowed. *Irvin v. Hazleton*, 37 *Pa. St.* 465; *Shephard v. Brenton*, 20 *Iowa*, 41; *Bull v. Ketchum*, 2 *Denio*, 188. It cannot be said that the delay in entering judgment resulted from any action of the defendant. It is true that the defendant has at all times contested the plaintiff's right of recovery, has at all times denied liability; but the contention of the defendant was sustained by the district court, which held that there was no liability. The view we take of this case, however, renders it unnecessary to decide the question whether a verdict bears interest from the time of its rendition or not. The verdict was never recognized nor received as a verdict by the district court until it was done in obedience to the mandate of this court. It then for the first time was given force and vitality. At the termination of the trial, although the

jury made such findings that this court afterwards held that the company was liable for the amount found by the jury, yet the district court recognized and received the verdict in favor of the defendant, which it ordered, and rendered judgment thereon in favor of the defendant for costs. Though the jury found that the defendant was liable, the trial court held that under the law there was no liability. The plaintiff then had failed to establish her right to the payment of any sum from the defendant. There was neither a judgment nor a verdict recognized as valid by the district court. No demand was established which the defendant was called on to discharge until judgment was entered on the findings of the jury in accordance with the mandate of this court. The claim in this case, as in that of Railroad Co. v. Gabbert, *supra*, was for damages resulting from a tort, not recoverable at all at common law, but solely by reason of a statute of the state. The damages were wholly unliquidated prior to the judgment, and no interest accrued, or could accrue, before a verdict was rendered. We think no liability was ever established against the defendant until the 16th day of May, 1894, when judgment was in fact rendered.

The district court is directed to modify the judgment by striking out the allowance of interest, so that it will stand as a judgment rendered on the 16th day of May, 1894, for \$5,000, from which date it will bear interest at 6 per cent. The costs in this court will be equally divided. All the justices concurring.

(16 Mont. 211)

HIRSCHLER et al. v. McKENDRICKS.

(Supreme Court of Montana. May 20, 1895.)

MINING—FORFEITURE OF CLAIM—RESUMPTION OF WORK.

1. The finding of a jury that plaintiffs had not done the \$100 worth of labor required by Rev. St. U. S. § 2324, each year on a mining claim, will not be disturbed where, under plaintiffs' evidence, it barely reaches that amount, and the evidence of the defendant makes it considerably less.

2. Evidence of the cost of sharpening picks used in the work on a mining claim, offered on the issue of whether \$100 worth of work had been done on the claim in a year, was properly rejected where counsel refused to inform the court whether he wished to show that they had been sharpened on the premises or before they had been taken there.

3. Under the proviso to Rev. St. U. S. § 2324, that failure to perform \$100 worth of labor in a year on a claim shall not open it to relocation if the locator has resumed work before relocation, he must have resumed work in good faith, and have prosecuted it with reasonable diligence towards accomplishment of \$100 worth of labor, and such prosecution is not shown by evidence that, during the first half of the month before, relocation work was done, but none the last half, and that notice was posted soliciting proposals for \$500 worth of work, no excuse being shown for the cessation from work, and it not being shown that the efforts to place the \$500 contract were before the relocation.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

Action by Edward Hirschler and others against William McKendricks. Judgment for defendant. Plaintiffs appeal. Affirmed.

This action was brought by plaintiffs to quiet their alleged title to certain mining premises. They claim the premises under the location of the Rose Cleveland claim. The defendant was asserting title to the ground under the location of the Clements claim. The Rose Cleveland was located by plaintiffs' predecessors January 1, 1889. The Clements was located by defendant January 30, 1891. Plaintiffs did not represent the Rose Cleveland in 1889 or 1890. Defendant claimed a forfeiture on the part of plaintiffs by reason of such nonrepresentation. We use the word "representation" as the popular term employed by miners to indicate the annual accomplishment of \$100 worth of labor or improvements upon a mining claim. Rev. St. U. S. § 2324. Plaintiffs defend against the forfeiture by allegation and attempted proof that, prior to the location by defendant, they (plaintiffs) had resumed work upon the claim after failure, and before relocation. Rev. St. U. S. § 2324. The case was tried upon the issue of whether the plaintiffs had in good faith, and with reasonable diligence, resumed work upon the Rose Cleveland before the relocation of the ground by the defendant as the Clements. The findings of the jury in this respect were generally and in detail against the plaintiffs. Judgment was entered in favor of defendant, quieting his title in the premises as to the Clements lode. Plaintiffs' motion for new trial was denied. From that order and the judgment, they appeal.

A. C. Botkin and Theo Sheds, for appellants. J. M. Clements, for respondent.

DE WITT, J. (after stating the facts). As to the construction of the words "resuming work," as found in section 2324, Rev. St. U. S., we will not again review the decisions. We are satisfied with the conclusion reached in *Honaker v. Martin*, 11 Mont. 91, 27 Pac. 397, as announced in the opinion by Mr. Chief Justice Blake. In that case, after reviewing the authorities, the court said: "When, therefore, he availed himself of the statutory privilege of resuming work to preserve his estate from forfeiture, we hold that he should have prosecuted the same with reasonable diligence, until the requirement for the annual labor and improvements had been obeyed." In the case at bar forfeiture for nonrepresentation in 1890 is conceded. The question remains whether, when the relocation was made by defendant (January 30, 1891), plaintiffs had resumed work in good faith, and prosecuted the same with reasonable diligence to or towards the accomplishment of \$100 worth of labor performed or improvements made.

Two contentions are made by plaintiffs: First, that they had actually accomplished \$100 worth of labor or improvements before the relocation; second, that, if the \$100 worth of labor or improvements was not completed, they were at least advancing towards such completion with due diligence when the relocation was made. We will take these propositions in their order.

1. Plaintiffs introduced testimony that two men, Langan and Walsh, for them, resumed work on the night of December 31, 1890, and worked until morning. Commencing again January 2d, these men performed six consecutive days of labor. This aggregated seven days for two men, or fourteen days of labor, which, at \$3.50 per day (the ordinary miner's wages), and with a little extra compensation for the nightwork on the 1st of January, footed up a total of \$25 for each man, which was paid to them, and which was a reasonable compensation. A miner by the name of Huggins, employed by the other owner in the Rose Cleveland, it appeared, worked 10 days in January before the relocation. This, at \$3.50 a day, would equal \$35. There was also evidence by plaintiffs tending to show that three men (McDonald, Baatz, and Dulah) worked a day each in December, 1890, at \$3 per day, which would be \$9. At plaintiffs' estimate of this labor, they would have \$94 to their credit in labor performed and improvements made. It was also claimed by plaintiffs that some logs were cut for a cabin before the relocation. Testimony upon this question was quite indefinite, and the value of this work, if any, was exceedingly small. The cross-examination upon this point did not leave the proof at all satisfactory that there was any substantial value in this labor or improvement. It is sufficient to state that plaintiffs were obliged to push the value of their labor and improvements to the very extreme to reach the \$100 mark. They barely reached that mark, if at all, under the best view of their own testimony. On the other hand, the defendant called a number of experienced miners, who had examined the results of the labor alleged to have been performed by plaintiffs in resuming work. They testified as to the reasonable expense of making the excavations which they had examined, and as to which plaintiffs' witnesses had testified. They testified as to how long it would take to do such work. Their testimony cut down the value of plaintiffs' labor to a point from \$14 to \$36 less than plaintiffs estimated it. The jury found that \$100 worth of labor or improvements had not been made before the relocation, and that the value was only \$75. We think that under these circumstances, when the plaintiffs were straining every point in their testimony to reach an estimate of \$100, and when it was doubtful that they had reached such figure, even in the best view of their own testimony, and when de-

fendant's testimony reduced the value far below \$100, the finding of the jury that the value was \$75 should not be disturbed.

The plaintiffs offered testimony as to the expense of sharpening some picks, which it was claimed Huggins used in prosecuting the work upon the claim. This evidence was excluded by the court, and error therein is assigned. It may be that there are circumstances that would justify charging the expense of sharpening picks as part of the costs of representation. We are quite sure that there are other circumstances where such expense could not be allowed as part of the representation work. But in this case we do not think we need inquire into the competency of this testimony, for the reason that it appears by the record that the court, for its own enlightenment, several times asked counsel to inform the court whether he wished to show that the picks had been sharpened on the mining premises which were being worked, or whether they had been sharpened before they were ever taken to the premises. The record further shows that counsel refused to enlighten the court upon this subject, whereupon the court excluded the evidence offered. It seems that the court, by this inquiry made of counsel, was endeavoring to ascertain whether the sharpening of the picks was such an expense as, under all the circumstances, should have been allowed. If the sharpening of picks was a legitimate expense, we cannot understand why counsel did not respond to the inquiry of the court, and give the information requested. As counsel chose to give no explanation, and state no facts which would enable the court to rule intelligently upon his offer of testimony, we think the court was justified in excluding the evidence.

2. We now come to the second contention of appellants. They claim that, if they had not completed the \$100 worth of labor or improvements, they did show that they were prosecuting such labor with due diligence towards the completion of said \$100 worth of labor when the relocation was made by defendant. But the jury found, and, as we think, the finding was sustained by the evidence, that the plaintiff had ceased all work upon the claim for 15 days before relocation. It does not appear that they were obliged to cease labor by the inclemency of the weather, or the rigor of the season of the year, or for any other reason. They had been performing such labor up to the middle of January, and no reason appears why they could not have continued such labor for the last half of January, as well as during the first half. But the contention of plaintiffs is that they were continuing labor in good faith and with due diligence, because they took steps towards the letting of a contract for the performance of \$500 worth of work for the purpose of obtaining a patent. The plaintiffs offered to show that when Huggins quit work, about the 14th of January, they posted a notice so

liciting proposals for \$500 worth of work, with a view of obtaining a patent for the premises, and that certain parties negotiated with plaintiffs with a view of taking such contract, and went upon the ground for that purpose, but that, on account of the relocation of the claim, they refused to perfect the contract or proceed with the work. The testimony so offered was excluded. We can understand how the diligent attempt to secure the performance of \$500 worth of work might, under proper circumstances, be due diligence in resuming and continuing labor upon the claim, but we do not think that the testimony offered in this case was evidence of such diligence. The most that was offered to be proved was that plaintiffs had posted up a notice soliciting proposals. The offer does not state even when they posted this notice, whether before or after the relocation. The offer of testimony does not show the negotiations proposed to be proved were after the relocation, and the rather lame statement was made that parties refused to take said \$500 contract because the claim had been relocated. It is not quite conceivable why a contractor should object to doing the work because the relocation had been made. If he received his pay for his contract, it would not be material to him whether the plaintiffs' title to the ground was good or bad. We do not think that the offer of this testimony showed any substantial effort to diligently complete the representation of the claim. Plaintiffs allowed work to cease altogether for 15 days, during which time they could have easily placed the question of forfeiture beyond dispute; and they do not make it clear whether their efforts to place the \$500 contract were before or after relocation.

The judgment of the district court and the order denying a new trial are affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 180)

WALSH et al. v. MUELLER et al.

(Supreme Court of Montana. May 13, 1895.)

LOCATION OF MINING CLAIM—DATE OF DISCOVERY
—EVIDENCE—INSTRUCTION—FRAUDULENT LOCATION—ABSENCE OF EVIDENCE.

1. In an action to try title to a mining claim, plaintiffs testified that on September 15, 1890, they discovered in a shaft they were sinking at a depth of about 50 feet a lead of manganese, carrying outcroppings of silver and lead, and that about the last of September they quit work, owing to the unsafe condition of the shaft. At the time of the alleged discovery plaintiffs located a claim. Several other witnesses testified that in the following April, soon after plaintiffs resumed work, they went down the shaft and saw the lead. There was no evidence to contradict this evidence. *Held*, that a finding by the jury that plaintiffs did not discover the lead on September 15, 1890, should be set aside as unsupported by the evidence.

2. Where, in an action to try title to a mining claim, defendants do not plead that plaintiffs' location was fraudulent, in that plaintiffs, with

knowledge of the direction of the vein, located their claim in disregard thereof, and there was no evidence to prove such fraud, an instruction based on such a fraudulent location is erroneous.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by P. T. Walsh and others against William Mueller and others to try title to a mining claim. There was a judgment for defendants, and plaintiffs appeal. Reversed.

H. G. McIntire and McConnell, Clayberg & Gunn, for appellants. Toole & Wallace, for respondents.

PEMBERTON, C. J. Plaintiffs claim to be the owners of the Haphazard quartz lode mining claim, located, as they allege in their complaint, on the 16th day of September, 1890. The said claim is situated in Montana (unorganized) mining district, in Meagher county. The complaint alleges that the defendants claim to be the owners of the Safety quartz lode mining claim, situated in the same mining district; that on the 31st day of January, 1891, the defendants made application to the United States land office at Helena, Mont., to obtain a patent to said Safety lode claim; that the premises covered and embraced within and by the said Safety lode application cross and overlap all of said Haphazard lode, and include 6.02 acres of the said Haphazard lode claim; that plaintiffs, within the time required by law, filed their adverse claim to the premises sought to be entered and patented under the name of the "Safety Lode." This suit is brought to try the right to the title and possession of the premises in conflict and dispute. The case was tried to a jury. Certain findings of fact were submitted to and returned by the jury. There was also a general verdict for the defendants. Plaintiffs filed their motion for a new trial, which was refused by order of the court. From this order this appeal is prosecuted.

Appellants assign as error that finding No. 2 is not warranted by the evidence; in fact, they say that said finding is absolutely contrary to the evidence. Finding No. 2 is as follows: "Did Walsh and Sweeney enter upon a portion of the unappropriated public lands of the United States prior to the 15th day of September, 1890, and on said 15th day of September, 1890, discover thereon a lead or lode with at least one well-defined wall, and containing rock in place bearing valuable mineral deposits of silver, lead, and manganese? Answer. No." As to whether a vein was discovered on the Haphazard claim, and when such discovery was made, P. T. Walsh testified as follows: "My name is P. T. Walsh. I reside in Nelhart. My business is mining. I have been 15 years in that business. My age is 37. I was born in California, and am a citizen of the United States. I am acquainted with the Haphazard mining claim. I am one of the locators of it. I first became acquainted with it

when we located it. I did some work on the Haphazard ground before it was located as the Haphazard. I went there the 22d or 23d of August, 1890. I worked about one month after that time. I helped around there a little. I also did a little mining work there. The shaft was on the northeast part of the claim. I began work in that shaft the 22d or 23d of August, and worked about one month. I worked there myself until the night of September 15, 1890. On that night I was working on the upper shaft. Two men were at work there. About 10 o'clock I went up there, and went down in the shaft, and dug it deeper. The more we dug the more we found croppings of the lead. I think we sunk three feet that night,—a narrow trench on this lead. This lead was 14 inches wide. On the east of it the formation was granite. With reference to the creek, the east side is the upper side of the shaft. I think we were down 47 feet when this lead was discovered. I did not measure it at the time. We then sunk 3 or 3½ feet more. This lead contained manganese, also a little talc. The formation on the east side was the footwall of the lead. This lead came through on the east side, and went angling and dipped towards the west. The general course of the vein is a few degrees off of north and south. We sunk four feet in the clear on this lead, when the shaft became dangerous. We then did no further work. We quit work about the last of September. The manganese that I mentioned contained croppings of silver lead ore. The lead matter also carried iron. After making this discovery, we stuck a notice on the claim. We then put up stakes 10 feet in an eastern direction from the shaft, one north of the shaft 12 feet. We measured 300 feet on each side of the northern stake, on the south line of the Compromise ground. We then went to the southwest corner of the Keagan location, and put up a stake there. Six hundred feet to the west we placed another stake. All the places which are indicated on the map we marked with stakes. I do not remember the points as they came, but they are all described in the notice of location. I staked it all around. Patrick Sweeney was with me. After we had done this staking we sent the location notice on the stage to be recorded." He also testifies that very soon after the discovery they quit work until in April, 1891. Patrick Sweeney testifies as follows: "We struck lead matter in the shaft about 45 feet down. This lead was struck in bedrock, composed, I think, of granite. I do not know what the lead contained, but it was of such a nature that it could be distinguished from the surrounding rock. I was not in the mine at the time the lead was struck. Mr. Walsh was there. We both went down in the shaft. Mr. Walsh was there sinking the shaft. That night I should judge we sunk three feet further. I think the vein was from 12 to 15 inches wide. The work

that we were doing was sinking in the shaft. After the discovery the shaft was timbered up. I do not know exactly the course or dip of the lead. It came in the shaft from the west,—from the hill side. I stayed at the shaft that night. I wrote a location notice, and put a copy of it on a post. We then staked the ground. We put up four stakes at the four corners of the claim. Mr. Walsh marked them, I remember, 'A,' 'B,' 'C,' 'D.' He also put the name of the claim on the stakes. The stakes were driven into the ground, and rocks were piled around them." Stephen Pierce testifies as follows: "I have worked in the upper shaft on the ground. I worked there September 16th and 17th. At that time the shaft was 40 or 50 feet deep, I should judge. I went to the bottom of that shaft. On the east side of the shaft there was granite. In the shaft lay a ledge of mineral containing manganese, talc, and lead matter. The course of this ledge was north and south. It dips or pitches to the west. The shaft had been sunk some 5 feet on the ledge, and at the upper side of the ledge about 3½ feet. I measured this ledge. It was about 1 foot wide. It contained some manganese, talc, and quartz. The talc was under the ledge at the footwall. This wall was on the east. The ledge carries silver, lead, iron, and I saw some galena there. I am acquainted with the mines of Nelhart. The dip of the mines at that place is generally towards the west. I have been engaged in mining in Nelhart ever since I came to the town. As these mines increase in depth the character of the same improves." Thomas Starboard testifies as follows: "I reside in Nelhart. My business is mining. I have been engaged in mining since 1870, 21 years or more ago. I am engaged in mining at Nelhart. I am foreman in the Monarch mine there. I know the Haphazard shaft. I was there in April, 1891. I went into it at that time. I went to the bottom. The shaft is about 40 or 50 feet deep. The shaft was timbered to about 5 or 6 feet from the bottom. I saw the lead in the south end of the shaft, 6 or 8 feet up from the bottom. I saw the footwall. I saw the wall on each side of the vein. The vein contains manganese and quartz, with oxidized iron and talc. It was very fair lead matter. The vein pitched to the west. The strike or course of the vein is from northwest to southeast. There was sufficient indication, in my judgment, as a miner, to justify further work in exploiting this vein. I saw no indication of a drift. There was so much water in the shaft." Starboard examined this mine about the time work was resumed, in April, 1891.

This evidence, we think, shows that the discovery was made on this Haphazard claim on the 15th of September, 1890. A close inspection of the record fails to show that this evidence is contradicted in any respect whatever. We are unable to discover

any conflict in the evidence as to when this discovery was made. It is not disputed that a discovery of a vein or lead was made on this claim by plaintiffs; but the respondents contend that it was not made on or before the 15th day of September, 1890. We find no evidence to sustain this contention of the respondents. This is not a question of the conflict of evidence. The contention of appellants is that there was no evidence to justify the finding of the jury under consideration. We think the position of appellants is amply sustained by the record. As this finding is not supported by the evidence, but is directly contrary to all the evidence in the case, we think the court erred in approving it, and denying a motion for a new trial.

The appellants assign as error the giving of instruction No. 8, which is as follows: "The defendants also insist that, even should it be found from the evidence that plaintiffs' location was otherwise sufficient, as based upon a sufficient discovery of a vein whose apex lay within their ground, yet it is void because it was made in willful and fraudulent violation of the law as to surface ground. On this point you are instructed that the act of congress provides that the locator take no more than 1,500 feet in length, nor more than 300 feet in width, on each side of the vein. This contemplates a location to be made nearly parallel with the line of the vein, and if a locator, knowing the line and course of his vein, and willfully, and with a fraudulent purpose, locate his claim in disregard of such line and course of the vein, and establish its length, not along the vein, but across it, to an excess of several hundred feet or more beyond the 300-foot limit allowed by congress for the fraudulent purpose of gaining and appropriating such excess surface ground as his mining claim, this would be in deliberate violation of the law, and a locator so acting could gain no rights whatever thereby, but his location would be absolutely null and void, and he would be left in as bad a position as if one had never been attempted to be made. In this case defendants claim that the line of plaintiffs' alleged vein ran in a course practically opposite to the length of their claim as they located it. How this is you will determine from all the evidence before you, but if from such evidence it should appear that such was the case, and that plaintiffs, with the knowledge of the direction of their vein, fraudulently located their claim in disregard of the line of the vein as above defined, then, even though they should satisfy you by a full preponderance of evidence that their location was in all other respects sufficient, yet this fact alone would render location void, and leave them without rights." There is no allegation in the pleadings that plaintiffs in locating the Haphazard claim committed, or attempted to commit, any fraud against the United States. There was

no evidence introduced to show anything of the kind. If evidence had been introduced for that purpose, we think it would have been error, as there is no issue made by the pleadings that would render such evidence admissible. We think it was error to give instructions that were not warranted by the pleadings and evidence. *Brownell v. McCormick*, 7 Mont. 12, 14 Pac. 651; *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633. On account of the foregoing errors the order appealed from is reversed, and cause remanded for new trial.

DE WITT and HUNT, JJ., concur.

(16 Mont. 183)

DUIGNAN et al. v. MONTANA CLUB et al.

(Supreme Court of Montana. May 13, 1895.)

MECHANIC'S LIEN—RIGHTS OF SUBCONTRACTORS—
APPEAL—OBJECTIONS WAIVED.

1. Subcontractors in the third degree are entitled to file a mechanic's lien under Comp. St. div. 5, § 1391, providing that "all persons furnishing things or doing work shall be considered subcontractors," and as such are entitled to a lien.

2. Objections that the complaint in a lien suit did not recite that the material was used in the building will not be heard first on appeal.

3. The question of nonjoinder of a party defendant cannot be raised on appeal where no demurrer was interposed, and the parties went to trial without objection.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

Action by Henry Daignan and others against the Montana Club and others to foreclose a mechanic's lien. From a judgment for plaintiffs, defendants appeal. Remanded.

Thomas C. Bach and Massena Bullard, for appellants. E. A. Carlton, for respondents.

DE WITT, J. This action was brought to obtain a judgment for materials furnished one of the defendants, and to foreclose a lien against the clubhouse of the defendant the Montana Club. There was a judgment for the plaintiffs. The defendant the Montana Club appeals. The appeal is here upon the judgment roll only. The Montana Club contracted with D. P. Wortman to erect the building. Wortman contracted with William Harrison, and William Harrison with the Helena Co-operative Granite & Sandstone Company, which company contracted with the plaintiffs for supplying certain stone. The plaintiffs are therefore subcontractors in the third degree. The appellant contends that the lien law of this state does not give a lien to a subcontractor beyond the first degree; that is, beyond the person subcontracting with him who is the original contractor with the owner. It was decided in *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454 (a decision with which we are satisfied), that a subcontractor has a lien in this state. We refer to that case for a careful and accurate analysis of the history of our legislation upon the subject of mechanics' liens. The fact for decision, however,

In that case, was only the lien of a first subcontractor. We observe that decisions and text writers have construed that case as holding that subcontractors of all degrees have a lien. While there may be language in the opinion indicating that view, the facts of the case do not extend the decision that far.

We will start in this consideration with the declaration of law, as clearly set forth in *Merrigan v. English*, that the first subcontractor has a lien. The inquiry, then, is, does our law also extend the lien to contractors under the first subcontractor. Appellants' counsel has made a very able argument against that position. We will not restate the history and the law as found in *Merrigan v. English*, but simply refer to that opinion. Counsel calls our attention to the fact, as noted in that case, and as discussed generally in the decisions and by text writers, that two systems of mechanics' liens are adopted in the different states of the Union,—one, the New York or subrogation system; the other, the Pennsylvania or direct lien system. The system of this state up to 1887 was that of New York. Since the legislation of that year it has been that of Pennsylvania. See the subject fully developed in *Merrigan v. English*. Counsel then points out that in states holding the New York system a subcontractor of a subcontractor had no lien, citing *Kirby v. McGarry*, 16 Wis. 70; *Harbeck v. Southwell*, 18 Wis. 439; *Wood v. Donaldson*, 17 Wend. 550; *Turcott v. Hall*, 8 Ala. 525; *Stephens v. Stock-Yard Co.*, 29 Ohio St. 227; *Rothgerber v. Dupuy*, 64 Ill. 452; *Berkowsky v. Sable*, 43 Ill. App. 411. Counsel next argues that, on the reasoning of the decisions in these states, it should also be held that there was no lien to a subcontractor of a subcontractor in this state prior to the law of 1887. But, under both the old law and the new, there is a lien, at least to the first subcontractor. *Merrigan v. English*, supra. It is also held in *Merrigan v. English* that the change made in the law in 1887, in discarding the New York system and adopting the Pennsylvania system, did not change the classes of persons to whom a lien was given in this state, but changed only the method by which such persons could secure their liens.

But the question now arises, was there not a lien to a subcontractor of a subcontractor under the old law? In the cases which counsel cites from states practicing under the New York system, he does not point out, nor do we find, a statute similar to section 845 of our law prior to 1887, which is the same as section 1391 of the law since that date. That section is as follows: "All persons furnishing things, or doing work, as provided for by this chapter, shall be considered subcontractors, except such as have therefor contracts directly with the owner or proprietor, his agent or trustee." Comp. St. div. 5, § 1391.

The cases which counsel cites do not construe such a section as this. Those decisions reason upon the applicability of their own statutes, as they find them. There is absent from the decisions of those states a direct statutory declaration as to who subcontractors are; but such declaration we find in our statute, as just quoted. It being conceded under the authority of *Merrigan v. English* that a subcontractor had a lien under the old law, as well as the new, who is a subcontractor? The statute answers. While it is held by the authorities that, to give a subcontractor of a subcontractor a lien, the declaration of such intention must be very plain and specific, we are of opinion that the declaration of our statute is perfectly clear, and that its meaning cannot be doubted. "All persons furnishing things or doing work" is the language. A subcontractor in the second, third, or any degree is one of the persons "furnishing things or doing work." Looking further at this statute, the language is "furnishing things, or doing work, as provided for by this chapter." As provided for by this chapter is: "Every mechanic, builder, lumberman, artisan, workman, laborer or other person, who shall do or perform any work or labor upon, or furnish any material, machinery or fixtures for any building, erection, bridge, flume, canal, ditch, mining claim, quartz lode, ranch, city or town lots, or other improvements upon land, or for repairing the same, upon complying with the provisions of this chapter, shall have for his work or labor done, or material, machinery, or fixtures furnished, a lien upon such building, bridge, flume, canal, ditch, mining claim, quartz lode, ranch, city or town lots or other improvements, to secure the payment of such work or labor done, or material, machinery, or fixtures furnished." Rev. St. 1879, § 820. Therefore, all persons furnishing things or doing work as provided by that chapter are subcontractors. A subcontractor of a subcontractor may furnish things or do work as provided for in the chapter. Therefore, a subcontractor of a subcontractor is included by the statute (section 845) as simply a subcontractor.

At this point we notice that counsel for appellants argue, with some reason, that, if the subcontractor of a subcontractor had a lien under the old law, other sections of the chapter on liens seem to be addressed peculiarly to the method of securing and enforcing liens by original contractors and first subcontractors. Whatever force there may be in this suggestion, we are of opinion that it cannot offset the separate and plain and specific definition in the statute of who a subcontractor is. In fact, we cannot intelligently read section 845 of the old law or section 1391 of the new law in any other manner than a declaration that all persons who furnish the things or do the work are to be considered subcontractors. If we give the construction which counsel contends for to this section, then it would read: "All persons furnishing things or do-

ing work, except second and third and later subcontractors, shall be considered subcontractors, except, again, the original contractor with the owner." But all persons furnishing things, etc., except the second and third subcontractors and the original contractor or contractors, need no definition to define them, for they are first subcontractors without definition. Counsel's interpretation of the section would simply reduce it to reading that subcontractors are subcontractors. We cannot consent to this construction. We cannot hold any other opinion but that under the old law a lien was given to subcontractors of lower degree than the first. It is then important to note that this section 845 was carried into the new laws enacted in 1887, and appears in the identical language as section 1391 of the Compiled Statutes of 1887.

It may be pertinent to observe that section 1391 was enacted by our legislature after many decisions had been made by courts interpreting lien laws to the effect that, to extend the lien to subcontractors inferior to the first, there must be a plain statutory declaration. It would seem that our legislature undertook to make such plain declaration. As noted above, *Merrigan v. English* held that the change made by the law of 1887 was simply from one method of lien to another, and not a change in the classes of persons to whom the lien was given. Therefore, it seems to be clear that subcontractors later than the first are now entitled to a lien under the laws of this state. In this respect there was no error in the district court.

As to the practicable application of such statutes as ours, we note the following from 2 Jones, Liens, § 1305: "Under such statutes, the burden is upon the owner to protect himself from the liens that may be incurred by the person with whom he contracts. It thus becomes incumbent upon him to see that the contractor is financially responsible for the contracts he may make in the prosecution of the work. His rights are affected only so far as is necessary for the security of those who are presumed to have added something to the value of the owner's property. The owner may always protect himself by withholding from the contractor such part of the contract price as will be sufficient to protect the property from all liens for work or materials. That the owner has paid the contractor before the expiration of the time for filing liens by subcontractors is no defense to such liens if they are filed in due time. The subcontractor is bound to give no other notice of his claim than that required by the lien law." We also append the following remarks from the case of *Manufacturing Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045: "It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but that fact alone does not invalidate the act; for the owner must be held to a knowledge of the existing law on the subject, and to the presumption that he employed the

original contractor, and gave out his work with reference to that law. The right of lien to subcontractors and material men is, by operation of law, incorporated into and made a part of the owner's contract, as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the subcontractor and material man in certain contingencies; hence the owner who makes the contemplated contract cannot justly complain of the legal result, especially when he receives the benefit of the labor and material of those for whom the lien is provided, and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him something for nothing. The second criticism, involving the proposition that the owner may be compelled to pay the subcontractor and material man after he has already paid the original contractor, is true literally, but it is not true in the sense that it ascribes to the statute a purpose of enforcing double payment. In other words, it is a fact that an owner who pays the original contractor within thirty days after the completion of the work, building, or machinery may, upon notice given within that period, be forced to pay the subcontractor and material man whom the original contractor unjustly fails or refuses to pay; but double payment does not follow as a necessary legal consequence in any case. In every instance the owner may fully protect himself by withholding the whole or a sufficiency of the price agreed upon from the original contractor until after the expiration of the thirty days, or he may see to it that the subcontractor and material man are paid as the work progresses, or he may indemnify himself by bond, as prescribed in the third section of this act. It may be truthfully said that it will be inconvenient for the owner to adopt any one of these expedients; yet inconvenience of parties affected is never allowed to defeat a statute. The constitutionality of the act of the legislature cannot be successfully impeached upon the ground that it involves the citizen in mere inconvenience. Much more than inconvenience is involved for the subcontractor and material man. Without the protection of such a law, they would be constantly exposed to the danger of an entire loss of labor and material. Hence, as a matter of pure wisdom and justice, there could be but little difficulty in choosing between the situation with such a law and that which would exist without it. A policy that would involve one class of citizens in mere inconvenience for the pecuniary safety of another class is far more wise and just than that which would suffer loss to the latter class rather than entail inconvenience on the former." But, notwithstanding these views, we should be inclined to say, if we belonged to

the legislative instead of the judicial department of this state, that section 1391 of our lien law, which we have considered, is not wise legislation.

In Phillips on Mechanics' Liens, in discussing the matter of extending liens to subcontractors of subcontractors (in the absence of a direct statute, such as ours, accomplishing such result), the author says, citing authorities: "There is no policy that would extend its construction to this latter class. If such were the case, the multiplication of liens would become an intolerable nuisance, by allowing distant subcontractors to thus incumber property. It would be intolerable, not only to persons having houses built, but to mechanics themselves; for no prudent man would, with such a law, venture to employ any but rich mechanics about his building, without getting security against liens, which they might multiply with so much facility. How distant, then, may the claimant stand from the contract between the owner and builder before there is no lien? Certainly there must be a limit somewhere. The carpenter may undertake with the builder for finishing all his kind of work, including all the nails, screws, etc. Can he transmit the right of lien to all dealers and artisans in these kinds of business? If he can, then the lien rights against any house may be entirely indefinite. The bricklayer, the stonemason, etc., may multiply them in the same way, until the costs of liens may exceed the value of the house. What, then, is the limit of these lien rights?"

* * * This would soon be felt as intolerable. To increase the risks materially, as to extend them to journeymen, would be seriously to interfere with the growth and improvement of our cities and towns, by interposing obstacles to the march of meritorious enterprise, and thus eventually to injure the workman himself. For the introduction of such a rule a distinct manifestation of legislative will is necessary. It is far better for all parties to leave the journeyman operative to the security he most commonly relies on,—the personal responsibility of his employer." Section 60. The policy of the legislation in this state has been strongly towards the protection of laboring men, but it is a serious question whether the law in the matter which we are considering has not overreached its object, and injured instead of benefiting the laborer. There is much force in the following remarks on this subject, found in Phillips on Mechanics' Liens: "It would be unsafe in that case for the principal contractor to make any payments or advances to the subcontractors who had undertaken to do particular portions of the work, until their several jobs were completed, and they had furnished to him conclusive evidence that all the journeymen and laborers employed by them, respectively, had been paid in full; and the various subcontractors would have

to raise money some other way to pay such journeymen and laborers, or those who actually did the work would have to wait until the subcontract was fulfilled, so that they and the subcontractor could be paid off by the original contractor at the same time, the probable effect of which would be to suspend the payments of the daily pittance which the journeyman frequently wants for the immediate use of himself and his family, or to compel the great mass of industrious and enterprising mechanics in our cities, who have as yet acquired no capital and but little credit, to become the mere journeymen of a few wealthy contractors, by placing them in a situation by which it would be impossible for them to obtain subcontracts for a part of the work." Section 49. But with the enactment of laws we have not to do. We commend the subject to the wisdom of the legislature.

Appellants contend that the complaint does not allege that the materials furnished went into and were used in the building. But the complaint, in the body thereof, alleges that the material was furnished to be used in the building, and the notice of lien, which is made part of the complaint, sets forth the fact that the material was used in the construction of the building. The defendants answered this complaint, and made no issue upon this matter, and thereupon went to trial. They, therefore, cannot raise that question now. *Hershfield v. Aiken*, 3 Mont. 442; *Murphy v. Phelps*, 12 Mont. 531, 31 Pac. 64.

The same answer may be made to appellants' objection that the complaint does not show at what time the materials were furnished. This is fully shown by the notice of lien.

Again, appellants contend that the complaint does not sustain the judgment, because Wortman was not made a party defendant. But there was no demurrer to the complaint on this ground, and defendants went to trial without any such objection. *Code Civ. Proc. § 87; Parchen v. Peck*, 2 Mont. 571.

The only error that we find in the case is in the judgment, which was prepared by plaintiffs' counsel, and entered. Almost as far as that document is intelligible it is wrong. We will not detail its remarkable characteristics, but will set it aside, and remand the case to the district court, with instructions to enter a judgment against the Helena Co-Operative Granite & Sandstone Company for the sums found to be due, as set forth in the present judgment, and the further judgment as provided in section 1383 et seq., *Comp. St.* As respondents have insisted that the judgment as entered is correct, it is ordered that the costs be taxed against the respondents. Remanded.

PEMBERTON, C. J., concurs. HUNT, J., deeming himself disqualified, did not sit in this case.

(16 Mont. 164)

JOHNSON v. BOSTON & M. CONSOLIDATED COPPER & SILVER MIN. CO.

(Supreme Court of Montana. May 18, 1895.)

INJURY TO EMPLOYE—DEFECTIVE BOILER—DEGREE OF CARE.

1. The ordinary care required by an employer in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm as well as good.

2. In an action for the death of an employé by the explosion of a boiler, an instruction that the defendant "is required to supply its employés with safe and suitable machinery" is not erroneous, when qualified by subsequent instructions that defendant is not liable if the explosion was caused by a "latent" defect, which defendant could not discover by exercising "ordinary care," and that "in this case, if defendant furnished such a boiler as a reasonably prudent man would furnish, then plaintiff cannot recover."

3. Defendant, on the opinion of an engineer that a boiler could be repaired for temporary use, had it repaired and used it for six months, when defendant's engineer, knowing of its defective condition, placed it in a position where the service was more severe. *Held* that, on explosion of the boiler, defendant was liable for an employé killed thereby.

Appeal from district court, Silver Bow county; J. J. McHutton, Judge.

Action by Charles M. Johnson, administrator, against the Boston & Montana Consolidated Copper & Silver Mining Company for the death of his intestate. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action by Charles M. Johnson, as administrator of the estate of William O'Connor, deceased, against the Boston & Montana Consolidated Copper & Silver Mining Company, a corporation operating mines at Butte, to recover damages for the alleged negligence in using a boiler, which exploded on November, 1888, and killed the plaintiff's intestate. There was a trial before the court and jury, resulting in a verdict and judgment in favor of plaintiff for \$2,500. The defendant moved for a new trial, and from the order overruling the same, and from the judgment, this appeal is taken. The complaint alleges that the defendant owned and used, in the concentration of ores, the old Colusa concentrator works at Meaderville, in Silver Bow county; that the deceased, about November 19, 1888, was in the employ of defendant at said concentrator as a boss carpenter; that it became the duty of the defendant to procure good and secure boilers with which to generate the steam usually required and necessary to propel and work the engine and machinery used in the said concentrating works; that the defendant carelessly, negligently, and unskillfully provided and used at said works, at said time and place, an unsafe, defective, and insufficient boiler, of all of which it had notice prior to the time of using the same; that for want of due care and attention to its duty in that behalf, on the said

19th of November, 1888, while the said boiler was in use, the said William O'Connor was called upon, in the line of his duty as boss carpenter, to enter the boiler room to inspect certain carpenter work, and that, while he was in said boiler room so inspecting said carpenter work, one of the boilers therein, connected with the engine aforesaid of said works, and in use for generating steam therefor, by reason of its unsafeness, defectiveness, and insufficiency, exploded, whereby said William O'Connor was fatally injured.

The defendant denied any negligence on its part, as alleged, or that it used in the said concentrating works any unsafe, defective, or insufficient boiler, or machinery of any kind, or that, by reason of any carelessness or negligence on its part, plaintiff's intestate was killed. The defendant further answered, and averred that the boilers used to generate steam to run the concentrator were good, safe, and sound, and in every respect proper to be used in the works for which they were used at the time the explosion occurred, and were in safe and serviceable condition, and that the engineers in charge were competent, but that, if the deceased was killed by the negligence of any one, it was by the negligence of the engineer in charge at the time the accident occurred, who was a fellow servant of the deceased, and not an agent or vice principal of the defendant, and that if there was any defect of any kind in the boilers defendant had no notice thereof, and was not aware of the same, and such defect, if any, was latent, and could not have been detected or exposed by the most careful and critical examination by competent and skilled engineers and boiler makers.

The replication of plaintiff simply denied that the engineer was the fellow servant of the deceased.

On the trial the plaintiff, to sustain the issues of his complaint, offered evidence tending to prove the following facts: The boiler which exploded had been used at the Colusa mine about four years before the explosion. The defendant moved the boiler out of the Colusa mine house, and put in another boiler instead. After the removal the boiler laid outside of the building for a while, it is difficult to tell just how long, but about 10 months before the explosion the general manager and chief engineer of the defendant company employed a competent boiler engineer to repair it. The object of the repairs was stated to be to run the pump from the creek. The boiler maker, a mechanic of skill and 33 years' experience, whose name was Sloan, said he thought the boiler could be repaired for the purposes suggested, and asked Heimbach, the machinist and engineer of the defendant, how much steam would be required. Heimbach told him about 60 or 65 pounds would run the pump. Sloan told him that there were a couple of sheets that would

have to come out, and the flues would have to come out, and be welded and put back. Heimbach told Sloan that all that the boiler would be required to do was to run the pump from the creek. Couch, the general manager, spoke to Sloan about the boiler, and, when told what was necessary to be done, said that if the boiler would run for six months or a year he would get a new boiler put on the pump. The repairs were greater than were expected, whereupon Heimbach told Sloan to do the best he could, and after they ran it awhile they would get a new boiler. The iron was old and crystallized. Its tensile strength was partly gone, and there was a scale all the way from $\frac{1}{16}$ to $\frac{3}{16}$ of an inch, which would weaken the iron in its capacity to resist pressure. Sloan took the scale out of the boiler. The thickness of the iron was $\frac{3}{4}$ of an inch. But this was reduced by the scale, which had cut through from $\frac{3}{4}$ to $\frac{1}{16}$ of an inch. The diameter of the boiler was 40 or 42 inches. Its capacity was 40 horse power. Its length 14 feet. It was single riveted, and 6 to 8 per cent. weaker than a double riveted boiler. The boiler, after several months' use at a pump, was placed between two larger boilers in the concentrating works. The other boilers were $\frac{5}{16}$ iron, and their capacity nearly double that of the one which subsequently exploded. An examination of the boiler after the explosion showed that it was torn to pieces, the old iron sticking to the new sheets which Sloan put in, the new iron not being torn. The boiler was lying between the two larger boilers. Patches had been put upon the boiler prior to the time that Sloan repaired it. These were not visible after the explosion, by reason of the condition of the boiler.

Sloan testified that the cause of the explosion was that the iron in the boiler was not good enough to stand the pressure the defendant wanted to put on it; that the boiler was not fit for the place where it was put; that the explosion might have occurred by turning on the steam; and that the boiler was not good enough to go alongside of such boilers as the other two were. When the boiler had been repaired in the December previous to the explosion, it was tested with water, merely to see if it was tight, and was perfectly tight. The general manager was then told that the boiler was good for 60 or 65 pounds of steam. It further appeared that if the steam from the two new boilers was turned into this old boiler suddenly it would cause evaporation, and a strain equal to the pressure in the boilers on either side, and the old boiler would have to give way because the other boilers were so much larger, or, if the steam from the other boilers was turned on quickly, the old boiler would explode. When the repairs were made on the old boiler, punched in-

stead of drilled holes were made. This fact also tended to slightly bend the fibers of the iron between the holes, which would not have occurred had the holes been drilled. Sloan says also that the work was to be done "as quick as possible, and as cheap as possible," and he was to be directed in part by Heimbach. Sloan testified, further, that when he told the agents of the company that the boiler was good for 60 or 65 pounds, he meant that as a maximum pressure which the boiler would stand, and that the agent said that 55 or 60 pounds would do to run the pump, and for that pressure he considered it perfectly safe. When Sloan finished repairing the boiler it was set up in a pump house, and used to run a pump of compound low pressure, requiring between 50 and 60 pounds of steam. It did not leak while used for pumping purposes, and while it was so used it showed no signs of weakness.

The principal witness for the defendant was A. Heimbach, an employé of defendant, and an expert machinist of 35 years' experience, and, according to his evidence, the boiler was thoroughly repaired by Sloan, and pronounced by Sloan to be "all right." It was tested before it was used for pumping purposes, and after it had served its purpose in that capacity, and, before it was put into the concentrating works, it was again tested, and showed no defects, "more than any boiler would have that was used the same number of years." When Sloan commenced to repair it, it was not in a condition to be used for any purpose whatever, and Sloan was directed to cut out what was poor. The last test made, within 30 days before the boiler was put into the concentrating works, was made with cold water, 120 pounds pressure to the square inch, and with a hammer. It was perfectly tight, and the witness thought it capable of doing the work in the concentrator. The test was not made as to its capacity. He further said that there were boilers in the works as old as the one in question, and that this boiler did the same work that they are doing, as far as its capacity went. "I knew," said the witness, "by the steam connection on the other boilers that it had to be necessarily connected with the same steam pipe, and had been used in the same way as this boiler." The witness denied that he ever told Sloan that if this boiler lasted six months he would get a new boiler. After the hammer and water test had been made by the defendant's agents, the boiler was never used until the day it exploded. Before the boiler was set up in the concentrating works it was scraped out with a scraper, and washed, in the manner usual in cleaning boilers. One gauge only was used in the test.

One witness, an experienced engineer, said that his rule for determining how much a boiler would stand to the square inch was to multiply the thickness of the iron by 56, if

It was single riveted, and by 70, if it was double riveted, and multiply that by one-half the internal radius, and divide that by 10,000, which would give a safe load, and that this boiler in question would blow off at 70 pounds, which amount of steam he thought the boiler would carry, and that he considered that he had used worse boilers than that one in Butte. The same witness, Wing, an employé of the company, said that the boiler was carrying 55 pounds of steam about 10 seconds before the explosion, and that there was then no attachment to any other boiler. Pickering, another employé, testified that he had just read the gauge three or four seconds before the explosion. He had been taking up the time through the works, and had seen the engineer standing on a ladder by the boiler. The engineer spoke to the witness, and said, "We will soon have her connected," which statement prompted witness to notice the gauge. The rebuttal testimony of plaintiff was to the effect that the way to ascertain the pressure upon a boiler is to take one-fifth of the tensile strength of the iron, and divide by the diameter of the boiler on 10,000, or one-fifth of whatever the pressure may be, and the bursting pressure is ascertained. Two gauges are usually used in testing, because one may be wrong, while two should work directly together.

Robinson & Stapleton, for appellant. Thompson Campbell and D. E. Waldron, for respondent.

HUNT, J. (after stating the facts). The specifications of errors which we will consider, as they relate to the issues before us by the record, are, substantially: (1) Was the boiler which exploded and killed plaintiff's intestate defective and unsafe for the uses and purposes to which it was put by defendant? (2) If it was unsafe or defective, was such condition patent or latent, and did defendant know of such defect or unsafety, or ought it, in the exercise of ordinary care and prudence, to have known of such defect or unsafe condition? (3) Did defendant use that degree of care required in furnishing and using the boiler for its concentrating works, or was defendant guilty of such negligence in these matters as to render it liable in this action for the death of one of its employes, plaintiff's intestate?

The first question may be easily answered by referring to the proof that the boiler exploded upon the first day that it was put into service in the works. Accepting as true the statements of the defendant's witnesses, that the boiler was carrying only 55 pounds of steam less than 10 seconds before the explosion, and was at that time unconnected with the larger boilers upon either side of it, and was simply being "warmed up," as it is expressed, it is an almost irresistible inference that the terrific explosion which ensued within 10 seconds thereafter, by which

the boiler was torn to pieces, was due to a radically unfit condition of the boiler to either carry the steam pressure which was then marked, or the probable increased pressure which was added by increased heat or connections with other boilers within the ensuing seconds. It naturally follows, therefore, that the boiler was unfit for the uses to which it was put (whether or not such uses were or were not reasonable or unreasonable) when the explosion occurred. We will therefore, in the light of the fact of the explosion, pass to the second and third inquiries concerning the defects in the boiler, and the alleged negligence of the defendant. The boiler was old and in bad condition before repair. Such doubts did defendant have about 11 months before it exploded, of its capabilities, that it seemed to hesitate to make use of it at all, until, in the opinion of Sloan, it could be made to answer for temporary purposes in pumping water, where about 60 pounds pressure would suffice. And it was upon the theory that it was only to be so used, and for about six months, that Heimbach, for defendant, directed the repairs to be made. We must attach stress to the brief period of time for which it was said use was to be made of the boiler, because Mr. Couch, the general superintendent, who advised Sloan that a new boiler would be procured in six months or a year, does not specifically deny that he made such a statement, or that such was the contemplated plan of his company. It is important, too, in adding weight to the whole testimony of Sloan, who says that the boiler was repaired, with the end in view of its use for pumping purposes, independently of any connection with other boilers of greater size, greater strength, and much more recent construction. Heimbach knew of the several patches which Sloan was putting upon the boiler to fit it for temporary service. He knew, as a mechanic and engineer of experience, that an old repaired boiler, once removed from mining works, and for a long time exposed to the impairing causes of scale and crystallization, was weakened generally, and that the iron was less capable to resist pressure than it would have been had it not been covered with a scale of $\frac{1}{16}$ to $\frac{3}{16}$ of an inch. He knew the boiler was single riveted, and that the holes made in the iron where the patches were put on were punched and not riveted. He knew, also, that the boiler was not fit to carry more steam than 70 pounds, as a maximum pressure. Yet, with all this knowledge, which was the knowledge of the company in this suit, long after the six-months use for pumping purposes had expired, and after additional age and wear and tear had wrought their deleterious effects upon the boiler, the defendant determined to use the boiler in the works, where Heimbach admits it had to be necessarily connected with the same steam pipe that the adjacent and larger and

stronger boilers are connected with. It is true that a test of the boiler was made before it was fired. But this test was evidently made, primarily, to see if the boiler leaked. It was made, too, with only one gauge, whereas, it appears, two are more certain, and are commonly used to insure that high degree of accuracy which should govern all boiler tests (particularly old and weakened boilers), but which can only be had where even the possible imperfection of a single steam gauge is guarded against. So that, notwithstanding the test, we are constrained to conclude, from all the evidence, that the boiler was not such a reasonably safe appliance as defendant ought to have furnished for use in its works where its employes were exposed. The defects were numerous, and not latent. The case is accordingly quite free from the difficulties often attending the imputation of a lack of that ordinary vigilance and care which ought, in reasonable prudence, to be exercised where dangerous machinery is used. The boiler was altogether so old and defective and weak that it could not perform the service required, and, by reason of the many defects hereinbefore recited, ordinary prudence should have deterred the defendant's servant, Helmbach, from using it at all in the works, or from placing it where a connection with other and larger boilers was to be made.

Now, when we test the conduct of defendant by the standard of duty imposed by law upon all employers towards employes, where steam boilers are used, in respect to the safe condition of such boilers, we are of the opinion that the defendant was negligent. *Jones v. Yaeger*, 2 Dill. 64, Fed. Cas. No. 7,510, was a case of negligence in a boiler explosion where there was some evidence that the boilers were old in their iron, in some places less than the ordinary thickness, and brittle, and the contention was that the explosion was caused by such defect. The defense, among other matters, was that the boilers had been regularly inspected, according to ordinance, and had been overhauled and put in repair but a few months preceding the explosion. Judge Dillon answers the question of the duty of employers towards employes in such cases in the following language: "This is an important question, and must be carefully answered. The employer does not, impliedly, engage to insure his servants that there shall be no accidents resulting from the use of such machinery. Steam, which is a necessary, is at the same time a dangerous, power, and the danger which attends the use of it imposes upon the owner of machinery propelled by it certain duties and obligations, and these are to use ordinary care and prudence (the degree of this must be proportioned to the danger) to have and to keep the boilers and machinery in a safe and sound condition. If the employer knows that his boilers are defective, or if, under all circumstances, as a reasonable man, he should have discovered, though he did not,

their defective condition, or if he negligently remanded ignorant of their defective condition, if the defective condition thereof was the direct and proximate cause of an explosion which injured the servants, who are blameless, and who did not contribute towards the production of the accident by their own fault or neglect, then the law is that the employer is liable to such servants in a civil action for damages thus occasioned." The learned judge says the duties are "to use ordinary care and prudence to have and to keep the boilers and machinery in a safe and sound condition."

The courts have very frequently, within the last few years, been called upon to define the meaning of "ordinary care and prudence." New inventions in steam and electrical machinery have resulted in new occupations for men, and new mechanical appliances whereby their labor is employed. Thus are unforeseen and nice questions of the law of negligence constantly arising as these new relations of employes and employers are discussed and considered by the courts. Familiar underlying principles, evolved from generations of experience and thought, are to be applied to the peculiar phases presented by the facts and circumstances of the particular case under investigation. And so we find the opinions, in discussing the definition of "ordinary care," recognize that no fixed arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised. The care and attention necessary on an employer's part in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm as well as good. In a concentrating works, where three large boilers are needed, aggregating about 200 horse power, it requires no technical knowledge to say that many men are necessarily employed about such machinery, and that the dangers and responsibilities of the owners and the men employed are great; hence ordinary care in furnishing suitable boilers for such works would be a much higher degree of care than, for instance, would be ordinary care in furnishing a wagon wherewith to haul the concentrates from the works to a railroad depot or elsewhere. The circuit court of the United States for the Eastern district of Michigan charged a jury in relation to negligence and ordinary care as follows: "You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved, and try it by that standard; and neither the judge who tries the case, nor any other person, can supply you with the criterion of judgment by any opinion he may

have on that subject." *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679. The supreme court of the United States review the instructions in the following approved language: "But it seems to us that the instruction was correct, as an abstract principle of law, and it was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of man, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." *Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679.

The appellant argues that the charge of the district court was not based upon the correct doctrine of ordinary care, as it should have been applied to the boiler used, and complains of the following instruction: "A corporation is required to supply its employes with safe and suitable machinery, and, through its officers and proper servants, make all reasonable efforts and take proper care to keep such machinery in safe and serviceable condition, and to that end make, through its officers and proper servants, all needed inspections and examinations. In this case, if you find from the evidence that the boiler in question was defective and unsafe, and that the officers of the corporation defendant and its proper servants failed to provide a safe and suitable boiler, or failed to make all necessary inspections and examinations to keep such boiler in safe and suitable condition, or, making such inspection and examination, failed to remedy the defects, then you must find a verdict for the plaintiff." The objection goes especially to the law as given requiring the corporation to supply its employes with "safe and suitable machinery." It might be that this statement of the law, without any qualification, would be calculated to mislead a jury into the error of believing that safe machinery

means absolutely safe or perfect instrumentalities for the performance of work. Such exact perfection is not the test. The employer is in duty bound to see that the machinery is fit and safe for the work, only so far as due and reasonable care and diligence and prudence will go towards having it, and keeping it, safe and fit. He is not a warrantor of the safety of the machinery, and, when he has exercised the degree of care hereinbefore discussed as ordinary or reasonable, his duty is done. *Whart. Neg.* § 211.

The general principle which must govern is stated as follows by Justice Lamar for the supreme court of the United States: "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances, for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master falls in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employe or servant." *Railway Co. v. McDade*, 135 U. S. 570, 10 Sup. Ct. 1044; *Bailey, Mast. Liab.* p. 14; *Wood, Mast. & Serv.* § 329; *Shear. & R. Neg.* § 92; *Thomp. Neg.* p. 982, § 11, par. 7; *Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. 387; *Carlson v. Bridge Co.*, 132 N. Y. 273, 30 N. E. 750; *Wilson v. Linen Co.*, 50 Conn. 433. In *Diamond v. Railroad Co.*, 6 Mont. 580, 13 Pac. 367, the court discuss the principle as applicable to common carriers.

Conceding, therefore, that, as given, the instruction, standing alone, seemed to import a general rule that perfect or absolutely safe machinery was the standard of duty, still we find the qualifications of the rule carefully laid down in other instructions throughout the charge. The jury were told that "a master is never liable for such defects in machinery as could not be discovered with ordinary care, and if you find that the boiler which exploded and killed the deceased, William O'Connor, was defective, and such explosion was caused by such defect, and that such defect in the said boiler was latent,—that is, if it could not be discovered by ordinary care on the part of the defendant,—then said defendant is not liable in damages, and your verdict should be for the defendant." And again, that, "in an action for damages for causing the death of deceased, the burden of proof is on the plaintiff, and he must show that the defendant did not use reasonable care in procuring for its operations sound machinery, and, if you

find that the defendant did use reasonable care in furnishing said boiler for the use of its servants, then you should find for the defendant." The court further charged: "In providing machinery, appliances, or tools for the use of his servants, the master does not warrant the safety of such machinery or tools; he is not an insurer of the fitness of such machinery, and he is not required to see that such machinery or tools are absolutely safe. Nor is he bound to exercise the highest skill, nor to use extraordinary care." "In providing such tools and machinery, he is bound to use only ordinary prudence and care, that the careful and ordinarily prudent man would use under the circumstances. Nor is the master bound to furnish the safest tools and machinery, and in this case, if defendant furnished such a boiler as a reasonably prudent man would furnish, the plaintiff cannot recover, and your verdict should be for the defendant."

When considered as a whole, our opinion is that the law was well and consistently stated, both as to latent and patent defects, and the jury must have had a clear idea of the principles applicable to the issues raised on the trial. To the evidence they applied these rules, and we think their verdict was just. We regard the instructions defining that reasonable care in providing a suitable boiler was the test, as by no means in conflict with the first instruction requiring safe machinery, but as proper limitations put upon the rule stated, and restricting the applicability of the rule within these limitations, which were laid down as qualifications not in conflict with the rule itself. Similar instructions were sustained in *Kenyon v. Gilmer*, 5 Mont. 257, 5 Pac. 847. The doctrine of latent defects, as said before, has but little to do with the case. Our view of the matter is that Heimbach knew, or ought, in the exercise of ordinary prudence and care, to have known, that such an obviously defective boiler was unsafe without connections, and fearfully so with connections with other and larger boilers. It was negligence on defendant's part to use such a defective boiler at all in the manner and place where it was used. Whether connections with the other boilers were or were not made is hard to tell, and, as we look at the testimony, is not of vital importance. It is probable, however, that, directly after the engineer said they were about to connect the boilers, they did so, and the great amount of steam in the larger boilers rushed into the old one, and that it at once exploded by incapability of withstanding the pressure. The element of contributory negligence needs no consideration, for neither the pleadings nor the testimony raises that issue in the case. Nor does the alleged negligence of the engineer as a fellow servant require any discussion, for the defendant offered no testimony to support this plea. The case is somewhat difficult, on the facts, but

our best judgment is that plaintiff is entitled to recover, and that the ruling of the district court must be affirmed.

DE WITT, J., concurs. The CHIEF JUSTICE, deeming himself disqualified, did not participate in the hearing or decision of this case.

(16 Mont. 217)

GILLIAM v. BLACK.

(Supreme Court of Montana. May 20, 1895.)

MECHANIC'S LIEN—SUIT TO FORECLOSE—NONSUIT—TIME FOR APPEAL—REVIEW OF EVIDENCE.

1. Plaintiff, in an action to foreclose a mechanic's lien, alleged a contract with the defendant for the work for which the lien was claimed. The evidence showed that the contract was made with another person, neither a party to the suit nor defendant's agent. *Held*, that a motion for a nonsuit should have been sustained.

2. When the evidence showed that the defendant in an action to foreclose a mechanic's lien was not a party to the contract sued on, a charge to the effect that the plaintiff was entitled to a personal judgment against him for the work done was error.

3. When the determination of questions of law involved in the action of the court on a motion for a nonsuit, or in giving or refusing charges, requires an examination of the evidence, the appellate court may examine it for such purpose, although the appeal was not taken within 60 days from the rendition of the judgment, as provided by Code Civ. Proc. § 421.

Appeal from district court, Gallatin county; C. H. Benton, Judge.

Action by Elijah S. Gilliam against A. H. Black. Judgment for plaintiff, and defendant appeals. Reversed.

Luce & Luce, for appellant. W. G. Fleischauer, for respondent.

PEMBERTON, C. J. This is an action to foreclose a mechanic's lien. The complaint alleges a contract with the defendant, under which plaintiff claims to have performed labor and services for him in the erection and construction of a certain building in the town of Belgrade, in Gallatin county, at the agreed price of \$3.50 per day, payable on demand, after the completion of the work. The complaint alleges a demand, and failure to pay, and is otherwise, in substance, such as is commonly used in such cases. The answer denies every material allegation in the complaint. The case was tried to a jury, and a general verdict was rendered in favor of the plaintiff. The defendant appeals from the judgment.

The principal error assigned is the action of the court in overruling defendant's motion for a nonsuit at the close of the plaintiff's testimony. The complaint alleges a contract with the defendant for the performance of the work sued for, and for which plaintiff claims his lien. The evidence of the plaintiff showed positively that he did not make the contract with defendant, but with one Alexander Brothers, who is not made a party; nor is there the slightest evidence that Brothers is the agent of de-

defendant. In fact, the evidence is positive that no such agency existed. Upon this showing, defendant moved for a nonsuit. We think the motion should have been sustained. Without question, it devolved upon the plaintiff to prove the contract for labor, as alleged in the complaint. If the contract was not made, as alleged, with defendant, but, as the evidence conclusively shows, with Brothers, then Brothers was a necessary party to the suit. Brothers, being the contractor, was the only party against whom plaintiff was entitled to a money or personal judgment. Comp. St. p. 1032, § 1379. The property of the defendant could only be sold to satisfy any lien plaintiff showed himself entitled to, in the event he could not satisfy his judgment against Brothers out of property belonging to him. The defendant, not being the contractor, was not primarily liable to plaintiff; nor, under such circumstances, was plaintiff entitled to a personal judgment against him. Id. §§ 1383, 1384; *Duignan v. Montana Club* (this term) 40 Pac. 294. The defendant also moved for judgment notwithstanding the verdict. The grounds of this motion were substantially the same as contained in the motion for nonsuit. This motion was overruled. This is assigned as error. But, after what has been said as to the ruling on the motion for nonsuit, it is unnecessary to treat this assignment.

The instructions to the jury ignored the necessity of making Brothers a party, and were, in effect, that plaintiff was entitled to a personal judgment against the defendant, notwithstanding the evidence showed he was not a party to the contract sued on. The giving of these instructions is assigned as error. We think, from what has been said above, that they were manifestly erroneous.

The respondent contends that the only question presented by this appeal is as to whether the evidence supports the judgment, and that under section 421, Code Civ. Proc., the evidence cannot be reviewed, because the appeal was not taken within 60 days from the rendition of judgment. We cannot agree with this contention. There are errors of law assigned, such as we have treated above. In order to determine these questions of law, we are compelled to examine the evidence. The sustaining or refusing a motion for nonsuit is a matter of law. *Kleinschmidt v. McAndrews*, 117 U. S. 282, 6 Sup. Ct. 761. The giving or refusing of instructions is a matter of law. To determine whether they were properly or erroneously given or refused, necessarily involves an examination of the evidence. The evidence is embodied in the statement on appeal, and we think may be properly examined to determine the errors of law presented by the record. The judgment is reversed, and the cause remanded.

DE WITT and HUNT, JJ., concur.

(5 Wyo. 274)

GRIGGS v. BOARD OF COM'RS OF WESTON COUNTY

(Supreme Court of Wyoming. May 11, 1895.)

DEPUTY COUNTY CLERK—APPOINTMENT.

Laws 1890-91, c. 56, §§ 2-4, provide that county clerks in counties of the third class may, with the consent of the board of county commissioners, appoint one deputy. It appeared that the board of a county of the third class did not consent to the appointment of plaintiff as deputy clerk, but paid the official salary to him. *Held*, though such payment may have been a ratification of plaintiff's appointment, the board is not prohibited from revoking the appointment when public interest demands it.

Error to district court, Weston county; Richard H. Scott, Judge.

Action by Lewis T. Griggs against the board of county commissioners of Weston county for salary alleged to be due him as deputy county clerk. From a judgment for defendant, plaintiff brings error. Affirmed.

N. K. Griggs, for plaintiff in error.

GROESBECK, C. J. This action was instituted in the district court for Weston county for the purpose of recovering the sum of \$75 for the services of the plaintiff in error as deputy county clerk from November 18, 1891, to January 1, 1892. The bill was disallowed by the board of the county commissioners for Weston county, for the reason that upon the said 18th day of November said board adopted the following preamble and resolution: "Whereas, the necessary expenses of this county under the most economical administration are far in excess of the current revenue of the county; and whereas, it is incumbent on the commissioners of this county to reduce the necessary expenses of the county to the lowest possible point expedient: Therefore, be it resolved that the county henceforth allow and pay for no deputy or deputies for county offices and all approvals of appointment of deputies are hereby revoked and rescinded." The county clerk, as clerk of the board, attended the meeting at which this resolution was adopted, and recorded the same in the proceedings of the board, and it is therefore claimed that he had due notice thereof. The deputy was appointed in writing by the county clerk January 24, 1891, for the term of two years. There is nothing in the record to show whether the county board consented to such appointment, but the salary of the deputy so appointed was audited and allowed by the board up to the time of the passage of the resolution, and this, we think, is a sufficient approval of the official appointed, and a ratification of his appointment.

The authority for the appointment of the plaintiff in error as deputy county clerk of the county of Weston is conferred by the terms of an act of the First legislature providing for assistants and deputies of certain county and district officers, approved January 10, 1891 (Sess. Laws 1890-91, c. 56). This legislation is authorized and directed by the

following constitutional provision: "The legislature shall provide by general law for such deputies as the public necessities may require." Const. Wyo. art. 14, § 4. This section evidently refers to deputy county officers, at least, as the next preceding section requires that the salaries of county officers shall be fixed by law, within certain limits therein defined. The statute referred to classifies the counties of the state for the purposes of the act according to the assessable valuation thereof into four classes. No proof was offered showing into which class Weston county would fall, but we may presume that it was the third class, as the action of the county clerk and the county board indicates that the deputy was appointed under the provisions of the statute regulating the appointment of deputy county clerks of that class of counties, and is so referred to in the brief of plaintiff in error. The statute provides that certain county and district officers may have deputies and assistants as prescribed by law, who shall be appointed subject to the approval of the county board. In counties of the first class the county clerk may appoint one deputy, and, with the consent of the board, may appoint such other deputies as may be necessary; and these deputies may each receive a salary not to exceed \$1,200 per year. In counties of the second and third classes the county clerk may appoint, with the consent of the board of county commissioners, one deputy, the salary of which in counties of the second class is not to exceed \$800 per annum, and in counties of the third class not more than \$60 per month. In counties of the fourth class the county clerk may appoint such deputies as may be allowed by the county board, with a salary not to exceed \$60 per month for the time actually employed. In addition to these provisions for deputy county clerks, the clerks of the several counties are permitted to appoint such assistants for clerical or other services as may be necessary, with the approval of the county board. Sections 2-4, c. 56, Sess. Laws 1890-01. From a careful examination of the provisions of this law, we think the legislative intent is clear requiring the approval of the county board to the appointment of each deputy county clerk, and, further, that in certain cases, particularly as to counties of the third class, into which Weston is conceded to fall, the deputy may not be appointed at all, unless the consent of the board is obtained thereto, and that the board in counties of that class have the right to regulate the appointment of deputies, by directing when such officers are required, and dispensing with their services when the public necessities do not demand their further employment.

The contention of the plaintiff in error that the board, having ratified the appointment, could not dispense with the services of the deputy, is not well founded. Although, by
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payment of the official salary, the ratification of the act of the county clerk in making the appointment and conferring it upon the plaintiff in error may be presumed, yet, as the statute fixes no time for which the deputy may be appointed, we think, in cases of counties of the third class, that the county board may withdraw its consent to the creation of the office, and revoke the appointment. The legislature provides for the appointment and payment of deputy county clerks in counties of the first class, one for the county absolutely, and as many more as the county board may deem necessary, and the appointment must be subject to the approval of the board; but in counties of the other classes the county board must consent to the initial or continuous employment of a deputy county clerk; and even after the employment of such an official, under circumstances showing the consent of the board to the employment of a deputy and the confirmation of the person appointed, the county board could withdraw its consent at any time to the future employment of any person in such a capacity, whenever, in its judgment, public interests required that the services of such officer be dispensed with, without injury to the public service, or where, as in this case, the revenues of the county were insufficient to warrant the continuance of such an office. The constitutional provisions invoked have no application.

It is contended that the deputy could not be removed except upon hearing and for cause, but there is no such provision of law, and the constitution is not self-executing in this respect. The provision of the constitution that "every person holding any civil office under the state, or any municipality therein, shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified," has no reference to the case of plaintiff in error, as his term of office as deputy county clerk is not for a fixed period, and could only exist "with the consent of the board of the county commissioners" in counties of the third class, and because the discontinuance of his office was impliedly warranted by the terms of the act under which he was appointed. Doubtless, the provisions of the statute under consideration are somewhat obscure, but the legislative intent seems clear that the county board in counties of the third class could control the employment and tenure of office of deputy county clerks. The terms of the recent statute (Sess. Laws 1895, c. 74) provide in plain language that in counties of the third class, the county commissioners may employ a deputy county clerk, and have thus removed the apparent obscurities of the act under consideration.

The judgment of the district court for Weston county for the defendant in error, the board of the county commissioners, is affirmed.

CONAWAY and POTTER, JJ., concur.

(5 Wyo. 279)

HECHT v. HARRISON.

(Supreme Court of Wyoming. May 11, 1895.)

DRIVING CATTLE FROM ACCUSTOMED RANGE—
DAMAGES.

In an action for damages for removing cattle from an inclosed tract of pasturage belonging in alternate sections to the government and defendant, when it appears that no injury was done in the removal, and that the land to which they were removed was superior to that inclosed, and plaintiff would not, in any event, be entitled to more than nominal damages, if any, a judgment for defendant, with costs to neither party, will not be reversed.

Error to district court, Albany county; J. W. Blake, Judge.

Action by Charles Hecht against Robert Marsh and another as copartners, and Frank O. Harrison, for damages for driving the cattle of plaintiff from their lawful range. At the trial it appeared that Marsh had retired from the firm before the commission of the alleged trespass, and the other was not served. From a judgment in favor of defendant Harrison, plaintiff brings error. Affirmed.

Burke & Fowler, for plaintiff in error.
Lacey & Van Devanter, for defendant in error.

GROESBECK, C. J. The action was brought in the district court for Albany county by the plaintiff in error, who was plaintiff below, against Robert Marsh, Arthur Francis Thomas Cooper, and Frank O. Harrison. Cooper and Marsh were sued as members of a copartnership, but it appeared on trial that defendant Marsh had disposed of his interest in the copartnership, and it was dissolved before the commission of the alleged trespass, and Cooper was not served with process, and did not appear. As Marsh did not participate in the act complained of in the petition, he was not joined as defendant in error, and it is sought here to reverse the judgment in favor of Harrison. The suit was in the nature of an action in trespass to personal property, and damages in the sum of \$16,950 were demanded in the petition for the driving by defendants of plaintiff's cattle from their usual and lawful range in what is known as "Coal Bank Hollow," in the county of Albany, in this state. Plaintiff claimed damages for the expense of hiring men and horses to recover his cattle, and for the loss and depreciation in value of his cattle, resulting from the alleged unlawful and injurious acts of the defendants in driving them from their range. Harrison answered by pleading a general denial, and special matter by way of justification, alleging that one Cooper was lawfully possessed of a certain close, and that Harrison, as his servant, having ascertained that certain cattle had, by some person unknown to him, been driven into said close, caused the cattle to be driven therefrom, gently

and with great care, and that this act was done under the authority and direction of Cooper, and was the alleged trespass set forth in the petition. Defendant Marsh pleaded a general denial. Hecht replied to the separate answer of Harrison, denying specifically the special matter of justification set up as a defense. Upon these pleadings the cause went to trial, and the evidence adduced is incorporated in the bill of exceptions. The trial court found for the defendants served, and made specific findings of fact and conclusions of law. Briefly stated, these findings disclose that in May, 1890, the plaintiff, against the objections and protests of the defendants, turned his cattle into that scope of country known as "Coal Bank Hollow," in Albany county, Wyo., for the purpose of permitting said cattle to wander indiscriminately over and to depasture all of the lands therein, and that the cattle did so range and feed upon all the lands of said locality until driven therefrom by Harrison. The tract of land known as "Coal Bank Hollow" averages about 20 miles in length from east to west, and about 6 miles in width from north to south, and was partially inclosed by fences belonging to divers owners, including Cooper, but that Hecht owned no interest therein. At the time the cattle of the plaintiff were turned into the hollow, there were four openings in the fences partially surrounding the tract, ranging from a few feet in width to two miles in width, through which cattle could obtain ingress and egress to and from the hollow; but prior to the driving of the cattle of plaintiff therefrom these openings were largely, but not entirely, closed by Marsh and Cooper by building fences across these gaps "upon their own lands" for the purpose of protecting to their own use their lands lying within the hollow; and these fences, as the court below states, "practically, but not absolutely," prevented the ingress and egress of cattle. Marsh and Cooper owned about one-half of the lands in this inclosure,—all the odd numbered sections and square miles of land therein, and a small tract besides,—nearly all the even-numbered sections being unappropriated public lands of the United States, unaffected by the right, title, or claim of any person or persons, save such rights as existed in favor of the general public. Marsh having disposed of all of his interest in the lands to Cooper before the alleged acts of trespass in driving plaintiff's cattle from the inclosure were committed, Cooper was the sole owner of the same at the time of the alleged trespass and at the time of the suit. Harrison, acting as the servant of Cooper, and under his direction, drove the cattle of plaintiff, numbering 760 head, from the inclosed tract, through a gap in the fence, turning them loose on the open range, just outside of the inclosure; and this act, the

court finds, was without malice, and without any intention to injure or damage the cattle, but for the sole purpose of preventing them from trespassing upon and depasturing the lands of Cooper. It was further found by the court that no loss, injury, or damage resulted to plaintiff or to his cattle from such driving of the same, and that until the cattle of plaintiff were so driven out of Coal Bank hollow it had been generally used by cattle men of the vicinity as a common cattle range, and the cattle of plaintiff had been accustomed to graze there. Marsh did not participate in any manner in or authorize the removal of the cattle from the locality mentioned. Cooper was not served with summons, did not appear, and was not considered a party to the suit. As conclusions of law the district court found that the driving of the cattle by Harrison in the manner that the same was done was not a trespass, but was the exercise by him, as a servant of Cooper, of the right to protect the lands of Cooper from being trespassed upon and depastured by the cattle of plaintiff; and that the plaintiff was not entitled to recover anything from the defendants Marsh and Harrison, or either of them. The judgment entered by the court is in these words: "It is therefore considered, ordered, and adjudged by the court that the plaintiff take nothing, and that the defendants Robert Marsh and Frank O. Harrison do go hence without day." No allowance of costs is made to either party.

There are 30 assignments of errors. Some of them relate to alleged errors of the trial court in admitting certain testimony on behalf of the defendants, under objections of the adverse party, and in refusing to strike out certain portions of the testimony of witnesses for defendants; and other assignments of error are based upon the findings of fact and conclusions of law. But little importance was attached to the former class of assigned errors in the brief, and they were barely mentioned upon the oral argument. We might well, therefore, treat them as waived, but it is unnecessary to consider them, as a consideration of a controlling point in the case, which will hereafter be developed, will govern the disposition of the case. Upon the merits the entire question hinges upon the right of Harrison, acting within the scope of his employment, to drive the cattle of Hecht from the inclosure embracing within its limits the large tract of land known as "Coal Bank Hollow," which contained the lands of Cooper, the employer of Harrison, and those of the government; the former consisting of the alternate odd-numbered sections or square miles of land and a few other parcels, and the latter nearly all the alternate and even-numbered sections, which were unappropriated lands of the United States, which Hecht, in common with other stock growers, had a right

to depasture and graze with his cattle and live stock, under the implied license extended by the government for many years to the public to graze live stock upon these unappropriated public lands in the grazing regions of this country. By the completion of the inclosure of Coal Bank hollow, Cooper inclosed the government sections with those of his own, all of these sections inclosed alternating in their location from the government survey like the arrangement of squares upon a checker board. If Cooper had inclosed his own lands by fences, separating them from those of the government,—that is, each section by itself,—he would have effectually prevented the depasturing of the government lands by the public generally, except himself and the owners of land contiguous to the government sections thus inclosed, because the inclosure of each of his alternate sections would have also inclosed the government sections on either side of each section. It may be urged that he would have been bound to leave spaces at the angles of the sections touching the government sections, for the passage of the public generally and of live stock, although in the grant to his predecessor in title, the Union Pacific Railroad Company, the government reserved no right of way, on the ground that the government, in its grant of all the alternate and odd-numbered sections to such railway company, impliedly reserved ways of easement and of necessity to its officers and agents, those desiring to enter the land by filing thereon, and to its licensees; but this precise question has never been directly decided by any decision cited or coming under our observation, and it is unnecessary to decide it in this case. It is contended by the plaintiff in error that the completion of the inclosure of Coal Bank hollow by Cooper, even by fencing wholly on his own lands, was unlawful, under the terms of the act of congress forbidding the inclosure of any part of the public domain, entitled "An act to prevent unlawful occupancy of the public lands," approved February 25, 1885 (23 Stat. 321). The matter was before the supreme court of Wyoming territory in the case of *U. S. v. Douglas-Willan Sartoris Co.*, 3 Wyo. 288, 22 Pac. 92, where a majority of the court held that the act covered the case of a landowner constructing a fence wholly on his own land, when it served to inclose government lands with those of such landowner; but one of the justices held the act was unconstitutional, so far as forbidding as a nuisance the erection by a party of a fence wholly upon the limits of his own land, as not a legitimate exercise of the police power, and an unwarranted invasion of private property, while the other justice held the act unconstitutional. The remaining justice held that, notwithstanding the apparent language of the act, it was not intended to forbid the erection by a landowner of a fence wholly within the limits of his

own land. Accordingly the judgment below was affirmed, and the temporary injunction obtained by the government was dissolved. For some reason the case was never taken to the supreme court of the United States. The trend of recent decisions is contrary to the ruling of our territorial supreme court, but the question has never been directly decided by the federal supreme court, although the case of *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, sustains the supreme court of Utah in the affirmance of a judgment of a lower court refusing an injunction prayed for parties owning tracts of land originally granted by the government to the Central Pacific Railroad Company against parties threatening an invasion of their unclosed lands for the purpose of grazing on the government sections alternating with those of the land grant. The following cases hold directly contrary to our territorial supreme court: *U. S. v. Buford* (Utah) 30 Pac. 433; *U. S. v. Brighton Ranch Co.*, 25 Fed. 465; *U. S. v. Brighton Ranch Co.*, 26 Fed. 218; *U. S. v. Camfield*, 59 Fed. 562,—the latter being affirmed in the recent case of *Camfield v. U. S.* (by the circuit court of appeals for the Eighth circuit) 68 Fed. 101. But in the case of *U. S. v. Brighton Ranch Co.*, 26 Fed. 218, Judge Brewer remarked: "So long as the government does nothing, an individual might, perhaps, not challenge the occupation by defendant [of unappropriated public lands]; but the right of the government to interfere, to challenge the occupation, and to compel the defendant to desist from it, is not lost by mere delay in enforcing it." See *Keith v. Telford*, 12 Neb. 271, 276, 11 N. W. 315. As the matter of the unlawful fencing of the public domain may be brought to the attention of the government through its law department by filing an affidavit with the local attorney for the government, under the act of 1885, it may be that the proper course would be to proceed as the statute directs, instead of entering the inclosure by removing or tearing down the inclosure, or some portion thereof. In this case the cattle of plaintiff were turned into Coal Bank hollow, the inclosure of which was afterwards completed by Cooper, by the owner of adjacent lands, by the authority of plaintiff, and at his direction.

Under the common law, the owner of cattle is required to take care of them; and if they trespass upon the lands of another the owner is responsible, even if there be no fence. But this rule, in a multitude of cases, has been held not to be applicable to the sparsely settled sections of this country, where legislation defining lawful fences has been enacted, and where the custom has prevailed from the early settlement of the west to permit cattle to graze on unclosed lands as a common. See *Kerwhaker v. Railroad Co.*, 3 Ohio St. 172; *Morris v. Fraker*, 5 Colo. 425. A distinction is made between cattle

and sheep, as the latter animals, from their nature, require to be under the care of a herder, and so the owner of sheep has been held responsible for their trespasses upon lands inclosed with a fence that would exclude cattle, but not sheep. *Willard v. Mathesius*, 7 Colo. 76, 1 Pac. 690. In many of the Western states, statutes are in force defining a lawful fence, and it is generally held that where cattle accidentally wander or stray on the unclosed lands of another, the owner of the cattle is not responsible for their trespasses. *Chase v. Chase*, 15 Nev. 259. Our statute defining a lawful fence, and providing for damages for animals breaking the same, is in line with the legislation of the newer states, where the common-law rule requiring owners of cattle to take care of them has been abrogated. Title 50, Rev. St. Wyo., as amended by chapter 33, Sess. Laws 1888. The general rule permitting cattle to run at large without holding the owner responsible for their trespasses upon the unclosed lands of another, is subject, however, to one important exception; that where such live stock are driven upon the unclosed lands of another, without his permission, the owner is responsible for whatever damage they may cause while there. *Delaney v. Erickson*, 11 Nev. 533, 10 N. W. 451, overruling on this point *Delaney v. Erickson*, 10 Neb. 492, 6 N. W. 600; *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477,—where it is held that the Texas statute relieving stock owners from liability for trespasses upon unfenced or insufficiently fenced lands merely condones accidental trespasses, and does not operate in favor of one who intentionally causes his stock to graze upon lands of another. *Larkin v. Taylor*, 5 Kan. 446; *Powers v. Kindt*, 13 Kan. 74. The act of the plaintiff in turning his cattle into a scope of country partially inclosed, where they must inevitably wander upon and graze the lands of another, though unclosed, while grazing on the government lands, separated from private lands only by imaginary lines, might make him responsible for their damage, under the rule announced in the case of *Lazarus v. Phelps*, supra, where *Lazarus* fed his own cattle and those of others left with him as agister, to the full extent of the lands in a large inclosure, being those leased by him and those owned by *Phelps*. He was held responsible in damages, as he turned into the inclosure more cattle than were sufficient to consume the grass on the lands leased by him, so that they must have fed upon the lands of *Phelps* lying in the inclosure, and alternating by sections with the lands leased by him. But upon this point we express no opinion, nor upon the right of *Harrison* to remove the cattle of *Hecht*, for the reason that the inclosure was overstocked. The whole case may be decided upon another point. The evidence fully sustains the finding of the trial court "that no loss, injury,

or damage of any kind in any way resulted to the said plaintiff, or to his said cattle, or any of them, from the driving of said cattle by the defendant Harrison as aforesaid." The cattle of the plaintiff, Hecht, were gently and carefully driven, by Harrison's orders, to the Foot Creek range, immediately adjacent to the inclosure of the Coal Bank hollow lands, and this range to which they were driven had formed a part of the same range as Coal Bank hollow. The evidence shows that the range to which they were driven contained better feed and a larger water supply, better distributed, than Coal Bank hollow, from whence they were driven. The cattle of plaintiff were in better condition at the time of the fall roundup than the cattle of Cooper and others which remained in Coal Bank hollow. The only damages, therefore, that could have been allowed the plaintiff in error in the court below were merely nominal damages, for they are always due for the positive and wrongful invasion of another's property; and a judgment which should have been given for a plaintiff for nominal damages, but was rendered for the defendant, will be reversed, if such damages will entitle plaintiff to costs. But the rule is otherwise when the judgment is only erroneous for not giving a plaintiff nominal damages, and it will not be reversed, nor will a new trial be granted, unless he is mulcted with the costs. 1 Suth. Dam. 13. Some of the courts evidently do not regard the question of costs in such cases, and will not reverse for the sake of allowing the plaintiff nominal damages, even where costs are allowed to the adverse party. Our statute relating to costs, among other things, provides that "when the judgment is less than one hundred dollars, unless the recovery be reduced below that sum by counterclaim or set-off, each party shall pay his own costs." Rev. St. § 2696. In a certain class of cases, frequently denominated "hard actions," the section cited further provides in actions for libel, slander, malicious prosecutions, false imprisonment, criminal conversation, seduction, action for nuisance, or against a justice of the peace for misconduct in office, when the damage assessed is under five dollars, the plaintiff shall not recover costs. This section of our statute was borrowed from the Ohio Code (Rev. St. Ohio, § 5349), omitting the initial words, "if it shall appear that a justice of the peace has jurisdiction of the action, and the same has been brought in any other court," etc. As this omission was intentionally made in our statute, the legislative intent is clear that the penalty provided in the statute in requiring the plaintiff to pay his costs, in case of a recovery less than \$100, where his claim is not reduced by set-off or counterclaim, is not because he brought his suit in the higher court, when he might have instituted his proceedings before an inferior tribunal, where parties are not put to the expense of going

to the county seat for trial, but probably to provide a penalty for the prosecution of trifling suits. If the judgment of the court below in favor of the defendants is correct, costs should have been allowed to the defendants as of course. Rev. St. Wyo. § 2697. But the judgment does not include costs. It is that the plaintiff take nothing, and that the defendants do go hence without day. A judgment must be certain and definite, and, if costs are included, they must be inserted. Where a judgment purports to be for costs only, but the amount of such costs is left blank therein, the judgment, not being exact as to costs, will be reversed. Mosher v. Commissioners, 2 Wyo. 462; Sibley v. Howard, 3 Denio, 72; Black, Judgm. 115. Doubtless the district court could have corrected its judgment, and included costs, during the term, and even after, if the error was a clerical misprision, or perhaps if the court had unintentionally omitted costs, and in a direct proceeding for the modification of the judgment on error the appellate tribunal would correct the omission at the instance of the party injured. Lewis v. Ross, 37 Me. 230. The defendant below does not complain, and, as he alone is affected by the omission to allow him costs, it is apparent that the plaintiff cannot complain, because the judgment is favorable to him, and he is not compelled to pay the costs of defendant upon a judgment in favor of the latter without the allowance of costs which the statute provides. If the plaintiff was entitled to recover at all in the court below under the evidence, he was entitled to recover but nominal damages, as the evidence shows that he suffered no actual damage, but was benefited by the alleged trespass of the defendant, as his cattle were in better condition than they would have been had they not been driven from one part of the range to another, which was larger, better supplied with water, and containing more feed, with less live stock to consume it. If the plaintiff had obtained judgment below, each party would have been compelled to pay his own costs, and that is the effect of the present judgment. The only difference is that the plaintiff would have been entitled to nominal damages merely, and, this being the case, we will not reverse the judgment to allow the plaintiff one cent. The doctrine pervading the adjudged cases is that a wrong ruling is not available unless it does harm in a material degree to the substantial rights of the complaining party, and this is the theory of our Code of Civil Procedure. Not only must there be harm in the error, but it must be so important as to merit the consideration of the appellate tribunal, and to take something more than nominal value from the complaining party. It is upon this principle that the failure to assess nominal damages is placed in the category of harmless error. An exception to this general rule is where an important

right is to be vindicated, or where an action is necessary to prevent an unjust or illegal claim from ripening into a right by long-continued possession, and then the court will enforce the right to merely nominal damages. *Elliott, App. Proc. § 636; Hibbard v. Telegraph Co., 33 Wis. 558, 569; Meyer v. Huse, 32 Ill. App. 323; Smith v. Machine Co., 26 Ohio St. 566; State v. Miller, 5 Blackf. 381; Jennings v. Loring, 5 Ind. 250; Robertson v. Gentry, 2 Bibb, 542; Watson v. Van Meter, 43 Iowa, 76; Hickey v. Baird, 9 Mich. 32.*

The right of the plaintiff in error to enjoy what is common to all, the privilege of grazing his cattle upon the public domain, under the implied license of the government, is not affected by this decision, for that right is conceded to him, and he will not be deprived of such right by the decision of this court. Neither will he lose the right to graze his cattle on that portion of the public domain which is not appropriated, lying within the limits of the tract inclosed, from which his cattle were driven. He has not been damaged at all by the acts of the defendant, as the evidence in the case discloses, and the removal of his cattle from one portion of the public range to another, as he claims, is but a mere technical injury, as he was benefited, and not injured, by such removal. As this injury is not permanent in its effects, and he is in no worse situation that he was before, even if his contention is correct, we will not put the parties to the trouble and expense of a retrial, even if we thought his rights had been invaded by any act of the defendant, upon which branch of the case we have grave doubts, but upon which we express no opinion. For the reason that we ought not to reverse a cause because the plaintiff might be entitled to nominal damages only, where the matter of costs is not affected, and where no rights of the plaintiff need to be vindicated or are imperiled, the judgment of the district court is affirmed.

POTTER, J., being of counsel in the trial court, announced his disqualification, and Hon. RICHARD H. SCOTT, judge of the district court for the First judicial district, sat in his stead.

CONAWAY and SCOTT, JJ., concur.

(5 Wyo. 291)

HESTER et al. v. SMITH et al.
(Supreme Court of Wyoming. May 11, 1895.)
ACTION AGAINST FIRM — GOODS SOLD TO MEMBER
—DECLARATIONS OF PARTNER—ADMISSIBILITY
—PROCEEDINGS IN ERROR—PARTIES.

1. Error in not rendering judgment by default against certain defendants will not be reviewed when the record fails to show that they were served with summons in error.

2. A motion for a continuance on the ground of newly-discovered evidence is properly refused where it appears that the evidence could, by the

use of proper diligence, have been procured at the trial.

3. In an action against a firm for the price of oats, it appeared that plaintiff sold the oats to one of the partners, not knowing that he was a member of the firm; that the vendee did not expressly buy for or in the name of the firm; that the firm did not receive the oats; and that the buying of oats was not a transaction within the scope of the business of the firm. *Held*, that a statement by the vendee, made after the purchase, to third persons, and not in the presence of any member of the firm, that he bought the oats for the firm, was not admissible.

4. In an action against a banking company for the purchase price of oats, it appeared that the plaintiff sold the oats to a member of the firm, not knowing at the time that he was a member; that the vendee did not expressly buy for or in the name of the firm; that the firm never received the oats; that the vendee paid the freight, and the plaintiff subsequently stated that he sold the oats to another firm, of which the vendee was a member; and that the vendee, at the time of the sale, merely said, "We are running a bank here." *Held*, that the evidence did not show a sale to defendant.

Error to district court, Natrona county; J. W. Blake, Judge.

Action by George W. Hester and others, partners, against Lew Smith and others, as partners, for the purchase price of oats. From a judgment for defendants, plaintiffs bring error. Affirmed in part.

Allen G. Fisher and George Walker, for plaintiffs in error. Burke & Fowler and A. T. Butler, for defendants in error.

POTTER, J. Plaintiffs shipped from Harrison, Neb., in their own name, a car load of oats to Casper, intending them for a purchaser upon whom a sight draft had been drawn, attached to the bill of lading, and sent through the bank of C. H. King & Co. This expected purchaser not taking the oats, George W. Hester visited Casper, and there met Lew Smith, one of the defendants, with whom a sale of the oats was consummated. Smith received them, and paid the freight thereon. Although it does not clearly appear, it seems to be disclosed by the evidence that the oats were taken to a store commonly referred to in the testimony as the "Mercantile Company's Store," the business of which was usually transacted by Smith. He was also a member of the firm of L. Smith & Co., bankers. It is attempted to make the banking firm of L. Smith & Co., of which firm J. B. Okie was also a member, responsible for the purchase price of the oats. The only fact which we find in the evidence at all tending to connect that firm with the purchase is in the testimony of George W. Hester, who says that while he and Smith were discussing the matter of the sale, and before it was consummated, the latter said to Hester, "We are running a bank here," and also: "You will run no risk. You will be safe in your money. You will get your money for your oats." We are unable to discover any testimony showing or tending to show that the banking firm ever received the oats, or any of them, or any of the proceeds thereof, except the sum of \$53, which

Mr. Okie testified was deposited in the bank to the credit of G. W. Hester, and was by Okie (who afterwards, it seems, had assumed the obligations of the bank) paid to Virgil Hester. Okie testifies that Smith informed him this deposit had been made by "the store" to the credit of Hester, but there is no direct testimony covering the matter of the original deposit. Okie testified that, when he paid the \$55 to Hester, the latter informed him that they had sold some oats to the mercantile company. There is testimony that statements were made by each of the plaintiffs to the effect that they had sold the oats to the mercantile company, and a witness connected with O. H. King & Co. testified that Hester & Son had at one time drawn a draft on the Smith Mercantile Company for \$350, which was received by C. H. King & Co. for collection, and was returned on the same day. The total amount for which the oats and some sacks were sold was \$353. Smith paid the freight (\$36.40), which was apparently to be credited on the price, and, with the \$55 subsequently received on account of the deposit in the bank, leaves the balance sued for as \$261.60. Neither Smith nor Shaffner appeared in the suit below. The defendant Okie filed an answer, denying every allegation of the petition.

The defendant Okie would not be liable unless the firm of L. Smith & Co., bankers, were, and by reason of his membership in that firm. If that firm was not the purchaser of the oats, then it was not liable. We do not think the court erred in finding said firm not indebted to the plaintiffs. The best construction which can be given to the evidence favorable to the plaintiffs shows a conflict in the testimony; and, there being evidence to sustain the finding, the judgment will not be reversed. *Bank v. Dayton*, 1 Wyo. 336; *O'Brien v. Foglesong*, 3 Wyo. 57, 31 Pac. 1047; *Ketchum v. Davis*, 3 Wyo. 164, 13 Pac. 15. In our opinion, however, there was not sufficient evidence to establish the liability of the firm of L. Smith & Co. Plaintiffs failed to connect them with the purchase made by Smith.

It is urged that the court erred in not taking the default of Smith and Shaffner, and rendering judgment against them. So far as Shaffner is concerned, his liability, like that of Okie, depends upon the establishment of an indebtedness from the firm. The parties are not in a position, however, to successfully urge this point, even if error was committed in the respect indicated, upon which we express no opinion. Neither Smith nor Shaffner are before this court, no summons in error having been served upon them for all that appears by the record.

It is contended that the court committed error in refusing to grant a new trial on the ground of surprise and newly-discovered evidence. The affidavits filed in support of the motion to sustain these grounds utterly fail to show any such surprise as would require the court to grant a new trial. The alleged new-

ly-discovered evidence consisted of certain letters said to have been signed, "L. Smith & Co.," which were in the possession of the attorney who brought the suit for plaintiffs, but did not represent them at the trial, and certain facts which Virgil Hester, one of the plaintiffs, would testify to, to rebut the testimony of one of the witnesses for the defendants, and other facts which G. W. Hester would testify to by way of rebuttal. It is also alleged in the affidavits that three persons who were not witnesses at the trial will testify that Mr. Smith had told them that L. Smith & Co. had bought the oats in question. One of the statutory grounds for a new trial is newly-discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial. It is not shown that the evidence could not have been discovered before the trial with reasonable diligence. No showing in that respect is made. The statement that the plaintiffs first learned the same after the trial does not show diligence. It only establishes the fact that it is newly-discovered testimony. This is in itself sufficient to dispose of this assignment of error; but another requisite is attached to this ground for a new trial, and that is, the evidence must be material. It must be competent. It has been held by this court that, if it is merely cumulative, it will not be sufficient. *Link v. Railway Co.*, 3 Wyo. 679, 29 Pac. 741. So far as the letters and the testimony of Virgil Hester and G. W. Hester are concerned, it is clear that they could, by the use of proper diligence, have been procured at the trial. The declarations of Smith made after the sale had been consummated, in the absence of any other evidence showing or tending to show that the firm of L. Smith & Co. had bought or received the oats, such a transaction not ordinarily being within the scope of the business of a mere banking firm, and nothing appearing to show that this firm ever engaged in such business, we do not think would have been admissible. *Heffron v. Hannaford*, 40 Mich. 305; *Uhlen v. Browning*, 28 N. J. Law, 79; *Thorn v. Smith*, 21 Wend. 365. Mr. Hester testified that he dealt with Smith. He knew nothing about the firm. Smith, in the transaction, did not expressly deal for the firm or in the firm name. Under such circumstances, together with the fact that the firm did not receive the subject of the sale, to admit in evidence, as against a partner, the declarations of the individual purchaser that he bought them for the firm, made after the purchase, to third persons, in the absence of his partner, would, in the language of Judge Nelson in *Thorn v. Smith*, supra, "enable a partner at any time to turn all his individual liabilities upon the partnership." This evidence, then, would not be competent, and therefore not material.

This disposes of all the questions raised by counsel. The case now here is practically between plaintiffs and the defendant Okie. The

judgment of the district court in favor of J. B. Okie and L. Smith & Co., bankers, as a partnership, is affirmed.

GROESBECK, C. J., and CONAWAY, J.,
concur.

(4 Idaho, 468)

STATE v. McDONALD et al.

(Supreme Court of Idaho. May 11, 1895.)

DEMURRER—ACTION ON OFFICIAL BOND—FAILURE OF PRINCIPAL TO SIGN—RECITALS—COLLECTION OF LICENSE TAX—ITEMS OF DEFALCATION—JUSTIFICATION OF SURETIES.

1. The omission of the sheriff to sign his official bond did not release him from any liability arising under the conditions of the bond, nor did such omission release the sureties.

2. The failure of the sheriff to sign such bond (it being joint and several) did not invalidate the bond.

3. The surety is estopped from denying any fact recited in the bond, when by such denial he seeks to avoid the bond in an action between the parties to the bond.

4. The collection of licenses is made the duty of the sheriff by law, and the bond sued on is conditioned on the faithful discharge of all duties required of him by law.

5. In a suit of this kind it is not necessary to state in the complaint the various items of defalcation separately.

6. In an action on a joint and several bond, all or any of the sureties may be sued.

7. The fact that a surety did not justify will not release him from liability, if the bond has been accepted without such justification.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; J. Holleman, Judge.

Action by the state of Idaho against Scott McDonald and others on a sheriff's bond. From a judgment sustaining demurrers to the complaint, plaintiff appeals. Reversed.

George M. Parsons, Atty. Gen., for the State. Hagan & Beale and W. W. Woods, for respondents.

SULLIVAN, J. This is an action to recover on an official bond. One Richard A. Cunningham was elected sheriff of Shoshone county on the 1st day of October, 1890, and on November 26, 1890, filed his official bond. Thereafter a question was raised as to the validity of his acts as sheriff, on the ground that he had failed to qualify as sheriff within 30 days after his election. To avoid any complications that might in the future arise by reason of that fact, Cunningham was appointed sheriff of said county by the governor of the state, and on the suggestion of the board of county commissioners he filed another bond, on the 18th of March, 1891. Said bond was duly approved by said board. Subsequent to the filing of said bond, the said sheriff collected and received for licenses \$7,303.05, and also collected for the use and benefit of said county fees in civil cases amounting to \$754.75. No part of either of said sums has he ever paid to said county or to the state of Idaho. The complaint alleges the entry of said Cunningham into said sheriff's office, his giving

the bond sued on, his collection of public moneys, and his failure to pay the same over as required by law or at all; and prays for judgment against the bondsmen for the sums so collected, with interest and costs. To the complaint several demurrers were interposed, one of which was joined in by several of the defendants, and others by separate defendants. The court sustained the several demurrers. Thereupon the plaintiff refused to amend, and judgment was entered dismissing the action, and for costs against the state. This appeal is from the judgment.

The first point made by the demurrers is that the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges the election and appointment of the said Cunningham to said office, and his entry upon the duties of said office; also that he gave an official bond conditioned upon the faithful performance and discharge of all duties required of him by law as such sheriff, with the defendants as sureties thereon; that as part of such duties he collected certain license taxes and fees, which belonged to the county and state, and failed and refused to pay the same over as by law required. The complaint states a cause of action, without ambiguity or uncertainty.

It is contended by respondents that section 396, Rev. St. provides that the bond must be signed by the principal and at least two sureties, and, as the bond sued on was not signed by the principal, it is void for that reason. The bond recites the fact that said Cunningham, as principal, and the defendants, as sureties, are jointly bound unto the state of Idaho, etc. The omission of the principal to sign the bond did not release him from any liability arising under the terms of the bond, nor would such omission release the sureties. The failure of Cunningham to sign as principal does not invalidate the bond. *People v. Slocum*, 1 Idaho, 62; *Kurtz v. Froquer*, 94 Cal. 91, 29 Pac. 413. A fact which must be borne in mind is that the bond is joint and several.

The bond sued on recites that Cunningham was elected, when it is contended it was given in pursuance of the appointment of the governor. The misrecital in that regard (if it is a misrecital) is not sufficient to avoid the bond and release the sureties. The clear intention of the sureties was to give a bond for the faithful performance of all duties required of Cunningham as sheriff, and they cannot escape liability by such a trivial technicality as that mentioned. And further, the plain rule of law is that the surety is estopped from denying any fact recited in the bond, when, by such denial, he seeks to avoid liability in an action between the parties to the bond. *Murfree, Off. Bonds*, § 133, and authorities there cited; also, *Id.* § 9; *Bigelow, Estop.* (4th Ed.) p. 355, note 5, and *Id.* page 361, notes 3, 4; *People v. Love*, 25 Cal. 521.

The next contention is that the bond was given on Cunningham's behalf as sheriff, and

not as license or tax collector. The law makes it the duty of the sheriff to collect and pay over county and state licenses. Rev. St. § 2157. The bond is conditioned on the faithful performance and discharge of all duties required of the sheriff by law. There is nothing in this contention. Murfree, Off. Bonds, § 193.

The complaint clearly indicates that this action is upon the bond filed March 18, 1891. There is nothing in the point made by the demurrer as to misjoinder of causes of action. The several items of defalcation need not be separately averred. 1 Estee, Pl. & Prac. § 560.

The fourth cause of demurrer is that there is a misjoinder of parties defendant. It is claimed that the defendants did not each obligate themselves in the same sum, and that the defendants Monk and Desaulnier did not bind themselves in any sum. To this contention it is sufficient to say the bond is joint and several, and therefore the action may be maintained against all jointly or against each severally. *People v. Stacy*, 74 Cal. 373, 16 Pac. 192. The fact that a surety fails to justify does not release him from liability, if the bond is accepted without requiring him to justify. *Taylor Co. v. King*, 73 Iowa, 153, 34 N. W. 774. The judgment of the court below is reversed, with instructions to overrule the demurrers, and to proceed with the case. Costs against the respondents.

MORGAN, C. J., and HUSTON, J., concur.

(4 Ariz. 331)

MARICOPA COUNTY v. OSBORN.

(Supreme Court of Arizona. May 13, 1895.)

APPEAL BY COUNTY—REVIEW—MOTION FOR NEW TRIAL—COUNTY RECORDER—FEES—TAX SALE TO STATE—TERRITORIAL LEGISLATURE—LENGTH OF SESSION.

1. A county may appeal without executing a bond to the appellee.

2. A motion for a new trial not made a part of the record by the bill of exceptions will not be considered on appeal.

3. A county recorder cannot recover from the county fees for filing and recording tax certificates and tax deeds to lands sold to the territory for delinquent territorial and county taxes.

4. Rev. St. U. S. § 1852, as amended December 23, 1880, limiting the sessions of territorial legislatures to "sixty days' duration," means 60 consecutive days from the beginning of the session. 23 Pac. 680, overruled.

5. A bill cannot be passed by the legislature nor approved by the governor after the 60 days allowed by Rev. St. U. S. § 1852, for the session of a territorial legislature.

Appeal from district court, Maricopa county; before Justice R. E. Sloan.

Action by Neri Osborn against Maricopa County. Judgment for plaintiff, and defendant appeals. Reversed.

The plaintiff sought to recover from the county \$1,818.55, for services as county recorder in filing and recording certain tax certificates and tax deeds to lands that had been

struck off to the territory for delinquent territorial and county taxes, claiming that such fees became a charge against the county by virtue of an amendment to Rev. St. § 2710, passed by the Fifteenth legislative assembly on April 2, 1889. The Fifteenth legislative assembly convened on January 21, 1889, and adjourned on April 10, 1889, being in actual session but 48 days. See 23 Pac. 680. Rev. St. U. S. § 1852, as amended December 23, 1880, restricts the sessions of territorial legislatures to "60 days' duration." Plaintiff recovered judgment for \$809.65.

Millay & Bennett, for appellant. Fitch & Campbell, for appellee.

HAWKINS, J. Action by appellee to recover \$1,818.55, for services as county recorder in filing and recording certain tax certificates and tax deeds to lands that had been struck off to the territory for delinquent territorial and county taxes. Judgment was recovered for \$809.65 against appellant. Appellee moved to dismiss the appeal, for the reason the appellant filed no appeal bond, as required by the statute. The statute does not say in direct terms that a county may appeal without giving bond to appellee. It does say that the territory may do so. A county is a political subdivision of the territory, and may sue and be sued. It does not have to file an appeal bond in order to maintain its appeal. The motion to dismiss is denied.

Appellee also raises the question that the motion for new trial was not embodied in a bill of exceptions, and the points therein contained cannot therefore be considered in this court. We think this point well taken, and we cannot consider any question in the case not apparent upon the face of the record. Upon this point this court has repeatedly so held. *Sutherland v. Putnam*, 24 Pac. 320; *Snead v. Tietjen*, Id. 325; *Gila R. I. Co. v. Wolfly*, Id. 257.

The only question for us to consider in this case is, does the complaint state facts sufficient to constitute a cause of action? It does not. The county is not interested in the deeds and certificates filed and recorded by the appellee. They were made by the tax collector under the law to the territory. It then became the duty of the county recorder (paragraph 2703, Rev. St.) to record the deeds to the territory without charge to the county. Paragraph 2710, Rev. St., provides the mode by which the county collector and the county recorder get their fees for the class of services sued on in the action at bar. There is no other. The board of supervisors (under paragraph 2709, Rev. St.) become the agents of the territory in the disposition of all real estate held by the territory under the tax deed for the collection of the total taxes, penalties, and costs, including the unpaid charges of the collector and recorder. When so collected by said board, the money is all paid by them to the county treasurer, and he (the

county treasurer) first pays therefrom what is due the county collector and the county recorder, and distributes and credits the balance to the funds entitled thereto. It is readily seen that under no circumstances can the county be held for such fees of the collector and recorder.

Appellee, in his complaint, however, claims that his fees became a county charge, under paragraph 2710, Rev. St., "as amended by the act of April 2, 1889." This act never became a law, for the reason that it was not signed by the governor; nor was it returned to the legislative assembly with his objections, and passed over his veto; nor did it remain in his hands 10 days during the existence of the legislature. The Fifteenth legislative assembly of Arizona convened on the 21st day of January, 1889. The 60 days' duration allotted it by congress expired long before this act purports to take effect. Territorial legislatures are limited to 60 days' duration. Rev. St. U. S. § 1852. Neither the governor nor legislature has any power to approve or pass bills thereafter. *Territory v. Clayton* (Utah) 18 Pac. 628. It is hardly necessary to cite authorities on this question. The mere reading of the act of congress solves the same.

The judgment is reversed, with directions to the court below to sustain the demurrer to the complaint. The case of *Cheney v. Smith* (Ariz.) 23 Pac. 680, is expressly overruled.

BAKER, C. J., having been of counsel for appellee in the court below, took no part in the cause in this court.

BETHUNE and ROUSE, JJ., concur.

(4 Ariz. 335)

MARICOPA COUNTY v. ROSSON.

(Supreme Court of Arizona. May 13, 1895.)

APPEAL BY COUNTY—BOND—BILL OF EXCEPTIONS—COUNTY TAX COLLECTOR—COMPENSATION.

1. A county may appeal without filing an appeal bond.

2. A judgment overruling a demurrer is a part of the record proper, and will be reviewed on appeal, although not embodied in the bill of exceptions.

3. A tax collector cannot recover from the county for executing tax certificates to the territory for land sold for delinquent territorial and county taxes, nor for money paid for acknowledgments to deeds to the territory for such land.

Appeal from district court, Maricopa county; before Justice R. E. Sloan.

Action by R. L. Rosson against Maricopa county. Judgment for plaintiff, and defendant appeals. Reversed.

Millay & Bennett, for appellant. Fitch & Campbell, for appellee.

HAWKINS, J. Action to recover fees claimed by appellee for executing certain tax certificates to the territory, and for money paid for acknowledgments to certain tax deeds to the territory. The court below ren-

dered judgment for appellee for \$292, being \$1 each for tax certificates issued to the territory. We find practically the same kind of a record and about the same questions involved as in *Maricopa Co. v. Osborn* (Ariz.) 40 Pac. 313.

Counties may appeal without filing appeal bond; hence the motion to dismiss the appeal is denied.

The motion for new trial not being here in a bill of exceptions, we can only consider errors upon the face of the record. The judgment overruling the demurrer is a part of the record, and does not have to be excepted to or embodied in a bill of exceptions before it can be reviewed here. *Hamlin v. Reynolds*, 22 Ill. 207. We have just decided in *Maricopa Co. v. Osborn* that a county recorder has no cause of action against the county for filing and recording tax certificates and tax deeds to the territory. He accepts his office with the law as written in the statutes, and can get such fees only by the mode set out in the revenue act. The tax collector is in the same category. He has stated no cause of action in his complaint against the county.

The judgment is reversed, and cause remanded, with directions to the court below to sustain the demurrer to the complaint.

BETHUNE and ROUSE, JJ., concur. BAKER, C. J., took no part in this case, having been of counsel in the court below.

(55 Kan. 150)

STATE ex rel. HOGAN v. FAGAN, County Auditor, et al.

(Supreme Court of Kansas. April 30, 1895.)

EX UNION SOLDIER—BURIAL—CHARGE ON COUNTY.

Where an honorably discharged ex Union soldier, sailor, or marine, who served in the army or navy of the United States during the late war, dies without leaving sufficient means to defray funeral expenses, it is the duty of the county commissioners of the county where he resided to cause his body to be decently interred; and if there are surviving relatives who desire to conduct the burial, and who are unable or unwilling to pay the charges therefor, they must be permitted to do so free from the interference of the officer or agent of the county, but the expenses so incurred, and for which the county will be liable, cannot exceed the sum of \$50.

(Syllabus by the Court.)

Petition by the state, on the relation of M. Hogan, for mandamus to compel W. F. Fagan, county auditor, and the county commissioners of the county of Shawnee, to allow a certain account. Writ allowed.

John T. Little, Atty. Gen., P. H. Coney, and Waters & Waters, for relator. W. F. Fagan, for respondents.

JOHNSTON, J. This is a proceeding to compel the county auditor and the county commissioners of the county of Shawnee to audit, allow, and pay an account of \$50 alleged to have been expended in the burial of Carl H. Peterson, who died on July 23, 1894,

at Topeka, in the county of Shawnee. He was an honorably discharged ex Union soldier, who left surviving him a widow and three children. He resided with his family in Shawnee county until his death, and died without leaving sufficient means to defray his funeral expenses. Upon his death his surviving relatives, consisting of his widow and children, desired to conduct the funeral, and did so, by engaging one M. Hogan to take charge and furnish those things necessary for the interment of the body, which Hogan fully performed, at an expense of \$53. It is conceded that the widow and children are wholly unable to pay the charges therefor, or any part of the same. Hogan presented his duly-verified account to the extent of \$50 to the county auditor, who disallowed the claim because it was not contracted by the township trustee or other person who had authority to bind the county; and it is stated that a further reason was that the county commissioners had let the contract for the burial of deceased soldiers to the lowest bidder, whose duty it was to furnish what was deemed necessary, and to conduct the funeral at a cost much below \$50, the amount of the claim presented. The parties to this proceeding have waived all other questions, and submit for the decision of the court the interpretation of the statute with respect to whether such a claim can be audited and paid, unless it has been contracted by some one designated by the county commissioners. The statutory provision under which the question must be determined reads: "It shall be the duty of the county commissioners in each of the counties of this state to designate the township trustee, or, for good reason, some person other than the township trustee in each township, whose duty it shall be to cause to be decently interred the body of any honorably discharged ex Union soldier, sailor or marine, who served in the army of the United States during the late war, and who may hereafter die without leaving sufficient means to defray funeral expenses. Such burial shall not be made in any cemetery or burial ground, or that portion of any burial ground, used exclusively for the burial of the pauper dead; provided, the expenses of such burial shall not exceed the sum of fifty dollars; and provided further, that in case surviving relatives of the deceased shall desire to conduct the funeral, and are unwilling or unable to pay the charges therefor, they shall be permitted so to do, and the expenses shall be paid as herein provided." Gen. St. 1889, par. 5916.

The contention is that, as the duty of burial is imposed upon the person designated by the county commissioners, such person must first determine that the deceased is an ex Union soldier, sailor, or marine, that he was honorably discharged, and that he died without leaving sufficient means to defray funeral expenses; and that no claim

can arise against the county for such a burial until these questions have been determined, and a contract for the services has been made by him. This contention is practically admitted to be correct, where there are no surviving relatives of the deceased who desire to conduct the funeral; but they insist that, where there are such surviving relatives, they may take entire charge of the burial, free from the control or interference of any public officer. It is plain that the legislative purpose was that one who had borne an honorable part in the defense of our country and its institutions during the late war, and who died without sufficient means to defray funeral expenses, should receive a respectable burial. The language employed clearly evinces the intention that such persons should not be buried at the lowest possible contract rate that the county might be able to obtain, nor that their remains should be treated or interred like those of paupers. It is provided that the burial shall not be made in any cemetery, or that portion of the same, used exclusively for the burial of the pauper dead. If there are no surviving relatives who desire to conduct the funeral, then the person designated by the county commissioners would be invested with discretion to determine the kind of casket that would be used, the means of conveyance to the cemetery, and what should be supplied for the purposes of burial, provided that the expenses of the same should be kept within the sum of \$50. On the other hand, if the surviving relatives desire to conduct the burial, and are unable or unwilling to pay the charges therefor, the statute specifically provides that they shall be allowed to do so, and the reasonable expenses of the same, up to the sum of \$50, must be paid by the county. In such a case, the relatives will order the means and facilities for a decent interment, and control the same, free from the superintending control of the agent of the county, but the charges therefor can never in any case exceed the sum of \$50; and all concede that the maximum allowance is exceedingly moderate. When the burial is controlled and conducted by the relatives, the bill of expenses for the same must be presented to the county commissioners, who can then determine whether the deceased was an honorably discharged ex Union soldier, sailor, or marine in the late war, and also whether he left sufficient means to defray funeral expenses. These questions having been determined in the affirmative, the account for expenses is to be audited and paid, the same as other accounts against the county are audited and paid. A peremptory writ of mandamus will therefore be allowed requiring the defendants to audit and pay the claim for the burial of the remains of Carl H. Peterson, in accordance with the prayer of plaintiff's petition. All the justices concurring.

(55 Kan. 417)

WATKINS v. GLENN et al

(Supreme Court of Kansas. April 30, 1895.)

**CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS
—IMPAIRMENT OF REMEDY—MORTGAGE SALES
—RETROACTIVE EFFECT OF STATUTE.**

1. Any subsequent law of the state, which so affects the remedy as substantially to impair and lessen the value of the contract, is forbidden by article 1, § 10, of the constitution of the United States, which ordains that "no state * * * shall pass any * * * law impairing the obligation of contracts."

2. Chapter 109, Sess. Laws 1893, concerning the sale and redemption of real estate, has no retroactive operation, and therefore does not apply to mortgage contracts existing at and before its passage. If the legislature intended the act to apply to such contracts, it violates article 1, § 10, of the constitution of the United States.

Allen, J., dissenting.

(Syllabus by the Court.)

Error from district court, Harper county; G. W. McKay, Judge.

Action by J. B. Watkins against Marshall H. Glenn and others to foreclose a mortgage. A judgment of foreclosure was rendered, and an order directing the issue of a certificate of purchase, under Laws 1893, c. 100, and plaintiff brings error. Reversed.

On March 1, 1886, Marshall H. Glenn and Lillie O. Glenn, his wife, executed and delivered their promissory note for \$1,500 to the trustees of the Home for Friendless and Destitute Children, in the city of Wilmington, and at the same time, to secure the payment of the note, they executed and delivered their mortgage deed to the home upon the following described real estate: "The south half of the northwest quarter of section twelve (12), township thirty-two (32), range seven (7) west, of the 6th P. M., in Harper county, in this state." The note and mortgage were subsequently assigned and transferred to J. B. Watkins, the plaintiff. This action was commenced in the district court of Harper county on the 14th of April, 1891, to foreclose and sell the mortgaged premises to pay indebtedness secured thereby. On May 13, 1891, the defendants Glenn and wife filed the following answer, omitting caption: "The defendants Marshall H. Glenn and Lillie O. Glenn, for their answer to plaintiff's petition in the above-entitled cause filed, deny each and every allegation therein contained. (2) These defendants, for a further answer to said petition, say and allege that the said note and bond sued upon in this action have been fully paid by these defendants long prior to the commencement of this action, and on or about the 1st day of March, 1888. (3) These defendants further aver that said note, if any there be, was given for a loan of money, and that the interest on said loan was to be at the rate of 10 per cent.; and the amount in the bond was to bear the rate of 7 per cent. interest, and 3 per cent. of said interest is represented by the mortgage and note held by the defendant Thomas S. Moffett, and the interest on said bond is

therefore usurious and illegal. (4) These defendants further aver that said bond or note is nonnegotiable, and all the facts above set forth were and always have been well known to the plaintiff herein. (5) These defendants further allege that the plaintiff, J. B. Watkins, is a member of the American Banking Association, a combination and association having for its object and purpose the controlling, regulating, and fixing the amount of money in actual circulation, and for the controlling, regulating, and fixing the rate of interest, and the rate of use and forbearance of money charged and to be charged by its members of their customers and borrowers. That said association is illegal, unlawful, and contrary to public policy. That by reason of the existence of said combination and its actions as aforesaid, in the furtherance of the object of said combination, these defendants have been injured and damaged, and their ability to pay and meet their contracts has been controlled. Wherefore these defendants demand judgment against the plaintiff for costs of suit, and for such other and further relief as equity may require."

Thomas S. Moffett, one of the defendants, filed an answer and cross petition to recover \$337.50 of Glenn and wife, and also to foreclose a mortgage upon the premises described in plaintiff's petition, executed on the 1st of March, 1886, by them to secure a note of \$225 with interest. Glenn and wife filed an answer to this cross petition. The mortgage executed and delivered to the home contained the following provision: "It is further agreed that in case of default in the payment of said bond, or any part thereof, or any of the sums of money to become due herein specified, according to the tenure and effect of said bond, or in the case of the breach by the said party of the first part of any of the covenants or agreements herein mentioned by said first party to be performed, then, and in that case, the bond secured hereby shall bear interest at the rate of twelve per cent. per annum from date, and this conveyance shall become absolute, and the party of the second part be at once entitled to the possession of the said above-described premises, and to have and receive all the rents and profits thereof."

Trial had before the court without a jury, on the 29th of January, 1894. The court found that the allegations of the plaintiff's petition were true, and that there was due the plaintiff, as therein alleged, from the defendants Marshall H. Glenn and Lillie O. Glenn, \$1,500 as principal, and \$952.55 as interest, aggregating \$2,452.55, and that the mortgage in plaintiff's petition set forth was and is a first and prior lien on the premises described therein. The court further found that there was due to the defendant T. S. Moffett, from Glenn and wife,

\$438, with interest, and that the mortgage set out in his petition was a second lien upon the premises. Subsequently the court rendered personal judgments upon his findings against Glenn and wife, and for a foreclosure of the mortgaged premises, and a sale thereof to pay the judgment, interest, and costs. The judgment or decree of foreclosure provided: "It is hereby further ordered, adjudged, and decreed that the sheriff making said sale shall execute and deliver to the purchaser or purchasers of said mortgaged premises, or any part thereof, at said foreclosure sale, a good and sufficient certificate of purchase for the premises so sold, upon the confirmation of said sale, as provided by the laws of the state of Kansas (Sess. Laws 1893, c. 109, §§ 1, 2, 26), containing a description of the property purchased and the amount of money paid by each purchaser, together with the amount of costs up to said date, and stating that, unless redemption is made within eighteen months thereafter according to law, the purchaser, or his heirs or his assigns, will be entitled to a deed to the same; and that, upon the making and execution of such deed or deeds to such purchaser or purchasers, any of the defendants who may be in possession of said mortgaged premises, or any person or persons holding possession under, through, or by them, or either of them, since the commencement of this action, shall immediately surrender the possession of said premises to such purchaser or purchasers, upon production of such sheriff's deed. That upon production of such sheriff's deed to said mortgaged premises, if the parties in possession of the same neglect or refuse to surrender the possession of said premises to the purchaser at said sheriff's sale, a writ of assistance shall be issued by the clerk of the district court, upon the application of the purchaser at said sheriff's sale, directing the sheriff of said county to take possession of said mortgaged premises, and deliver the same to said purchaser. It is hereby further ordered, adjudged, and decreed that, from and after the execution of such deed or deeds, each and all of the defendants herein named shall be forever barred, both at law and in equity, from any right, title, lien, or interest in, to, or against the mortgaged premises hereinbefore described."

Sections 1, 2, and 26 of said chapter 109 read as follows:

"Section 1. After sale by the sheriff of any real estate on execution, special execution, or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, together with the amount

of the costs up to said date, stating that unless redemption is made within eighteen months thereafter according to law, that the purchaser or his heirs or assigns will be entitled to a deed to the same: provided, that any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void.

"Sec. 2. The defendant owner may redeem any real property sold under execution, special execution or order of sale, at the amount sold for, together with interest, costs, and taxes, as provided for in this act, at any time within eighteen months from the day of sale as herein provided, and shall in the meantime be entitled to the possession of the property; but where the court or judge shall find that the lands and tenements have been abandoned, or are not occupied in good faith, the period of redemption for defendant owner shall be six months from the date of sale, and all junior lien holders shall be entitled to three months to redeem after the expiration of said six months."

"Sec. 26. The sheriff shall at once make a return of all sales made under this act to the court; and the court, if it finds the proceedings regular and in conformity with law and equity, shall confirm the same and direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser the certificate of sale or deed provided for in section 1 of this act."

To the judgment, decree, and order of the court directing the issuance of a certificate of purchase, under chapter 109, Sess. Laws 1893, J. B. Watkins, the plaintiff below, excepted, and brings the case here for review and reversal.

W. J. Patterson, for plaintiff in error.
Washbon & Washbon, for defendant in error.

HORTON, C. J. (after stating the facts). The question for our determination in this case is whether chapter 109, Sess. Laws 1893, relating to the sale and redemption of real estate, was intended by the legislature to operate retrospectively, so as to apply to mortgage contracts existing at and before its passage. Involved in this is the further question whether, if the act was intended to apply to such contracts, it violates article 1, § 10, of the constitution of the United States, which ordains that "no state * * * shall pass any * * * law impairing the obligation of contracts." The contention on the part of the plaintiff is that chapter 109 was not intended by the legislature to apply to mortgage contracts entered into prior to its passage, and that, if such were the intention of the legislature, the act is unconstitutional as to such contracts. It is admitted upon the part of the defendants below that if, under the provisions of the statute

of 1893, there is any material change or impairment of the contract rights secured under the mortgage, however slight, it is unconstitutional. But the claim is that the statute acts on the remedy only; that the plaintiff has under that act a substantial remedy to enforce the provisions of his mortgage; and therefore that it is constitutional, and was intended by the legislature to apply to all contracts, whether made before or after its passage. It is conceded "that the laws which subsist at the time and place of making the contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Von Hoffman v. Quincy*, 4 Wall. 535. It has been ruled in *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, "that the remedy subsisting in a state when and where a contract is made, and is to be performed, is a part of its obligation, and that any subsequent law of the state, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is therefore void." Again, in *Louisiana v. New Orleans*, 102 U. S. 203, the court held: "The obligation of the contract is impaired by such legislation as lessens the efficacy of the remedy which the law in force at the time it was made provided for enforcing it. Whatever legislation lessens the efficacy of the remedy impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb '*Qui cito dat bis dat*,'—'He who gives quickly gives twice,'—has its counterpart in a maxim equally sound, '*Qui serius solvit minus solvit*,'—'He who pays too late pays less.' Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition."

Whether the contract sued on is modified or affected by the act of 1893, if held to apply, is a test as to the constitutionality of the act. If that act lessens the value of the mortgage or its security, it cannot operate upon such a contract in existence at the time of its passage. The act provides that the mortgagor shall have 18 months from the date of sale to redeem; that a receiver can only be appointed in case of waste; that the income during the period for redemption, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution or the owner of the legal title. Under the express condition of the mortgage sued on, in case of default in the payment of the debt secured, the mortgagee is entitled "to have and receive all the rents and profits of the mortgaged premises to apply upon his note or bond." Under the former law, a receiver could have been appointed to take possession of the mortgaged premises, collect the

rents and profits thereof, and apply the same, less expenses, to the satisfaction of the debt. The act of 1893 deprives the mortgagee of this right, and therefore of a part of the security given by the very terms of his mortgage.

Again, the act carves out for the mortgagor, or the owner of the mortgaged property, an estate of several months, more than obtainable by him under the former law, with full right of possession, and without paying rents, profits, or taxes. Under the former law, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter the mortgagor or the owner had no possession, title, or right in any way to the premises. In the counties where the courts are almost continually in session, as Atchison, Shawnee, Sedgewick, and Wyandotte, and in other counties of the state where there are frequent sessions of the courts, a sheriff's deed generally issues in a few days after the sale. To contend that the actual possession of the mortgaged premises by the mortgagor or owner for any specified period of time, whether it be for 6, 12, or 18 months, after a judicial sale, gives the same security to the mortgagee as the former law, which permitted the purchaser of the premises under a decretal sale to take possession as soon as the sale was confirmed and the sheriff's deed issued, is to claim that the possession of real estate is of no value whatever. As was forcibly observed by Allen, J., in *Greenwood v. Butler*, 52 Kan. 424, 34 Pac. 967: "It cannot be said that a sale of lands, with a right of possession remaining in the judgment debtor for a year and a half thereafter, is the same thing as a sale with a right to immediate possession on confirmation of the sale. It is simply the carving out and taking away from the estate originally decreed to be sold another estate limited for a year and a half. It diminishes the value of the lands to be sold by just exactly the value of the tenure, rent free, for a year and a half. The fact that the judgment would still draw interest does not affect the question as to the value of the security to be sold for its satisfaction. In our opinion, the obligation of the mortgage contract in this case is substantially impaired by the act of 1893, if that act operates upon contracts in existence at the date of its passage, as it injuriously affects the value of the mortgage security. The act, therefore, if applied to past contracts, is unconstitutional and void."

We think this conclusion is fully supported by the great weight of authority, and especially by the decisions of the supreme court of the United States, which are controlling in the interpretation of the provisions of the federal constitution. In *Pounds v. Rodgers*, 52 Kan. 558, 35 Pac. 223, it was ruled that: "The sale of land for delinquent taxes, under the statute, constitutes a contract between the purchaser and the state, the terms of which are

found in the law then in force. All matters relating to the sale and conveyance of land for taxes under any prior statute must be fully completed according to the laws under which they originated, the same as if such laws remained in force." In *Bixby v. Bailey*, 11 Kan. 359, *Brewer, J.*, speaking for the court, in referring to the redemption law of the 4th of June, 1861, observed: "It is insisted that, under the law in force at the time of the decree and sale, the debtor had two years to redeem, and therefore the sheriff's deed was void. The note and mortgage were executed before the redemption law, and therefore unaffected by its provisions." He cited *Bronson v. Kinzie*, 1 How. 311. In *Ogden v. Walters*, 12 Kan. 283, *Valentine, J.*, stated: "At the time the mortgage was executed, in 1858, there was no law authorizing the redemption of land from a sheriff's sale, and the law of June 4, 1861, cannot have a retroactive operation, so as to apply to said mortgage." In view of these expressions of this court delivered by such eminent and painstaking jurists as *Brewer* and *Valentine*, and considering that section 1 of chapter 109 provides for deeds to issue at once on sales of real estate not subject to redemption, and for certificates to issue on sales subject to redemption, we think the legislature did not intend that the provisions of the act of 1893 should apply to mortgage contracts existing at the date of its passage. No statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it should so operate is expressly declared. And courts will apply new statutes only to future cases, unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retroactive operation. *Potter, Dwar. St. 75; Id. 162, 163, note. Sedgwick*, in his work on the Construction of Statutes and Constitutions (2d Ed.), after stating that retrospective or retroactive statutes, independently of certain exceptions, are within the scope of the legislative authority, yet says that "such laws, as a general rule, are objectionable, and the judiciary will give all laws a prospective operation only, unless their language is so clear as not to be susceptible of any other construction." Page 173. Again he says: "The courts refuse to give statutes a retroactive construction, unless the intention is so clear and positive as by no possibility to admit of any other construction." Page 166. If the legislature intended the act to be retrospective in its operation so as to apply to prior mortgages, the following decisions of the supreme court of the United States, and the reasons given therein, are conclusive that the act is unconstitutional and void as to such contracts: *Ogden v. Saunders*, 12 Wheat. 213, 327; *Green v. Biddle*, 8 Wheat. 1-107; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Gantly v. Emery*, 3 How. 716; *Ex parte*

Christy, Id. 328; Clark v. Reyburn, 8 Wall. 322; *Walker v. Whitehead*, 16 Wall. 314; *Howard v. Bugbee*, 24 How. 461; *Bank v. Sharp*, 6 How. 301; *Gunn v. Barry*, 15 Wall. 601; *Brine v. Insurance Co.*, 96 U. S. 627, 637; *Memphis v. U. S.*, 97 U. S. 293; *Kring v. Missouri*, 107 U. S. 233, 2 Sup. Ct. 443; *Butz v. City of Muscatine*, 8 Wall. 575; *Mobile v. U. S.*, 116 U. S. 305, 6 Sup. Ct. 398; *Curran v. Arkansas*, 15 How. 319; *Louisiana v. New Orleans*, 102 U. S. 206; *Selbert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190; *Edwards v. Kearzey*, 96 U. S. 595. As sustaining the constitutionality of chapter 109 to prior contracts, we are referred to *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236; *Morley v. Railway Co.*, 146 U. S. 162, 13 Sup. Ct. 54; *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757; *Curtis v. Whitney*, 13 Wall. 68; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91. The cases mostly commented upon are *Insurance Co. v. Cushman*, *supra*, and *Morley v. Railway Co.*, *supra*. In the *Cushman Case*, the action was between the purchaser of the mortgaged property at the decretal sale and the party entitled to redemption. The mortgagee was not a party, or interested. The court ruled that the Illinois statute for 1879, reducing the interest from 10 per cent. to 8, was valid between the purchaser of mortgaged premises and the party entitled to redemption, although the mortgage was given before the passage of the statute. Mr. Justice Harlan, in delivering the opinion in that case, said among other things: "Certainly the obligation of that contract was not impaired by the act of 1879, for it did not diminish the duty of the mortgagor to pay what he agreed to pay; or shorten the period of payment, or interfere with or take away any remedy which the mortgagee had, by existing law, for the enforcement of its contract. The statute in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the purchaser should bear, as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. The mortgagor might, perhaps, have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage. But, as to the mortgagee, the obligation of the contract was fully met when it received what the mortgage, and statute in force when the mortgage was executed, entitled it to demand." And after referring to *Edwards v. Kearzey*, 96 U. S. 595, and other prior decisions of the supreme court of the United States, remarked: "These decisions clearly have no application to the case now before the court. The laws with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their direct or necessary legal operation controlled or affected the obligations of such contract. We have seen that

no reduction of the rate of interest, as between the purchaser of mortgaged property at decretal sale and the party entitled to redeem, affected, or could possibly affect, the right of the insurance company to receive, or the duty of the mortgagor to pay, the entire mortgage debt with interest as stipulated in the mortgage up to the decree of sale; and the result of the sale in this case shows that the company, as mortgagor, has received all that it was entitled to demand."

In this case there is no showing that the mortgagor can or will receive all that he is entitled to demand under the decree complained of. If the plaintiff in this case had received the full amount of his mortgage, with interest and costs, he would not be here. In the *Morley Case*, *supra*, the court ruled that a state statute, reducing the rate of interest upon judgments obtained within the courts of the state, is not, when applied to one previous to its passage, in violation of section 1 of the fourteenth amendment of the constitution of the United States. Mr. Justice Shiras, in delivering the opinion, observed: "Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures, or until payment is made; and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the constitution. But if the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract; and whether, after maturity and a failure to pay, interest shall accrue, depends wholly on the law of the state, as declared by its statutes. If the state declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment. * * * It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute, but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract, within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. "A judgment is, in no sense, a contract or agreement between the parties." These cases, and the other United States cases referred to, to sustain the decree of the trial court, are clearly distinguishable from the federal decisions cited by us against the act of 1893, if it be given a retrospective operation.

Finally, it is suggested that, if chapter 109 is not retrospective, there will be great confusion in the courts in the mode of procedure in foreclosing and selling mortgaged property. But the act of 1893 itself specifically provides that in some cases real estate may be sold without redemption, and in other cases be sold subject to redemption; hence the act does not command uniformity of procedure. *Sess. Laws, 1893, c. 109, § 1*. Further, the suggestion of confusion of procedure in the courts could be used as effectively against the decision in *Greenwood v. Butler*, *supra*, as in this case. There were many judgments rendered in this state before the passage of chapter 109, foreclosing mortgages upon real estate, where the sales did not occur until after the passage of the act. Yet this court held unanimously that the act had no retrospective operation as to judgments rendered before its passage. Therefore the argument concerning the confusion of procedure is one of degree only between judgments and mortgages existing prior to the passage of the act. We think such an argument is without substance. The judgment of the district court will be reversed, and cause remanded, with direction to the court below to correct the decree complained of, and to order that, after sale and confirmation, a sheriff's deed shall issue according to law.

JOHNSTON, J., concurring.

ALLEN, J. (dissenting). I am clearly of the opinion that the legislature intended the act under consideration to apply to the procedure for the enforcement of contracts made prior to its passage. Section 25 reads: "The provisions of this act shall apply to all sales under foreclosure of mortgage, trust deed, mechanic's lien, or other lien, whether special or general, and the terms of redemption shall be the same." No language can be found anywhere in the act expressly excepting prior contracts from its operation. Probably no clause of the federal constitution of the United States has occupied the attention of the courts more than section 10, art. 1. It is easy to glean from the authorities language which would seem to afford a clear and unvarying criterion for the determination of every controversy that may arise. In the early case of *Sturges v. Crowninshield*, 4 Wheat. 196, it was said by Chief Justice Marshall, in defining the meaning of the word "obligation," as used in the constitution: "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." This definition was cited with approval in *Ogden v. Saunders*, 12 Wheat. 318. It was there said: "The obligation does not inhere and subsist in the contract itself *proprio vigore*, but in the law applicable to the contract." In *Bank v. Sharp*, 6 How. 301, it was said: "One of the tests that a contract has

been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force." And in *Edwards v. Kearzey*, 96 U. S. 505, that "the remedy subsisting in a state when and where a contract is made, and is to be performed, is a part of its obligation." These expressions of the highest tribunal in the land on a question of construction of the constitution of the United States, concerning which its authority is binding on all state and federal courts, if given literal effect, would determine the case in favor of the plaintiff in error. An examination of the cases will show, however, that that tribunal has not adhered to any such plain and simple rule. And the passage cited from *Edwards v. Kearzey*, which is probably the strongest case to be found in the books on that side of the question, is immediately followed by this statement: "And any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution of the United States, and therefore void." Other language may be extracted from the cases leading to a diametrically opposite result. In *Bronson v. Kinzie*, 1 How. 311, which is, perhaps, the leading case on the subject of the foreclosure of mortgages, it was said: "If the laws of the state, passed afterwards, had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection, for undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. * * * And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional."

That the legislature of a state, when not restricted by provisions of the state constitution has unrestricted power to determine what courts shall be established, what abolished; to fix the forms and modes of issuing and serving process; the times for filing pleadings, for hearing and determining issues raised, as well as the process and manner of enforcing judgments and decrees, provided a remedy is still afforded which will substantially secure the rights of the parties,—is affirmed in a great number of cases, decided by both state and federal courts. This must be so in the nature of things. The parties to a contract have no power to create or perpetuate any particular arm of the government. The people in their sovereign capacity, as framers of constitutions, or acting through their representatives in the legislature, determine all questions of general policy, and regulate the organization and procedure of courts as they deem best for the

general interest of the public. To say that the parties to a contract have a vested interest in the identical remedy afforded under the law as it stands at the time the contract is made would be to render them superior to the lawmaking power, and to place the government of the country in the hands of creditors to such an extent that no change whatever could be made cutting off a particular remedy until every past contract was fully enforced. The real difficulty arises when we undertake to determine what changes in the law have the effect to substantially impair the obligation of the contract. To determine what is mere matter of form and what is substance might seem easy, but an examination of the authorities discloses great difficulty in the practical application of a rule.

It is perfectly clear that the mere entry of a judgment in favor of the creditor for the amount due him may be no substantial remedy. The state must do more for him. It must force payment of the amount of the judgment by seizure of the person of the debtor or of his property. In semibarbarous countries, a common remedy is to seize the body of the debtor and sell him into servitude. The peonage of Mexico is the fruit of such a system. In the early history of the United States a *capias* for the body of the debtor was an ordinary writ issued on a judgment for money. In the case of *Mason v. Haile*, 12 Wheat. 370, it was held that "states have a right to regulate or abolish imprisonment for debt as a part of the remedy for enforcing the performance of contracts"; and this, as applied to prior as well as subsequent contracts. Imprisonment for debt is mentioned in *Edwards v. Kearzey*, *supra*, as a relic of ancient barbarism, rather than as a remedy to be applied in a civilized country. Yet that imprisonment is a potent means of enforcing the payment of debts is fully understood by every intelligent citizen, as well as by members of the bar; for we still retain in the Code of Civil Procedure a remedy by arrest in cases of fraud. Formerly all property of the debtor, even to the most necessary household furniture, was subject to seizure and sale, often resulting in inflicting sore distress on the helpless family of the unfortunate or improvident debtor. A more enlightened policy has refused to employ the strong arm of the state in stripping the needy of the last vestige of property to satisfy the hard creditor. Laws affording a reasonable exemption have been held in numerous cases to be good as to past as well as future contracts. *Morse v. Gould*, 11 N. Y. 281; *Stephenson v. Osborne*, 41 Miss. 119; *Taylor v. Stockwell*, 86 Ind. 505; *Rockwell v. Hubbell's Adm'rs*, 2 Doug. (Mich.) 197; *Snelder v. Heidelberger*, 45 Ala. 126; *Hardman v. Downer*, 39 Ga. 425; *Coleman v. Ballandl*, 22 Minn. 144. One of the strongest cases of this kind is that of *Cusick v. Douglass*, 3 Kan. 123, where it was held that the home-

stead exemption given by the constitution could be maintained by the debtor as against a judgment rendered before the adoption of the constitution, when no such exemption existed. This case was decided before that of *Edwards v. Kearzey*, supra, where it was held by the supreme court of the United States that a change in the constitution of the state of North Carolina, allowing a homestead exemption not exceeding \$1,000 in value, and also exempting certain personal property from execution, was invalid as to past contracts. In an opinion concurring specially, Mr. Justice Clifford took occasion to say that the legislature would have power to exempt wearing apparel, implements of agriculture, tools of the mechanic, etc. The decision of the case was put on the ground that the exemption was excessive and unreasonable, as applied to obligations existing prior to the adoption of the constitution. Laws taking away the remedy of imprisonment for past debts have been upheld in the following cases: *Fisher v. Lacky*, 6 Blackf. 373; *Peniman's Case*, 103 U. S. 714; *Bronson v. Newberry*, 2 Doug. (Mich.) 38. Changes in statutes of limitations, provided a reasonable time is allowed, are universally upheld. *Smith v. Packard*, 12 Wis. 371; *Kenyon v. Stewart*, 44 Pa. St. 179. In the following cases the power of the legislature, through a change of remedy, to diminish in some degree the security of the creditor, has been upheld: *Evans v. Montgomery*, 4 Watts. & S. 218; *Appeal of Mechanics' & Farmers' Bank*, 31 Conn. 63; *Stocking v. Hunt*, 3 Denio, 274; *Conkey v. Hart*, 14 N. Y. 22; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Watson v. Railroad Co.*, 47 N. Y. 157. In the following cases enactments similar to the one under consideration, providing for the redemption of real estate sold under judicial process, have been upheld: *Davis v. Rupe*, 114 Ind. 588, 17 N. E. 163; *Iverson v. Shorter*, 9 Ala. 713; *Moore v. Martin*, 38 Cal. 428; *Holland v. Dickerson*, 41 Iowa, 367; *Berthold v. Fox*, 13 Minn. 501 (Gil. 462); *Butler v. Palmer*, 1 Hill, 324. In *Von Baumbach v. Bade*, 9 Wis. 559, it was held that an act of the legislature which provided that defendants in actions to foreclose mortgages, which were executed prior to its passage, should have six months' time in which to answer the complaint, and that the mortgaged premises should not be sold upon the judgments, except upon six months' previous notice of the time and place of sale, did not violate the provisions of the constitution of the United States. It was said in the opinion: "If from sudden and unlooked-for reverses, or misfortune, or any other cause, the existing remedies become so stringent in all or a particular class of actions that great and extensive sacrifices of property will ensue without benefit to the creditor or relief to the debtor, a relaxation of the remedies becomes a positive duty which the state owes to its citizens. The

general welfare of the community is committed to its care and keeping, and on fundamental principles of justice it is bound by reasonable regulations to promote and protect it. In passing upon questions like the present, courts must look behind the statute itself, and take notice of the causes which led to its enactment, for otherwise they would be unable to determine whether its regulations are reasonable or not, or were demanded by the state of the times, or the financial situation of the country." In *Institution v. Forman*, 33 N. J. Eq. 436, an act providing that in foreclosure proceedings thereafter commenced no personal judgment should be taken was held good as to past contracts, the remedy by action at law for the deficiency being still left. The supreme court of Pennsylvania in *Coxe's Ex'r v. Martin*, 44 Pa. St. 322, sustained a law providing that no civil process should issue or be enforced against any person in the military service of the state or United States, and ruled that the act extended to a writ of *scire facias* upon a mortgage, unless expressly prohibited by the act of the contracting parties, and that it was not unconstitutional, as impairing the obligation of a contract. In *Robertson v. Vancleave*, 129 Ind. 217, 26 N. E. 899, and 29 N. E. 781, a statute reducing the rate of interest which a purchaser might receive under a foreclosure sale was held not unconstitutional. A critical examination of the cases will disclose the fact that the courts, in determining what amounts to a substantial impairment of the remedy, have entertained widely different views. All the cases concede that the legislature may make changes in the remedies. All concede that there is a limit they may not exceed without violating the federal constitution. No clearly-marked boundary line beyond which the legislature may not pass has been, or in the nature of things can be, pointed out. Each case must be determined by itself. In *Bixby v. Bailey*, 11 Kan. 359, but little consideration seems to have been given to this question, the case of *Bronson v. Kinzie* only being cited, and in *Ogden v. Walters*, 12 Kan. 282, it was only necessary to hold that the decree on which the sale was made was valid until reversed. I have no inclination to criticise either of these cases. By the act of February 27, 1860, it was provided that, in all sales of real property thereafter to be made, the land should be appraised, and should not sell for less than two-thirds the appraised value. The act of June 4, 1861, gave the debtor the right to redeem at any time within two years after the day of sale. It would be exceedingly difficult to hold that these two acts taken together, or that the redemption act alone, where such an appraisal law was in force, did not materially diminish the value of the creditor's remedy. The legislature of Illinois on the 19th of February, 1841, passed an act authorizing the debtor to redeem

within 12 months, and a judgment creditor within 3 months thereafter. On the 27th of the same month another act was passed requiring that the property be appraised, and providing that it should not be sold for less than two-thirds the appraised value. Prior to the enactment of these laws the rights of the parties to a mortgage were determined according to the principles of the common law. The legal title was deemed to be in the mortgagee, the mortgagor having only an equity of redemption. It seems a little peculiar that mortgage contracts have never been enforced either by the courts of the United States or by those of England according to their terms. Mortgages do, and always have, conveyed in terms the title of the property to the mortgagee, following which there is a clause of defeasance providing that the conveyance shall become void if the money which it is intended to secure be paid in accordance with its terms. At common law the mortgagee was entitled to possession of the mortgaged property in case of default. His title, however, notwithstanding the express terms of the instrument, was never held to be complete and absolute. No matter what the terms or provisions of the mortgage, courts of equity have always held that, if the conveyance was made merely to secure the payment of a debt, it was a mortgage, and that even a default in the payment of the money at the time specified would not, under any circumstances, render the deed absolute, but that the creditor might redeem within a reasonable time. To obtain an absolute title, the mortgagee proceeded, either by strict foreclosure to extinguish the equity of the mortgagor, or in chancery to obtain a sale of the mortgaged premises to satisfy his debt. The time and manner of cutting off the equity of the debtor courts of equity always assumed the right to determine; it being considered that the creditor who obtained payment of his debt and interest, even at a later day than was specified in the mortgage, had all he was entitled to in equity and good conscience.

The decision of *Bronson v. Kinzie* was placed not merely on the ground that the value of the remedy was impaired, but that the contract itself was attempted to be changed. It is said in the opinion: "As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly on the contract itself, and to ingraft upon it new conditions, injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale, and it, moreover, gives a new, a like, estate, which before had no existence, to the judgment creditor, to continue for fifteen months."

By the statute of Kansas in force prior to the execution of the mortgage in question in this case, it was provided in what is now paragraph 4495, Gen. St. 1889: "No real estate shall be sold for the payment of any money, or the performance of any contract, or agreement in writing, in security for which it may have been pledged or assigned, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale." Both strict foreclosures and sales under powers contained in mortgages are unknown in Kansas. The decisions of the supreme court of the United States cited in the foregoing opinion were in cases where no such statute was in force. It appears to me, also, that that court, in its more recent decisions, has been much more liberal than formerly in upholding the power of the legislatures of the states to change and modify remedies. In *Antoni v. Greenhow*, 107 U. S. 760, 2 Sup. Ct. 91, an act of the legislature requiring a taxpayer who sought to pay his taxes with interest coupons of state funding bonds, which were refused by the tax collector, to pay his taxes in lawful money, and file his coupons in court, before he could maintain mandamus to compel their reception, where there was no requirement of such payment by the law as it stood at the time the bonds were issued, and providing that, in case the coupons were found to be genuine, the money deposited should be returned, was held valid; following *Tennessee v. Sneed*, 96 U. S. 69. The case of *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236, was a bill to foreclose a mortgage given by Cushman and wife to the insurance company on property in the city of Chicago. By the law in force at the time the mortgage was given, the mortgagor might redeem on payment of the sum for which the property was sold under foreclosure proceedings, with interest at 10 per cent. Subsequently an act was passed reducing the rate of interest in case of redemption to 8 per cent. It was held that "such reduction in the rate of interest did not impair the obligation of the contract between mortgagor and mortgagee, because the amendatory statute did not diminish the duty of the mortgagor to pay what he agreed to pay, or shorten the period of payment, or affect any remedy which the mortgagee had by existing law for the enforcement of his contract." It was said in the opinion: "The statute in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the purchaser should bear as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. The mortgagor might perhaps have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage, but, as to the mortgagee, the obligation of the contract was

fully met when it received what the mortgage and statute in force when the mortgage was executed entitled it to demand. The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when its debt was merged in the decree, or, at least, when the sale occurred; thenceforward its interest in the property was as purchaser, not as mortgagee." It was held, further, that the possible diminution of the amount for which the mortgaged property might sell, subject to the right of redemption at the diminished rate of interest, did not sufficiently impair the remedy to render the act void as to the mortgage in suit. In *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, it appeared that, under the statute of Rhode Island, the stockholders of a manufacturing company were made jointly and severally liable for all debts of the company until the whole amount was paid in, and that "their persons and property may be taken therefor on any writ of attachment or execution, issued against the company for such debt, in the same manner as on writs and executions against them for their individual debts." By a subsequent statute, the right to so proceed was taken away, and it was provided that all proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, or by an action of debt upon the judgment obtained against such corporation. It was held that this latter statute governed in proceedings to enforce past liabilities, notwithstanding the fact that it clearly operated to delay creditors. In *Morley v. Railway Co.*, 148 U. S. 162, 13 Sup. Ct. 54, it was held, affirming the decision of the court of appeals of New York, that a statute of that state reducing the rate of interest on judgments from 7 to 6 per cent. operated to reduce the rate of interest on a judgment rendered before the passage of the act, and that it was not a law impairing the obligation of contracts. The case last cited is a very strong one, upholding the power of a legislature to modify remedies.

In determining what remedies the state will afford creditors for the collection of their debts, the lawmaking power has a right to take into consideration all matters affecting the general conditions of the people, and to so temper its processes that, while the creditor is given his just dues, the debtor may not be needlessly ruined. As contracts, in general, can only be discharged by the payment of money, and as the state is called on to convert the property of the debtor into money, and pay it over to the creditor, why may not the legislature, in providing remedies, take into consideration those circumstances which every man of even ordinary intelligence cannot fail to note? The history of England and of the United

States is full of instances where debts have been contracted during a period of great inflation of the currency, as was the case when private bank notes circulated, which were not legal-tender money, and for the payment of which the government was not responsible, and as happened during the Revolutionary War, when the states were flooded with continental currency, and later, during the Civil War, when treasury notes were substantially the only money in circulation, and coin was at a great premium. It is clearly apparent that debts, contracted when values of all property were greatly inflated by reason of an inflated currency, become a greatly increased burden when payment, is required from a contracted currency. When the values of all property are very greatly reduced, while the nominal amount of the obligation remains the same, the amount of real or personal property which the state must seize and sell in order to discharge the obligation may be very greatly increased. The hardship to debtors, and the undue advantage gained by the creditors, who can acquire from the debt collected a much greater amount of property than could have been acquired at the time the debt was contracted, is apparent. On the other hand, instances corresponding in number may be cited where the creditor has been paid in a depreciated currency, and at a time when values were greatly inflated; thus, while nominally receiving the full sum due, they were, in fact, compelled to accept but a portion of the debt in discharge of the whole.

If matters affecting the currency of the country were due solely to the action of individuals, it might be argued with very great force that the legislature ought not to take such fluctuations into consideration: but when we consider that the kinds and character of circulating medium in use in any country depend almost wholly on legislation, when the medium for the payment of debts and for the exchange of products is regulated wholly by the lawmaking power of the general government, it would seem that legislatures in regulating the collection of debts might and ought to take into consideration the general conditions which determine the ease or difficulty with which debtors in general will be able to discharge their obligations in money. It is a fact well known to all that the country at the time this law was passed was feeling a serious depression in values, resulting from a long-continued policy on the part of the general government of contracting the currency. Must the legislature remain blind to these conditions? Must the courts ignore them? It is true that the extent to which such conditions affect values is not susceptible of accurate measurement, and that courts ought not and cannot do otherwise than award payment in lawful money of the stipulated sum which the debtor has agreed to pay. Nor has the legislature in the act under com-

sideration attempted to vary, by the slightest fraction, the sum of money required to discharge a debt. All that it has undertaken to do is to permit the debtor, after his property has been sold by the sheriff, to redeem it within a stated time, and to permit other creditors also to redeem for the purpose of securing their claims. A careful analysis of the law will also develop the fact that the changes made are far from being all in favor of the debtor. Under the law as it stood before this act was passed, when there was no express waiver of appraisement contained in the instrument securing the payment of the debt, the law required that lands seized on execution, or to be sold under order of sale, must be first appraised by three householders, and could not be sold for less than two-thirds the appraised value. In case there was a waiver of appraisement, the lands might be sold without valuation, but no execution could issue on the judgment until after the expiration of six months from its rendition. The sections of the statute containing these provisions are wholly repealed by the act of 1893. The effect of this repeal is to allow execution to issue at once in all cases, and the lands levied on to be sold without appraisement, and without any restriction as to price, and the proceeds of such sale to be applied in discharge of the debt. In these particulars, it will be observed that important clogs in the way of a speedy collection of debts have been removed; leaving the case wholly different from that under the laws of Illinois considered in *Bronson v. Kinzie*, supra, and of Kansas in the cases of *Bixby v. Bailey* and *Ogden v. Walters*, before mentioned. No right of the creditor, as a creditor, is taken away, postponed, or delayed, but rather, in a very great class of cases, the collection of his debt is expedited and made easy. The only change in the law which it can be said affects the creditor injuriously in any manner is that postponing the time when the purchaser may take a deed, and giving the debtor a right to the possession of the property in the meantime. This, however, falls clearly and entirely within the principle considered in the case of *Insurance Co. v. Cushman*, and cannot possibly affect the creditor, except by reducing the price realized from the property. The law in its principal features seems to me eminently just and commendable. It relieves the debtor of the expense of an appraisement; it allows a speedy sale, yet reserves to the debtor the right to redeem the land at any time within one year. Judgment creditors may redeem from the purchaser without the expense of advertising a sale again, and a subsequent mortgagee may, without suit, also redeem. Thus the various creditors of a debtor may, through the instrumentality of one sale, speedily made, obtain, in the order of the priority of their respective claims, the full benefit of the debtor's lands. The only

questionable feature of the law, which perhaps might be held invalid without affecting the other provisions, is that giving to the debtor the rents accruing between the time of sale and the execution of a deed thereunder. *Insurance Co. v. Brouse*, 83 Ind. 62. Where the security is found to be inadequate, possibly this provision ought not to be upheld as to past contracts. Where the security is adequate, I perceive no objection to the whole law. Often in a case like that under consideration, where there is a waiver of appraisement in the mortgage, the delay in obtaining a deed under foreclosure proceedings will not be nearly so great as might at first appear. Under the old law, six months must elapse after the rendition of a judgment before an order of sale can issue. Then the property must be advertised at least 30 days. After the sheriff makes his return, the sale must be confirmed by the court before the deed can issue. In most counties of the state, it will be found that something near a year is required to obtain a deed. This is the length of time given by the statute exclusively to the defendant, when in possession of the land, for redemption, and for six months thereafter the right extends to creditors and mortgagees as well. But where the lands have been abandoned, or are not occupied, the period of redemption for the defendant is six months only, and for the lien holders three months thereafter. So, in cases where the property is vacant, the remedy is more speedy and better in all respects than was formerly afforded. If the law does not apply to past contracts, then sales for all debts contracted prior to its passage, where there is no waiver of appraisement, must be made in accordance with the old statute. The property must be appraised, and must sell for not less than two-thirds the appraised value. Where appraisement has been waived, there must be a stay of six months after the rendition of judgment. It seems that a statute so eminently fair and reasonable in its main features and provisions, and which affords, in most instances, an even better remedy for creditors than was before afforded, ought to be upheld; that the legislature has not by modifying the remedy materially impaired the obligation of contracts; and that the law should be followed in all cases, whether the obligation was created before or after its passage.

(55 Kan. 451)

BEVERLY v. BARNITZ.

(Supreme Court of Kansas. April 30, 1895.)

OBLIGATION OF CONTRACTS—RETROACTIVE EFFECT OF STATUTE—MORTGAGE SALES.

1. The case of *Watkins v. Glenn* (just decided) 40 Pac. 316, followed.

2. Chapter 109, Sess. Laws 1893, relating to the sale and redemption of real estate, does not apply to mortgages given prior to the passage of that act. Allen, J., dissenting. (Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Martha Barnitz against John L. Beverly to foreclose a mortgage. From an order and judgment directing the sheriff to execute a deed to plaintiff, defendant brings error. Affirmed.

E. A. McMath, for plaintiff in error. Ferry & Doran, for defendant in error.

HORTON, C. J. On November 1, 1885, one George A. Kirkland executed and delivered to Martha Barnitz his promissory note for \$1,500, and, to secure the payment of the note, he executed and delivered, at the same time, his mortgage deed upon the following described real estate, to wit: The N. E. $\frac{1}{4}$ of section 12, township 10 S., of range 12, in Shawnee county. On the same date, Kirkland executed and delivered to Martha Barnitz ten interest coupon notes, for \$60 each, payable at intervals of six months from the date of their execution, which notes were secured by the same mortgage as the principal note. All of the coupon notes were paid except the one falling due November 1, 1890. The principal note and the last-mentioned coupon note not being paid, on January 21, 1893, this action was brought to recover upon the notes, and for the foreclosure of the mortgage. Previous to the institution of this act, the property was conveyed to various parties, and John L. Beverly was the owner of the equity of redemption of the property at the time of the commencement of this action. The principal note sued upon in this action provides that: "It is expressly declared and agreed that this note, and the coupons hereto attached, are made and executed under, and are to be construed by, the laws of the state of Kansas, in every particular." It was stipulated in the mortgage as follows: "But whether the legal holder or holders of this mortgage elect to pay such taxes, assessments, or insurance premiums or not, it is distinctly understood that the legal holder or holders hereof may immediately cause this mortgage to be foreclosed, and shall be entitled to immediate possession of the premises, and the rents, issues, and profits thereof; and the said party of the first part, for said consideration, does hereby expressly waive an appraisalment of said real estate." On July 7, 1893, judgment was rendered in this action for the sum of \$2,077.94, and for the foreclosure of the mortgage. Appraisalment was waived in the mortgage, and the judgment provided for six months' stay. On January 9, 1894, an order of sale was issued, and on February 12, 1894, the property was sold to Martha Barnitz for \$2,000, being less than the mortgage debt or judgment. On February 16, 1894, the order of sale having been duly returned by the sheriff, a motion was filed for the confirmation of the sale; and on February 26, 1894, the sale was confirmed by the court, and the sheriff ordered

to execute a deed of the premises to the purchaser. At the time of the hearing of the motion for the confirmation of the sale, John L. Beverly appeared, and showed to the court that he was the owner of the equity in the premises, and in the possession thereof by tenant, and asked the court to order the sheriff to execute to the purchaser a certificate under section 1, c. 109, Sess. Laws 1893. This request was denied. The court ruled that chapter 109 of the Laws of 1893, relating to the sale and redemption of real estate, is unconstitutional, so far as it is intended to apply to mortgages previously executed and delivered, and that the defendant is not entitled to any right of redemption under the statute, for the reason that the mortgage foreclosed in this action was executed and delivered prior to the enactment of said law. From the order and judgment of the court directing the sheriff to execute a deed to the premises to Martha Barnitz, John L. Beverly appeals to this court. The only question for the court to determine is whether, under the admitted facts, the court below should have ordered the sheriff to execute to the purchaser of the premises a deed or a certificate of purchase. The judgment will be affirmed, under the authority of *Watkins v. Glenn* (just decided) 40 Pac. 316. In that case it was ruled that "any subsequent law of the state which so affects the remedy as substantially to impair and lessen the value of the contract is forbidden by article 1, § 10, of the constitution of the United States, which ordains that 'no state * * * shall pass any * * * law impairing the obligation of contracts.' Chapter 109, Sess. Laws 1893, concerning the sale and redemption of real estate, has no retroactive operation, and therefore does not apply to the mortgage contracts existing at and before its passage. If the legislature intended the act to apply to such contracts, it violated article 1, § 10, of the constitution of the United States." Judgment affirmed.

JOHNSTON, J., concurring. ALLEN, J., dissenting.

(55 Kan. 173)

COFFEYVILLE MINING & GAS CO. v.
CITIZENS' NATURAL GAS &
MINING CO. (two cases).

(Supreme Court of Kansas. April 30, 1895.)

PETITION FOR INJUNCTION—SUFFICIENCY—RIVAL
GAS COMPANIES—USE OF STREETS.

1. The practice of granting temporary injunctions materially affecting the interests of the party enjoined, without notice, condemned.

2. A corporation organized for the purpose of supplying a city with natural gas, and authorized by an ordinance passed by the city council to use the streets and public grounds of the city for the purpose of laying its mains and pipes, has no standing in court to test the right of a rival company to use the streets for a similar purpose, or the validity of subsequent ordinances, under which the defendant claims the right to use the streets.

3. A petition for an injunction which fails to show that the defendant threatens or intends to injure the plaintiff's property, or interfere with its rights, is demurrable. Mere averments that the plaintiff fears and believes that an injury will be done are insufficient.

(Syllabus by the Court.)

Error from district court, Montgomery county; J. D. McCue, Judge.

Petition by the Coffeyville Mining & Gas Company against the Citizens' Natural Gas & Mining Company for an injunction and other relief. A temporary injunction was dissolved, and a demurrer to the petition was sustained, and plaintiff brings error. Affirmed.

Two cases have been filed in this court, both growing out of the same action in the district court of Montgomery county. The first was brought to review an order dissolving a temporary injunction granted by the probate judge of that county. In the other error is alleged in sustaining a demurrer to the plaintiff's petition. The petition states, in substance, that the parties plaintiff and defendant are corporations; that the plaintiff was granted a franchise by the city of Coffeyville to use the streets and public grounds of the city for the purpose of laying its mains and pipes to furnish and distribute natural gas for heat and light to consumers in Coffeyville for the term of 21 years; that the plaintiff had expended a large amount of money in prospecting for and developing natural gas, in erecting works, and providing means for distributing and supplying it to the people of the city. The petition then alleges that certain persons named were members of the city council of Coffeyville, a city of the second class; that the parties named corruptly procured the passage of an ordinance by said city council granting to the defendant corporation a like franchise to that before given to the plaintiff; and that "said defendant claims that they have the exclusive privilege at this time to use the streets, avenues, alleys, roads, commons, and public grounds of the said city, for the purpose of laying its mains and furnishing light and heat to the said city, and all persons, bodies, or corporations within the same." The petition also states that an action was brought by the attorney general to annul the privileges granted the defendant as before mentioned, and that the defendant, notwithstanding such proceedings, will, unless restrained, attempt to use the streets, etc., of the city, to the exclusion of the plaintiff, for carrying on its business under said ordinances, which the plaintiff alleges are illegal and void. The petition then proceeds: "Plaintiff further states and shows to this court that it has no adequate remedy at law to prevent said defendant, its officers and employés, from committing any of the wrongs herein set forth; that, unless they are restrained by order of this court, plaintiff fears and believes that said defendant, its officers, agents, and employés, will begin operations under its said illegal fran-

chise so procured as aforesaid, and that in pursuit of their said employment in and about laying their mains and pipes through the streets and alleys of said city of Coffeyville, that they will tear up and destroy and ruin the service and injure the business of said plaintiff, and will dig up and cross and go over the mains of the plaintiff, and that, on account of the injury of his said service, said plaintiff will be subject to numerous suits, for failing to render to its many patrons the service which it has contracted to perform; that the said defendants have in divers places where they have crossed the mains of this plaintiff already destroyed and injured its pipes and mains, and thereby caused plaintiff great expense and loss of time to repair the same. Said plaintiff fears that, unless said defendants are restrained by an order of this court, will so trespass on the affairs of the business of this plaintiff that its property will become greatly damaged and injured by reason thereof. Wherefore this plaintiff prays judgment against the said defendant that it be restrained and temporarily enjoined from operating and performing any work or operating its plant, or attempting to do so, under its said pretended franchise, as shown by Ordinance 283 and 'Exhibit C'; that it be restrained and enjoined from interfering with the said plaintiff in the prosecution of its work under and by virtue of its ordinance; and that said defendant be restrained and enjoined from laying its pipes and mains over and across the mains and pipes of said plaintiff; and that the said Ordinance 283 be adjudged null and void so far as it attempts to repeal the franchise granted to this plaintiff, and for such other and further relief as to the court may seem right and proper; and further asks for judgment for costs of this suit." The district court dissolved the temporary injunction, sustained a demurrer to the petition, and dismissed the action, with costs.

Gled, Ware & Gled, for plaintiff in error. Joseph Chandler and J. D. McCue, for defendant in error.

ALLEN, J. (after stating the facts). The plaintiff went before the probate judge of Montgomery county, and, without notice, obtained a full temporary injunction against the defendant, restraining it from the commission of any of the acts complained of in the petition. A bond for \$200 only was required. This injunction, although afterwards dissolved by the district judge, has been kept in force in the manner provided by statute. It is apparent that notice of the application could have been given, as both parties were located at the same place. The practice of obtaining temporary injunctions affecting materially the rights of parties litigant, without giving any notice or any opportunity to be heard, is most reprehensible. Where it is necessary that a party should be restrained from an unlawful act, and there

is occasion for immediate action, a temporary restraining order should be issued, to operate only until such time as notice can be given, and a fair opportunity afforded the party complained of to be heard. There is no safety in attempting to administer justice when one side alone can be heard. Parties and their attorneys can never be relied on to present the case fairly and truthfully in all respects. It is especially improper for a probate judge to grant such orders without notice. Indeed, we think the most a probate judge should ever do is to afford such temporary relief as the circumstances of the case urgently demand, to continue only until the application can be heard before the judge of the district court in which the action is pending. We have thought it necessary in this manner to condemn the practice resorted to in this case, for which, however, counsel who now appear are not responsible, as they were not then employed in the case.

The only questions of law necessary to be considered arise on the demurrer to the petition. The main scope and purpose of the plaintiff's action plainly is to prevent the defendant from laying mains and pipes in the streets of the city of Coffeyville for the purpose of supplying natural gas. In other words, it is to maintain a monopoly of its business. It seeks to test the validity of two city ordinances granting the defendant company the use of the streets, etc., and to restrain the defendant from using the privilege granted. For these purposes the plaintiff clearly has no standing in court. The city authorities are charged with the duty of preventing encroachments on the streets and public grounds. The proper public officers alone can test the validity of the ordinances under which the defendant claims. The city did not in terms attempt to give the plaintiff company a right to the exclusive use of the streets and alleys for the purpose of laying its pipes. If it had attempted to do so, it could not, for want of power. A private person or corporation will not be recognized in a court of justice as the guardian of purely public interests, nor to further its private ends by assuming that character. *Craft v. Jackson Co.*, 5 Kan. 518; *Bobbett v. State*, 10 Kan. 9; *State v. Commissioners of Marion Co.*, 21 Kan. 419; *Nixon v. School Dist.*, 32 Kan. 510, 4 Pac. 1017; *Commissioners v. Smith*, 48 Kan. 331, 29 Pac. 565. It is apparent then that the plaintiff has no standing in court to litigate the principal questions it seeks to present. It can neither test the validity of the ordinances under which the defendants claim a right to act, nor could it, if no ordinances had been passed, try the right of the defendant to lay pipes in the streets for the purpose of supplying natural gas.

It only remains to be considered whether there are such averments in the petition as show a threatened interference with the private rights of the plaintiff. It is alleged that

the defendants have in divers places, where they have crossed the mains of the plaintiff, destroyed and injured its pipes and mains; but it is not alleged that the defendants are preparing, threatening, or about to do any further injury to the plaintiff's property. The rule is well settled that on a demurrer the averments of the pleading demurred to are to be strictly construed against the pleader. Nothing is to be inferred. Under our system of practice, which is so liberal in the allowance of amendments, no harm can come from adherence to this rule. The only averments in the petition with reference to any contemplated injury to its rights are that the defendant claims that it has the exclusive privilege to use the streets, etc., to the exclusion of the plaintiff; and that the plaintiff "fears and believes" that the defendant "will tear up and destroy and ruin the service and injure the business of said plaintiff, and will dig up and cross and go over the mains of the plaintiff"; and that "said plaintiff will be subjected to numerous suits for failing to render to its many patrons the service which it has contracted to perform." Undoubtedly, the plaintiff may obtain an injunction, when necessary, to restrain the defendant from injuring its mains or pipes or other properties, so as to interfere with the conduct of its business; but, before the defendant can be subjected to the expense and vexation of a lawsuit, it must be shown that it is threatening or preparing to perpetrate some wrong. Injunctions cannot be obtained on the visionary basis of fears or beliefs. It is only actual unlawful purposes, made evident by acts or declarations, that furnish a valid foundation for the interposition of the strong arm of the law by injunction. *Jones v. Railroad Co.*, 39 Ga. 138; *Portland v. Baker*, 8 Or. 356; *Hol-drege v. Gwynne*, 18 N. J. Eq. 26; *Branch Turnpike Co. v. Board of Sup'rs*, 13 Cal. 190; *McHenry v. Jewett*, 90 N. Y. 58; *High, Inf.* § 34. No act or declaration of the defendant is shown indicating a purpose to injure plaintiff's property. It is not even contended in argument that any real injury to the plaintiff's pipes had been done or was threatened. On the contrary, affidavits contained in the case made (which, however, are, of course, not to be considered on this demurrer as affecting our decision) show that the defendant has not injured the plaintiff's pipes or mains at all. We mention this only because it seems evident that the main and really the only substantial purpose of the plaintiff in this case is to prevent the defendant from competing with it in supplying gas to the people of Coffeyville, and that no wrong will be done by a strict construction of the language employed in the petition. As to the allegation of a claim of exclusive right, courts do not interfere by injunction to restrain unfounded claims. *Consumers' Gas Co. of Kansas City v. Kansas City Gaslight & Coke Co.*, 100 Mo. 501, 13 S. W. 874.

It is said in the petition that the city coun-

cil, by the ordinances under which the defendant claims, attempted to repeal Ordinance No. 241, granting the plaintiff its privileges. Copies of the ordinances are attached to the petition. We fail to find any language in either ordinance indicating any purpose of the city council to repeal Ordinance No. 241. In Ordinance 283, section 7 reads: "All ordinances or parts of ordinances in conflict with this are hereby repealed." As Ordinances Nos. 275 and 283 both relate to the privileges granted the defendant company, we think it evident that the council had reference only to Ordinance No. 275 in the section quoted. The rights of the plaintiff under Ordinance No. 241 were not taken away by the subsequent ordinance, but a concurrent right to the use of the streets, etc., was thereby given to the defendant.

The ruling of the district court in dissolving the temporary injunction and sustaining the demurrer was right, and the judgment is affirmed. All the justices concurring.

(55 Kan. 182)

McCLUN v. GLASGOW, Judge.

(Supreme Court of Kansas. April 30, 1895.)

MANDAMUS—APPROVAL OF APPEAL BOND.

1. A writ of mandamus will not issue to compel a probate judge to fix the amount of or approve an appeal bond for an appeal from an order removing the guardian of an insane person, where no notice of appeal is given, nor affidavit required by the statute is filed.

2. Whether an appeal lies from such an order in any case is not decided.

(Syllabus by the Court.)

Error from district court, Republic county; F. W. Sturges, Judge.

Petition by L. J. McClun, guardian, against J. T. Glasgow, judge, for mandamus. A motion to quash the alternative writ was sustained, and the petitioner bring error. Affirmed.

Clark A. Smith and Noble & Hogan, for plaintiff in error. W. T. Dillon and D. M. Thorp, for defendant in error.

ALLEN, J. An alternative writ of mandamus was allowed by the district judge of Republic county, commanding the defendant, as probate judge, to allow the plaintiff's appeal from an order of the probate court of Republic county discharging said plaintiff from her trust as guardian of the person and estate of Isaac McClun, insane, or to show cause by a time named in the writ. The defendant moved to quash the writ, because the facts stated in the writ are insufficient to warrant the relief prayed for, and on other grounds. This motion was sustained by the court. The plaintiff alleges error in sustaining the motion.

The writ is fatally defective, in that it fails to state, either that notice of appeal was given or that the applicant filed the affidavit required by statute. Both these requirements are jurisdictional, and no appeal

could be taken without them. It is unnecessary for us to decide whether the view entertained by the district court that no appeal can be taken in any case from an order discharging the guardian of an insane person is sound or not. The act concerning lunatics and habitual drunkards makes no provision for an appeal. Provision is made for appeals in the act concerning guardians and wards and the act concerning executors and administrators. Section 188 of the last-named act, which prescribes the cases in which appeals may be taken, concludes as follows: "And in all other cases where there shall be a final decision of any matter arising under the jurisdiction of the probate court, except in cases of habeas corpus and injunction." Gen. St. 1868, p. 469. Appeals authorized by the act concerning guardians and wards are to be taken in the manner provided in the act respecting executors and administrators. It is averred in the writ that the probate judge refused either to fix the amount of the appeal bond, or to approve the bond which the plaintiff tendered, and refused to allow the appeal. Nothing whatever is averred with reference to a notice of appeal or an affidavit. As the notice and affidavit were essential prerequisites to the granting of an appeal, the plaintiff had no standing in this action until the notice was given and the affidavit filed. The probate court was wholly powerless to grant an appeal without them. *Spangler v. Robinson*, 20 Kan. 682. As it is not claimed in this case that an affidavit was, in fact, filed, and as the time for taking the appeal has long since passed, the order of the probate court removing the plaintiff as guardian is final, and no appeal can now be taken. The judgment in the district court quashing the writ is affirmed. All the justices concurring.

(107 Cal. 187)

SINNOTT v. COLOMBET, City Treasurer.
(No. 15,721.)

(Supreme Court of California. April 29, 1895.)

POWERS OF CITY—ESTABLISHMENT OF KINDERGARTEN SCHOOLS—TEACHERS' CERTIFICATES—PAYMENT OF SALARIES.

1. Under Pol. Code, § 1576, as amended by St. 1893, p. 245, making a city a school district which shall be governed by the city board of education, or under a city charter giving the city board of education control over public schools in the city, and power "to determine the course of study and mode of instruction to be pursued in the city schools," in connection with Pol. Code, §§ 1665, 1666, as amended by St. 1893, p. 254, making instruction compulsory in certain branches "in the several grades in which each may be required," and providing that other studies than those specified in the above section may be authorized by the city board of education, and section 1617, subd. 9, and section 1662, as amended by St. 1893, pp. 249, 253, allowing the admission of children to kindergarten classes in cities which have made the kindergarten a part of the public primary schools, the board of education of a city may adopt the kindergarten as a special branch of the primary school system.

2. A certificate entitling one to teach "any

kindergarten class of the public schools," issued by a county board of education under Pol. Code, § 1771, allowing a county board of education to grant certificates entitling the holders to teach such special branches as may be required by city boards of education, qualifies the holder to teach kindergarten classes in a city of the county which has adopted the kindergarten as a special branch of its primary school system.

3. The salary of a teacher of kindergarten classes is payable out of a fund raised for the support of primary schools, although the tax to raise the fund was levied before the kindergarten system was adopted by the city.

4. Pol. Code, § 1771, authorizing the county board of education to grant certificates entitling the holder to teach such special branches as may be required by city boards of education, is not in conflict with Const. art. 9, § 6, providing that the public-school system shall include primary and grammar schools, and such other schools as may be established by the legislature or by municipal or district authority, and giving the county superintendents control of the examination of teachers and the granting of teachers' certificates.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action of mandamus by Kathryn Sinnott against J. F. Colombet, treasurer of the city of San José, to compel defendant to pay plaintiff money due on a warrant for services rendered by her as teacher. From a judgment awarding a peremptory writ, defendant appeals. Affirmed.

Morehouse, Tuttle & Richards, for appellant. Wilcox & Patton and H. A. Mason, for respondent.

BRITT, C. Appeal by defendant from a judgment awarding a peremptory writ of mandate requiring him, as treasurer of the city of San José, to pay a warrant drawn on him by the board of education of the school district constituted by, and in turn comprising, said city, in favor of plaintiff for services rendered by her as teacher in a certain kindergarten school of the district. From the agreed statement of facts on which the case was submitted in the court below, the following matters, among others, appear: Said board of education is chosen under the provisions of the charter of the city of San José (St. 1873-74, p. 395), as required by section 1616 of the Political Code. The power to employ teachers in the district is vested in such board exclusively. Since November 25, 1893, plaintiff has been the holder of a special certificate issued to her by the county board of education of Santa Clara county, by the terms of which plaintiff is "entitled to teach any kindergarten class of the public schools" in said county. She has no other teacher's certificate. On December 8, 1893, said city board of education adopted the following order: "Resolved, that the kindergarten system be, and the same is hereby, adopted as a special study to be taught in the public schools of the school district of the city of San José, in the county of Santa Clara, and that classes be organized wherein such special study shall be solely taught. Be it further resolved, that no teacher be employed to

teach such classes, and to teach such special study, unless such teacher shall be provided with a special certificate, issued by the proper authority, authorizing the holder thereof to teach the kindergarten system as a special study in the public schools of said school district, and to teach kindergarten classes in said schools; and that no other certificate be required." Thereupon said city board of education caused kindergarten classes to be organized wherein such special study is solely taught in separate school buildings devoted to that purpose. About December 11, 1893, plaintiff was employed by said city board as teacher in one of the kindergarten schools so established, for a term commencing on that date, and to end June 30, 1894, and performed the duties pertaining to such employment from the commencement thereof to January 5, 1894, and earned during that time, at the agreed rate of compensation, the sum of \$67.50. For this sum said board drew its warrant in plaintiff's favor on defendant, as treasurer of the city, against the fund in his hands known as the "Grammar and Primary School Fund," which warrant, upon presentation, he refused to pay; hence this proceeding. Said fund consists of all moneys levied and collected by the city of San José for school purposes within its limits other than for the maintenance of high schools. Defendant, as treasurer, holds money belonging to such fund, several thousands of dollars in amount, which was collected by the municipal authorities as a tax upon the property within the city for the purposes of said fund. At the time of the levy of such tax those authorities (the common council, we assume) "failed, refused, and neglected to levy any separate tax for kindergarten schools, as such, in the city." Appellant maintains, as we understand his argument, that the board of education had no power to adopt the resolution of December 8, 1893; that, if it had such power, still the kindergarten classes form no part of the grammar and primary school system of the district, and hence moneys raised for the support of the grammar and primary schools cannot be used to pay for instruction of the kindergarten classes; and, if it be held that the kindergarten is part of the primary schools, yet the judgment is wrong, because plaintiff had no certificate authorizing her to teach in those schools.

The case does not disclose the character of instruction had in view by the terms of the resolution, further than the same may be inferred from the word "kindergarten"; but we think we may take judicial cognizance of its significance, as the supreme court of Colorado has apparently done. In *re Kindergarten Schools*, 18 Colo. 234, 32 Pac. 422. Thus informed, we find that the term "kindergarten" (meaning literally "a garden of children") was devised by Friedrich W. A. Froebel, German philosopher and educator, to apply to a system which he elaborated for

the instruction of children of very tender years. "Children's garden" ought to be taken in its allegorical sense. The child is a plant, the school is a garden, and Froebel calls teachers "gardeners of children." Compayré, *History of Pedagogy*, § 537, Payne's translation. "He saw that the child's inborn desire for activity manifests itself in play, and that children love to play together. His system, therefore, guides this inclination into organized movement, and invests the games (unknown to the child) with an ethical and educational value, teaching, besides physical exercises, the habits of discipline, self-control, harmonious action and purpose, together with some definite lesson of fact." Sennenschein's *Cyclopaedia of Education*, p. 169. The law governing the board warranted its action in adopting such a system into the methods of the schools under its supervision, whether we look to the same as written in the city charter or in the Political Code, and it need not be determined which controls, if either is exclusive of the other, as seems to be held by the appellant. The city forms a school district governed by the city board of education. Pol. Code, § 1576, amended St. 1893, p. 245. It is declared by the charter that the board of education shall have power "to make, establish, and enforce all necessary and proper rules and regulations, not contrary to law, for the government and management of the public schools within the said city, and for carrying into effect laws relating to education, * * * and to determine the course of study and mode of instruction to be pursued in said schools." St. 1873-74, p. 415. By section 1665 of the Political Code, amended in 1893, instruction in certain branches of study is made compulsory "in the several grades in which each may be required"; and section 1666, also then amended, reads: "Other studies may be authorized by the board of education of any county, city, or city and county; but no such studies shall be pursued to the neglect or exclusion of the studies in the preceding section specified." St. 1893, p. 254. Section 1617, subd. 9, and section 1662 (amended in 1893), of the same Code, are controlling in the city of San José as elsewhere. They provide for the admission of children to kindergarten classes "in cities and towns in which the kindergarten has been adopted, or may hereafter be adopted, as part of the public primary schools" (St. 1893, pp. 249, 253, 254); thus recognizing that the proper governing body may adopt the kindergarten as an integral part of the primary schools.

Since the "kindergarten system" has for its object the purposes above briefly indicated, and as those purposes seem appropriate for pursuit in the primary schools, and as the law evidently contemplates that such system, when adopted, shall be regarded "as part of the public primary schools," we consider that the kindergarten classes mentioned in the resolution of the board of education

became, when organized, classes in the primary schools of the district. The mere fact that such classes were instructed in separate buildings, and that the special study mentioned in the resolution was "solely taught" in those classes, does not render such course obnoxious to the restrictive clause of section 1666, Pol. Code, as supposed by counsel for appellant. It may well be that the branches, some or all of them, specified in the preceding section 1665, are not, and should not be, required in the grade to which the kindergarten classes properly belong, and, if so, are not compulsory under that section; besides, non constat but that the children in the kindergarten who have sufficient capacity may receive in other classes and other buildings instruction in such of the studies named in section 1665 as their minds are prepared to comprehend.

But it does not follow, because the provision made by the board for the kindergarten system incorporates such system into the primary schools of the district, that, therefore, the plaintiff must have a certificate authorizing her to teach the whole primary school course before she could be eligible to employment as a teacher in the kindergarten. Under section 1771, Pol. Code, the county board of education has authority to grant certificates, valid for six years, which entitle the holder to teach such special branches as may be required by city boards of education. In this instance the plaintiff held a certificate entitling her to teach kindergarten classes, and the city board has required instruction appropriate to such classes as a "special branch." We see no conflict between the portion of said section 1771 referred to and sections 6 and 7¹ of article 9 of the constitution of the state. The certificate of fitness to teach any kindergarten class in the case before us is a certificate of fitness to teach a special branch of study in the primary schools; she was employed to teach that branch, and none other, and could not have been lawfully required to give instruction in any other; and no provision of law is brought to our attention which requires the plaintiff to hold a certificate of qualification to teach any subject which she was not legally bound to teach if pupils should offer themselves for instruction therein. The fund in the hands of appellant, and against which the warrant in plaintiff's favor was drawn, is subject to the disposition of the board of education for the payment of the proper expenses, including teachers' salaries, of the

¹ Const. art. 9, § 6, provides that the public-school system shall include primary and grammar schools, and such other schools as may be established by the legislature, or by municipal or district authority, and restricts the use of the state school fund to the support of primary and grammar schools; and section 7 gives the county superintendent and county boards of education control of the examination of teachers, and the granting of teachers' certificates, within their respective jurisdictions.

grammar and primary schools of the city; and since as we hold the kindergarten is, in virtue of the order of the board, incorporated as a substantive part of the primary schools, the fund was lawfully drawn upon to pay the compensation due the plaintiff for teaching the kindergarten classes (see sections 61-64 of the city charter; St. 1873-74, p. 417), and it is immaterial that the kindergarten classes or system had no existence in those schools at the time the tax to raise the fund in question was levied. The judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(6 Cal. Unrep. 27)

HAINES v. STILWELL. (No. 15,828.)

(Supreme Court of California. April 30, 1895.)

MODIFICATION OF CONTRACT — FINDINGS—APPEAL
—OBJECTIONS WAIVED—INTEREST.

1. After defendant had agreed to repay to plaintiff all moneys received under a contract in consideration of its annulment, a proposition by him to pay a certain amount was accepted by the latter, if he would agree in writing to do so, and defendant promised to send the agreement, but never did so. *Held*, that the new agreement was never perfected so as to change the defendant's liability under the agreement for the rescission of the contract.

2. Where counts for money loaned, money had and received, and on a special contract, which is especially set out, are joined, and the complaint shows that they are all on the same cause of action, the failure to find the issues under the first and second counts is not reversible error, the issues under the third count being found, as the latter include the former.

3. The fact that defendant's promise, in the action on a contract, is alleged in the complaint, merely by way of recital, is not ground for reversing a judgment for plaintiff, where the complaint is attacked for the first time on appeal, and where defendant specially denied the promise.

4. Defendant, after having agreed, in consideration of the rescission of a contract, to repay plaintiff all moneys received thereunder, refused to do so. *Held*, that he was liable for interest on the money received from the date of the later agreement.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Byron W. Haines against Henry C. Stilwell. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Pierson & Mitchell, for appellant. J. W. Dorsey and Haven & Haven, for respondent.

HAYNES, C. This action was brought by Haines to recover from Stilwell \$6,293.65, with interest. The cause of action was single, but was stated in different forms in the complaint: First, for money loaned; second, for money had and received; and the third count set out a contract in writing made March 30, 1891, whereby defendant agreed to sell and

plaintiff agreed to buy one-half of the capital stock of the Stoney Creek Improvement Company, a corporation, defendant then being the owner of all the stock of said corporation. Certain payments were made thereon by plaintiff, the particulars of which need not be stated in this connection. The stock was not to be delivered until fully paid for, and none of it was delivered. On or about August 12, 1891, the parties thereto, under date of April 15, 1891, indorsed upon said contract the following: "We do hereby mutually agree that this contract is and shall be null and void,"—and signed their names thereto; and it was alleged that defendant promised and agreed to repay to the plaintiff all moneys he had paid or advanced under said contract. The issues raised by defendant's answer were tried by the court without a jury, and findings and judgment were for the plaintiff for \$4,793.65, with interest thereon from August 12, 1891. Defendant's motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial. Appellant specifies findings 1, 3, 5, 6, and 8 as not justified by the evidence.

1. The court found that plaintiff paid under the contract \$4,793.65, and appellant contends that the evidence is insufficient to sustain a finding for more than \$2,789.15. A careful examination of the evidence reveals no ground upon which this finding should be disturbed. The principal point of difficulty in the mind of appellant seems to be based upon the "Nager Mill" sale, as to which the plaintiff claimed that defendant guaranteed he would sell it for a specified sum, which was larger than defendant received for it. But the court clearly found against plaintiff's contention that defendant guaranteed to sell the mill for \$8,000, and must have found that defendant sold it for \$6,500,—\$2,200 in cash and \$4,300 in notes,—and credited plaintiff and charged defendant said cash as received under said contract (the notes having been delivered to plaintiff), and this is in exact accord with defendant's testimony as to that transaction.

2. The third finding is to the effect that at the time of the rescission of the contract the defendant promised and agreed to repay to the plaintiff all the moneys he had advanced or paid to the defendant under the contract. There was direct testimony given by the plaintiff sufficient to sustain this finding, and, while there was a conflict of evidence, such conflict principally related to how and when and to what extent the plaintiff should be reimbursed. There seems to have been a proposition made by defendant, after the cancellation of the contract, to pay plaintiff \$3,000 when the property should be sold, and that plaintiff was willing to accept such proposition provided the defendant would agree in writing to do so; that defendant said he would send such agreement to the plaintiff, but never did it; and defendant contends that, as the plaintiff did not allege such agreement or promise in his complaint, he cannot recover upon it in this

action. But the plaintiff's recovery is not based upon such promise, but upon the original promise made at the time the contract was rescinded. Of course it was in the power of the parties to change the agreement, but such new agreement was never perfected, the condition imposed by the plaintiff not having been complied with.

3. The fifth finding negatives the claim of the defendant that plaintiff agreed that he should retain to his own use the moneys plaintiff had paid to him, and the sixth is to the effect that plaintiff at no time waived his right to claim a repayment from the defendant. The first and third findings above noticed being sustained by sufficient evidence, it follows that the fifth and sixth must be also sustained.

4. The eighth finding is that the plaintiff never received any benefit from defendant under the original contract. As to this, appellant says the plaintiff received a benefit, in that he was admitted into the ownership of a half interest in said corporation, and received therewith all its benefits and emoluments. I think the court did not understand the word "benefits" to mean the barren honor of being a stockholder in a corporation burdened with debts and mortgages, and the evidence shows that plaintiff received no income, profits, or other tangible benefit.

5. Appellant further specifies that the issues under the first and second counts were not found upon by the court. These counts were upon the same cause of action as the third, and it so appeared upon the face of the complaint. As they rested upon the same facts, the facts found include them. Were it otherwise, it would not avail the appellant, as his answers to those counts consisted only of conclusions of law, and therefore admitted the facts alleged in them.

6. Appellant further contends that the third count of the complaint does not state facts sufficient to constitute a cause of action. His point is that the promise and agreement to repay the money he had received from the plaintiff is not alleged except by way of recital, as a consideration merely for the cancellation. The count mentioned is clearly open to criticism; but no demurrer was interposed upon the ground that the allegations were uncertain, and the case was tried as though the facts were properly alleged, and without any objection to evidence given under the imperfect averment. That it is too late to raise the question in the appellate court, under such circumstances, see *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186; *Kirsch v. Kirsch*, 83 Cal. 633, 23 Pac. 1083; *Ortega v. Cordero*, 88 Cal. 221, 26 Pac. 80. Not only so, but defendant in his answer expressly denied "that he agreed to restore or repay to the plaintiff all or any of the moneys theretofore paid by the plaintiff to defendant under the terms of said contract." If the defendant had not understood the complaint to allege that he had so agreed, the denial would not have been made,

and the denial, therefore, admits the existence of the allegation, and aids or cures its defects.

7. It is further contended that the findings do not support the judgment. The only point made is that the court found that the plaintiff had paid under said contract \$1,793.65, while the judgment is for \$5,657.63, the difference between these sums being the interest on the sum first stated from August 12, 1891. The court, however, having found that from the date last stated the defendant had in his hands \$4,793.65 belonging to the plaintiff, as a conclusion of law rightly found that he was entitled to interest thereon, and ordered judgment accordingly. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(107 Cal. 210)

BIGGINS v. RAISCH et al. (No. 15,771.)

(Supreme Court of California. April 30, 1895.)

EXECUTOR'S BOND—LIABILITY OF SURETIES—RELEASE BY LACHES OF HEIRS—JUDGMENT AGAINST EXECUTOR—EFFECT.

1. The sureties on an executor's bond conditioned on the executor faithfully executing the duties of his trust according to law are not released, on the ground of laches, by the mere failure of the heirs to compel the executor to file an account.

2. A judgment against an executor's estate in an action for an accounting is binding on the sureties on the executor's bond, who were made parties to the action, but were discharged, having demurred to the complaint for misjoinder.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Thomas J. Biggins, administrator, against Gottfried Raisch and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Eugene N. Deuprey and D. H. Whittemore, for appellants. Hepburn Wilkins, for respondent.

VANCLIEF, C. Thomas Biggins died testate in the county of Marin, September 8, 1879. On October 6, 1879, the will was proved, and Patrick Mallon was appointed executor thereof, and executed a bond for the faithful performance of his duties in the sum of \$25,000, with the defendants and Patrick Burns as sureties thereon. Patrick Burns died before the commencement of this action. The executor, Patrick Mallon, died testate on January 26, 1890, without having closed the administration of the estate, and without having rendered any account thereof to the probate court. On February 17, 1890, letters of administration with the will annexed were issued to the plaintiff, who, six months thereafter, brought an action in

the superior court of the city and county of San Francisco against Ellen Mallon, executrix of the will of Patrick Mallon, and the defendants herein, for an accounting in the matter of Patrick Mallon's administration of the estate of Thomas Biggins. The defendants herein were joined as defendants in that action on the ground that they were sureties on the bond of Patrick Mallon; but, their demurrer to the complaint on the ground that they were improperly joined as defendants having been sustained by the court, the action proceeded against the executrix of Patrick Mallon alone. On the trial of that action the court stated the account of Patrick Mallon, as executor of the estate of Thomas Biggins, deceased, charging him and his estate with a balance of \$13,281.58, and thereupon ordered and adjudged that his executrix, the defendant in that action, pay to the plaintiff therein, in due course of administration, the said sum of \$13,281.58, with costs. Said executrix having failed and refused to pay said sum on demand, and the estate of Patrick Mallon being insolvent, this action was brought to recover said sum, with interest, from the defendants as sureties on said bond. The obligations of the sureties are expressed in the bonds as follows: "And we, said sureties, are severally held and bound with said Patrick Mallon, are held and bound unto the state of California as follows: Gottfried Ralsch in the sum of ten thousand dollars, Patrick Burns in the sum of twelve thousand dollars, John Mallon in the sum of five thousand dollars; for the payment of which sums we, and each of us, respectively, bind ourselves, our heirs, executors, and administrators, jointly and severally, as aforesaid, firmly by these presents. Sealed with our seals, and dated this 11th October, A. D. 1879. The condition of this obligation is such that if the said Patrick Mallon, as such executor, shall faithfully execute the duties of the trust according to law, then this obligation to be void; else to remain in full force and virtue." The court found upon all the issues in favor of the plaintiff herein, and rendered a several judgment against defendant Ralsch for the sum of \$9,831.09, and against defendant Mallon for the sum of \$5,000. Both defendants have appealed from the judgment and from an order denying their motion for a new trial, but, the appeal of Ralsch having been dismissed, only that of Mallon remains to be considered.

It is not claimed that the findings do not support the judgment, nor that the evidence does not justify the findings. But it is contended by appellant that the action is barred by the laches of the heirs of Thomas Biggins, namely, Honora, Thomas J., and Michael, whose respective ages, at the time Patrick Mallon died, were as follows: Honora, 23 years; Thomas J., 22 years; and Michael, 20 years,—in that they failed to compel the executor to render his accounts to the probate court as required by law. Surely no laches

can be attributed to them after the death of Patrick Mallon, since Thomas J. was appointed administrator, and commenced said action against the executrix of the will of Patrick Mallon within 8½ months after his death, this being only a reasonable time within which to procure the appointment of the administrator, examine the condition of the estate, and commence the action. And before the death of the executor the heirs did nothing that could have discharged or affected the obligation of the sureties on his bond. While it is true that they might have compelled the executor to account to the probate court long before he died, yet merely passive delay and forbearance on their part could not discharge the sureties, nor affect their obligation (*Humphreys v. Crane*, 5 Cal. 173; *Brandt, Sur.* § 342, and cases there cited); for the condition of their obligation was that their principal should perform all the duties of executor, including that of rendering to the probate court from time to time such accounts of his administration as required by law; so that his failure to render such accounts was a dereliction of duty for which his sureties are responsible. If the sureties could not have initiated proceedings to compel the executors to account to the probate court, yet they might have taken proceedings under Sections 1403 and 1404 of the Code of Civil Procedure at any time during the administration to procure their release from future responsibility; and, having failed to do so, they are responsible for all derelictions of their principal during his administration of the estate.

It is further contended by appellant that the judgment against the executrix of the will of Patrick Mallon is not conclusive against the sureties on his bond, since they were not parties to that action. But it was held otherwise in the case of *Chaquette v. Ortet*, 60 Cal. 594, a case similar to this in all respects. See, also, *Brandt, Sur.* § 580, and authorities there cited.

Other points made by appellant either have no foundation in the record or lack sufficient plausibility to require special consideration. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(107 Cal. 193)

CENTRAL LUMBER & MILL CO. v. CENTER et al. (No. 15,678.)

(Supreme Court of California. April 30, 1895.)

BOND ON APPEAL—VALIDITY—STAY OF EXECUTION.

1. Where a bond on appeal has no validity as a statutory bond, a motion for judgment thereon should be denied, even if it is supported by a consideration, and is good as a common-law bond.

2. On appeal from a judgment foreclosing a mechanic's lien and ordering a sale of the property, defendant gave an undertaking to stay execution in double the amount of the judgment under Code Civ. Proc. § 942, which provides for appeals from judgments directing payment of money, and not under section 945, providing for appeals from judgments directing sale of real property. It did not appear that the property upon which the lien was adjudged was not available, or that, in the absence of the undertaking, plaintiff could have levied execution as upon a mere personal judgment against defendant. *Hdd*, that the undertaking did not stay execution upon the judgment, and was therefore void.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Central Lumber & Mill Company against John Center and others to foreclose a mechanic's lien. From a judgment against the sureties on an undertaking on appeal, defendant Nathan Cohen appeals. Reversed.

Marcus Rosenthal, for appellant. H. A. Powell, for respondent.

HAYNES, C. The Central Lumber & Mill Company brought an action against John Center et al. to foreclose a lien upon the leasehold interest of said Davis in a certain lot, for materials furnished by the plaintiff to said Davis as owner. The action was dismissed as to all the defendants except Joseph Davis. The judgment, so far as material to the questions involved, was that the plaintiff "have and recover judgment against defendant Joseph Davis in the sum of \$198.47, with interest, * * * and for the sum of \$5.00 cost of filing the notice of lien herein, and \$25 counsel fees herein, making in all the sum of \$245.80, together with plaintiff's costs and disbursements herein, amounting to the sum of \$30.25; and said sums are a lien upon the building upon the land herein-after described, and the interest of Joseph Davis in said land"; and, after stating said interest and describing the property, directed that it be sold by the sheriff, according to law and the practice of the court. Davis appealed from that judgment, and, in addition to the ordinary \$300 undertaking for the prosecution of the appeal and the payment of costs and damages, as required by section 941, Code Civ. Proc., gave an undertaking to stay execution in double the amount of the judgment, under section 942, *Id.*, which provides for appeals from judgments or orders directing the payment of money. Said appeal was dismissed, and, after the remittitur went down, the superior court allowed respondent's counsel a fee of \$50 for services in the supreme court, under section 1195, Code Civ. Proc., relating to the enforcement of mechanics' liens; and upon motion entered judgment against the sureties in said undertakings on appeal, and from that judgment Nathan Cohen, one of said sureties, appeals.

Appellant contends: That the court erred in granting the plaintiff's motion for judgment against the sureties. That, as to the first undertaking, no costs or damages were

awarded the plaintiff upon the dismissal of the appeal, and, as to the undertaking to stay execution, that it was unauthorized by the statute and ineffectual to stay the execution of the judgment, and was therefore without consideration. That it should have been given under section 945, Code Civ. Proc., which provides: "If the judgment or order appealed from direct the sale or delivery of possession of real property the same cannot be stayed, unless a written undertaking be executed * * * to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed or the appeal dismissed he will pay the value of the use and occupation from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court, * * * and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." Where a bond on appeal has no validity as a statutory bond, a motion for judgment thereon should be denied, even if it could be shown to be supported by a consideration, and to be good as a common-law bond. *Powers v. Chabot*, 93 Cal. 266, 28 Pac. 1070; *McCallion v. Society*, 98 Cal. 442, 33 Pac. 329. The question, therefore, is whether the bond here given was sufficient to stay the execution of the judgment. If it was, the motion for judgment thereon was rightly granted. If not, the judgment must be reversed. It is contended by respondent that there was a personal judgment in the original action against Davis, and that his appeal was taken from that judgment; and counsel refers to the notice of appeal, in which it is said that he appeals from a judgment against him, rendered on a day named, for certain sums of money, stating the different items, amounting in all to the sum of \$306, "and from the whole thereof." The judgment, however, declared a lien for all the moneys mentioned upon certain property therein described, and ordered a sale of that specific property; and the notice of appeal embraced this part of the judgment as well as that fixing the extent of his liability. It is quite true that Davis, having bought the materials from plaintiff as owner, was personally liable for the full amount, whether the property was sufficient to pay it or not; and it is also true that section 1197, Code Civ. Proc., provides that: "Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor." But where the action is to foreclose the lien, the defendant being also personally liable, the whole amount due is ascertained, "and when-

ever in the sale of the property there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages" (Code Civ. Proc. § 1194); while the personal action provided for is a simple action upon the contract against the person who purchased the materials, whether contractor or owner, and has no reference to the lien given by the statute. And in such action the plaintiff, even though he filed a lien, cannot include the cost of filing, nor can he recover attorney's fees; those items being incident to a foreclosure of the lien, and not to the personal action. *Bates v. Santa Barbara Co.*, 90 Cal. 543, 548, 27 Pac. 438. The Code provisions relating to the foreclosure of mechanics' liens provide no mode of enforcing the judgment other than by a sale of the property and docketing a deficiency judgment against the defendant who may be liable therefor; and in *Phillips on Mechanics' Liens* (section 458) it is said: "The execution to be issued for the enforcement of the lien is generally provided for by express enactment. * * * Unless otherwise provided, the execution is always special against the particular property incumbered with the lien." I conclude, therefore, that an execution as upon a mere personal judgment could not have been issued and levied upon the property of the defendant had the undertaking in question not been given, unless by direction of the court upon a showing that the property upon which the lien was adjudged was no longer available, and that the bond given did not operate to stay the enforcement of the lien upon the property described in the judgment. That a bond conditioned as required by section 945, Code Civ. Proc., concerning appeals from judgments or orders directing the sale or delivery of real property, is proper, where the appeal is from a judgment foreclosing a mechanic's lien, was held in *Corcoran v. Desmond*, 71 Cal. 100, 102, 11 Pac. 815.

It is said by respondent, in its brief, that at the time the judgment was entered in the original action the leasehold interest of Davis had expired, and was worthless, and that his only concern was to stay execution for the payment of the money. The judgment recites that the lease was for the period of five years from April 1, 1889. The judgment is dated September 2, 1891, and the undertaking on appeal was filed November 12, 1891, and there is nothing in the record tending to show that the lease was forfeited, or that from any cause the interest of Davis had ceased or become valueless. The other surety does not appeal. The judgment appealed from, so far as it affects appellant, Cohen, should be reversed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed so far as it affects appellant, Cohen.

(107 Cal. 206)

E. E. THOMAS FRUIT CO. v. START et al.
(No. 15,840.)

(Supreme Court of California. April 30, 1895.)

CONTRACT—PERFORMANCE—BREACH—EVIDENCE.

1. Where nothing was said as to the manner in which a contract was to be performed, it will be presumed, under Civ. Code, §§ 1983, 1984, that it was to be done in a proper and skillful manner.

2. Where plaintiff cured certain fruit for defendants, who disposed of it at values usually obtained for good fruit, that fact will not affect plaintiff's liability to defendants for damages to the fruit in defectively curing it.

3. Where plaintiff cured certain fruit for defendants, which defendants claimed was thereby damaged, boxes of one fruit, though not fair samples thereof, are admissible in evidence to show its condition, under Code Civ. Proc. §§ 1827, 1934, providing for the admission of "objects cognizable by the senses," and an "item in the sum of evidence."

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by E. E. Thomas Fruit Company against George H. Start and another for services rendered. From a judgment for defendants, plaintiff appeals. Affirmed.

S. G. Tompkins, for appellant. Crandall & Biddel, for respondents.

BRITT, C. Plaintiff, a corporation, brought this action to recover of defendants the sum of \$603.90, claimed to be due from them as the compensation they had promised to pay plaintiff for drying a quantity of prunes (something over 86 tons), at the agreed rate of seven dollars per ton. Regarding its own undertaking, plaintiff, in its complaint, alleged merely that it agreed to dry the prunes for defendants, without specifying the degree of care or skill it should employ for that purpose. Defendants, in their answer, averred that plaintiff contracted to dry and cure the prunes "in a first-class manner," but failed to do so, and so negligently performed its contract that its services were of no value. As a counterclaim, defendants further alleged in effect that, by reason of the negligence and want of skill of plaintiff in the performance of its contract, the prunes were injured, and defendants thereby sustained damage in the sum of \$1,525, for which they prayed judgment. The court found, among other things, that by the contract between the parties plaintiff agreed to dry the prunes in a proper and skillful manner; that the sum due for plaintiff's services at the contract rate was \$603.90; that the prunes were injured by the careless and unskillful manner in which plaintiff performed its engagement, to the damage of defendants in the sum of \$675. Judgment was given in favor of defendants and against plaintiff for the difference between the two sums last mentioned, amounting to \$71.10, and their costs. Plaintiff appeals from the judgment and an order denying a motion for new trial.

From the statement of the case used on

such motion it seems to have been virtually conceded at the trial that the prunes as cured were of inferior quality for fruit of that class. Plaintiff maintained that such inferiority occurred on account of the overripe or other unfit condition of the green fruit when received by it from defendants; while defendants contended that it was produced by plaintiff's unskilled or negligent treatment of the fruit. On the question thus made the testimony of some 50 witnesses was introduced. There was proof that defendants, after taking out about four tons of the most inferior dried fruit, had mixed the remainder with other fruit, and, as so mixed, sold a large quantity at regular prices, without objection from the buyers on account of its condition. During the trial, defendants offered in evidence four boxes of the prunes dried by plaintiff for defendants as samples thereof. The offer was objected to on the ground that they were not shown to be fair samples, but, on the contrary, were shown to be prepared for the occasion. Some witnesses testified in a general way that they were fair samples of the whole, and there was more detailed evidence to contrary effect. The court overruled the objection, plaintiff excepting.

Appellant, in its argument here, apparently questions the finding that plaintiff agreed to dry the prunes in a proper and skillful manner, as not justified by the evidence; but an obligation to that effect is implied from the terms of the contract itself as alleged in the complaint. Civ. Code, §§ 1983, 1984.

It is also argued that the evidence does not sustain the finding of plaintiff's failure to exercise care and skill in drying the fruit; but, after perusal of the same as exhibited in the transcript, we think that it is not only conflicting, but that it preponderates in favor of the conclusion of the trial court. The circumstance that defendants sold at usual prices a large part of the fruit cured by plaintiff, and so incurred no loss as to the portion sold, does not affect the correctness of that conclusion. Proof of the circumstance referred to may have been relevant evidence and proper for consideration upon the question whether the value of the prunes was really lessened, and to what extent; but the dexterity—to employ a euphemism—of defendants in disposing of the product (thus possibly incurring liability in their turn to the purchasers) does not exempt plaintiff from its own responsibility to defendants. See *Hunt v. Van Deusen*, 42 Hun. 302; *Muller v. Eno*, 14 N. Y. 598; *Brown v. Bigelow*, 10 Allen, 244.

The court did not err in admitting in evidence the boxes of prunes offered by defendants. Being a finished and separable part of the manufactured product, the character of which was in question, they were "objects cognizable by the senses," and made "an item in the sum of the evidence" (Code Civ. Proc. §§ 1827, 1954), whether they were fair samples or not. If the proof showed that they were not such, that was a circumstance affecting

the weight of the evidence, not its admissibility. The court might have inspected the whole quantity of fruit cured, if accessible, and such view could enlighten the question on trial; and so it had the right to inspect any part of it.

Appellant makes no other points for reversal. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(107 Cal. 229)

RAUER v. LOWE et al. (No. 15,651.)

(Supreme Court of California. May 3, 1895.)
PUBLIC IMPROVEMENTS—VALIDITY OF ASSESSMENT
—ENGINEER'S CERTIFICATE—RECORD—CONTRACT FOR WORK—VALIDITY.

1. A certificate as to the completion of street work, signed by a mere clerk, under a general direction of the city engineer to make out such certificates, is not sufficient, under St. 1891, p. 205, requiring such a certificate by the city engineer in order to make the amounts assessed a lien on the lands.

2. Under St. 1891, p. 205, requiring the assessment, warrant, diagram, and engineer's certificate to be recorded in the office of the superintendent of streets in order to render an assessment for street improvements a lien on the land, the engineer's certificate must be recorded as a part of the assessment record, and not in a separate book.

3. A contract for the construction of a sewer is not void because it guarantees the street superintendent and his sureties immunity from liability, as this clause could not affect persons injured by the acts of the superintendent.

4. Act March 18, 1886, providing that the superintendent of streets shall fix the time for the commencement of the work, which shall not be more than 15 days from the date of the contract, is satisfied by a provision in the contract that the work shall be commenced within 14 days from the date of the contract.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by J. J. Rauer against Susanna Lowe and another to recover an assessment for street improvements. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Reversed.

Horace W. Philbrook, for appellants. J. C. Bates, for respondent.

HAYNES, C. This action was brought by Rauer to recover an assessment for work performed in the construction of a sewer, and certain street work connected therewith, under a contract with the superintendent of streets, in the city and county of San Francisco. Written findings were filed and judgment entered for the plaintiff; and the appeal is from said judgment, and an order denying defendants' motion for a new trial.

The plaintiff called as a witness John G. Fitzgerald, who testified that he was a deputy superintendent of streets. The witness then produced several certificates, purporting to be the certificates of the city engineer, as to the performance of the work. These certificates were signed, "C. S. Tilton, City Engineer, H. D. G." In connection therewith the witness also produced the assessment, warrant, and diagram, and testified in relation thereto that he produced them from the office of the superintendent of streets; that they were duly recorded in volume 112, at page 28, of Assessment Records; that the affidavit therein contained was also recorded at said page in said book, but that the said certificates of the city engineer were not recorded in said book, or referred to therein, or in any book of assessment records, but were recorded in a small book, kept by the superintendent of streets in his office; that there was not any index or reference showing where they were recorded; that said small book was not kept with the assessment records, and that the latter did not in any manner refer to the record of the certificates or the place where they were recorded. The said certificates of the city engineer, together with the assessment, warrant, and diagram, were then offered in evidence by the plaintiff, and were received over the objection of defendants. Of the numerous grounds of objection stated in the record two only need be noticed: (1) That said certificates are not shown to be the certificates of the city engineer; and (2) that the assessment, warrant, and diagram, together with the certificates of the city engineer, were not recorded in the office of the superintendent of streets.

1. As already stated, these certificates were signed, "C. S. Tilton, City Engineer, H. D. G." The addition of the letters "H. D. G.," if they did not absolutely indicate that the certificates were not signed by the city engineer in person, were sufficient to call for an explanation before receiving them in evidence. There is no addition to his title, known to the law, that could be represented by them; and, if they are taken to indicate that the signature was written by a person other than the officer named, the certificates did not disclose the authority of such person to append the signature. The defendants, however, afterwards called as a witness H. D. Gates, who testified that throughout the year 1892 he was employed by the city engineer as an ordinary employé, but never was his deputy; that Mr. Tilton did not make the examinations himself, but certain employés made the examinations of the work, and left in the office notes thereof, and that he, the witness, prepared the certificates from said notes, and signed the name of the city engineer thereto, adding his own initials to indicate that he had written that officer's name; that when he was

first employed, in the beginning of the year 1891, he was instructed by Mr. Tilton to make out the certificates, and sign his name to them, and that Mr. Tilton had nothing to do with them except through him as his employé. Pol. Code, § 4112, provides: "Every county and township officer, except county judge, supervisor, and justice of the peace, may appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office." Section 865, Pol. Code, provides: "In all cases, not otherwise provided for, each deputy possesses the powers and may perform the duties attached by law to the office of his principal." The general rule is that an officer has no authority to appoint a deputy unless it is specially conferred, especially where the duties of the office involve trust, skill, and confidence. *State v. City of Buffalo*, 2 Hill, 434. It would seem to follow that, if a deputy cannot be appointed unless authority to make the appointment has been conferred by law, a mere clerk or employé could not be empowered by an officer to perform official acts; and that the making of a certificate which is essential under the statute to create a lien upon real estate is an official act is beyond question. That such certificates may be made by a deputy is not questioned; and as the city and county surveyor, or city engineer, has ample power to appoint deputies, necessity cannot be urged in justification of the performance of any official duty by a clerk. Deputies must be appointed in writing, filed with the county clerk, and by section 910, Pol. Code, must make and file an oath in the manner required of their principals. The making of these certificates seems to be the final acts of the city engineer in reference to the work. It is the evidence of the completion of the work under the contract and according to the plans and specifications prepared by him, and is then required to be recorded in another office by another and different officer. There is nothing to call the attention of the city engineer to these certificates after they are signed; and, if they may be prepared and signed by a clerk under a general direction, such as is here shown, the official duty of determining from the notes of the field deputies whether the work is completed according to the plans, specifications, and contract is delegated to an irresponsible clerk, and may be made and handed to the superintendent of streets wholly without the knowledge of the city engineer. These certificates so made and signed are invalid, and insufficient as the basis of a lien upon property chargeable with the expense of the work; and therefore the evidence does not sustain the finding that the assessment is a lien upon defendants' lot.

Appellants also contend that the certificates are insufficient upon their face. It is not necessary to decide that question, but it should at least be said that they are unsat-

isfactory as evidence of the proper completion of the work.

2. The second ground of objection to the introduction in evidence of said papers, viz. that they were not properly recorded, should be noticed. Section 9 of the act of 1885, as amended in 1891 (St. 1891, p. 205), after prescribing the form of the warrant, provides as follows: "Said warrant, assessment and diagram, together with the certificate of the city engineer, shall be recorded in the office of said superintendent of streets. When so recorded, the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording of any warrant, assessment, diagram and certificate, all persons mentioned in section 11 of this act shall be deemed to have notice of the contents of the record thereof. * * *". In *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025, it was said: "By the act approved March 18, 1885, it was only necessary to create a lien, such as is sought to be enforced in this action, to record the warrant, assessment, and diagram. But by the act of March 14, 1889, the recording of the engineer's certificate was made an additional and necessary prerequisite to the creation of a lien thereunder. Nor does the creation of such a lien depend upon whether the owner of the lot had notice of any of these proceedings, but upon the recording of the warrant, assessment, diagram, and engineer's certificate; and, if they were recorded as provided by the terms of the statute, then a valid lien was created upon the defendant's lot, otherwise not." In that case the recorded certificate showed upon its face that the work was completed, except as to a certain part, which the certificate stated was shown by the diagram on the back thereof. It was held that the diagram thus referred to was a material part of the certificate, and should have been recorded with the certificate, and because it was not no lien was created. In the case at bar the testimony shows that the assessment, warrant, and diagram were duly recorded in a book kept for that purpose, and designated "Assessment Records," while the engineer's certificates were recorded in a small book kept in the same office, but not with the assessment records, nor was it in any way referred to in the assessment record, so as to make it even constructively a part of that record. The statute requires four things to be recorded in order to constitute the one thing called a lien, viz. the assessment, warrant, diagram, and engineer's certificate; and these are intended to constitute one record, and should be found together. Before the amendment of the statute in 1889, these certificates formed no part of the assessment record; and, as they were then intended only for the information of the superintendent of streets, the

custom of placing them in a separate record was proper, though not required by the statute. That fact, however, emphasizes the intention of the statute that they should be recorded in the assessment record of which they are an essential part.

Appellants further contend that the contract under which the sewer was constructed is void, because it "guaranteed the street superintendent and his sureties and bondsmen immunity from liability." I think this provision can have no such effect. If the defendants are injured by any acts of the superintendent of streets for which that officer is liable personally, or upon his official bond, they are not affected by this clause of a contract to which they were not parties. That they may have such action against the superintendent of streets, see *Goodsell v. Ashworth*, 96 Cal. 397, 31 Pac. 261. This precise question was decided against appellants' contention in *Byrne v. Luning*, 38 Pac. 454. The case of *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701, cited by appellant, is not in point.

It is further contended that the contract did not fix the time for the commencement of the work, and for that reason the contract is void; citing *Libbey v. Elsworth*, 97 Cal. 316, 32 Pac. 228. The provision in the contract now under consideration is, "The work to be commenced within fourteen days from the date of the contract." In *Fletcher v. Prather*, 102 Cal. 413, 36 Pac. 658, the same words were used to fix the time of commencing the work, and it was held sufficient; and in *White v. Harris*, 103 Cal. 528, 37 Pac. 502, the same provision, substituting the word "fifteen" for "fourteen," was again considered, and it was said: "The word 'time,' as here used, was not intended to mean a particular day to be fixed by the superintendent of streets for the commencement of the work, but that the time fixed by him for that purpose should not be more than fifteen days from the date of the contract." This question must therefore be considered settled. The judgment and order appealed from should be reversed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

(11 Wash. 692)

BARTLETT v. REICHENEKER et al.

(Supreme Court of Washington. May 6, 1895.)

RECEIVERS—LIABILITIES.

Where a receiver followed the conclusions of law of the court, and made part payment of plaintiff's claim, and paid other claims as therein directed, and thereafter the decree was filed which directed the receiver to pay plaintiff in full, the receiver is obliged to do so, though the decree is inconsistent with the conclusions, and

he has not sufficient funds left to pay the amount directed in the decree, which he did not complain of for two years.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by N. J. Bartlett against W. C. Reicheneker, James M. Gephart, receiver, and others, to foreclose chattel mortgage. From an order directing him to pay certain moneys to plaintiff, the receiver appeals. Affirmed.

Frank A. Steele and Carr & Preston, for appellant. Fishback & Ferry, for respondent.

ANDERS, J. One N. J. Bartlett instituted an action in the superior court of King county against W. C. Reicheneker and others, to foreclose two chattel mortgages, one upon a certain lot of jewelry and silverware owned by said defendant Reicheneker, and the other upon the fixtures in the store in which the goods were situated. In that action James M. Gephart was appointed receiver, and, after duly qualifying, took possession of the said property, and, under direction of the court, proceeded to sell the same. It appears that plaintiff's mortgage did not include all of the goods in said defendant's store. The goods not covered by the mortgage were claimed by alleged consignors, and were designated, during the pendency of the action, as "consigned goods." The fund created by the sales of mortgaged property was claimed by the plaintiff, and that arising from the remainder of the goods was claimed by consignors and judgment creditors. These two funds were kept separate and distinct from each other by the receiver. At the time of the trial of the cause all of the mortgaged goods had been disposed of, and \$5,226.58 received therefor by the receiver. A portion of the consigned goods were also sold, the proceeds of which amounted to \$1,247.19. Actions had been instituted against the receiver by parties claiming to be consignors of goods held by him, among others by Whiting Manufacturing Company, which action was finally determined in this court. 34 Pac. 161. At the time of the trial of the foreclosure suit the receiver had in his possession unsold goods of the consigned class of the invoice value of \$1,907.23, and which were still in his possession when this proceeding was instituted. The receiver was directed not to sell these goods until the Case of Whiting Manuf'g Co. should be determined. The court filed its findings of fact and conclusions of law on March 3, 1892, but the final decree was not filed until June 17, 1892. At the time of the trial, February 19, 1892, the receiver, at the request of the court, filed a report of all his doings up to that date, from which it appeared that he had realized from sales the sum of \$6,473.77, and had expended \$2,253.97, leaving a cash balance of \$4,219.80. At or about the same time the court made an allowance to the receiver and his coun-

sel of \$450, which, added to the expenses, made a total of \$2,703.97, which amount the court found to be the expenses of the receivership up to that time, leaving in the hands of the receiver a cash balance of \$3,769.80. Between the date of the filing of the findings of fact and conclusions of law, and of the filing of the decree, the receiver paid two judgments against Reicheneker, amounting to \$867.28, and thereafter also paid some expenses incident to his trust. As indicated by the final decree of the court, the two judgments above mentioned were directed to be paid out of the consigned goods fund, after adding to it the net proceeds of the sale of goods remaining therein after the determination of the suit of Whiting Manufacturing Company, and after deducting its proper share of the costs and expenses of the receivership. The decree follows one of the conclusions of law reached by the court, but there is a further, and apparently inconsistent, conclusion, "that pending said further sales the funds now on hand to be paid as follows: Selwyn & Co. to be paid in full. The Gilbert Clock Company to be paid in full. The plaintiff to be paid on account the sum of \$2,500, out of which the receiver may pay plaintiff's attorney's fees." These latter directions to the receiver were, it seems, overlooked by the court in making up its decree, and are the cause of the principal difficulty in this proceeding. Moreover, the court finds as a fact that, until the termination of the Whiting Manufacturing Company action and the conversion into cash of the goods on hand, a distribution of the costs of the receivership is impossible. But in the decree the two funds in the hands of the receiver seem to be treated as determined amounts, between which the expenses of the receivership were to be ratably apportioned. The language of the decree is: "it is further ordered and decreed that the fund first above referred to, to wit, the fund of \$5,226.58, after the said fund shall have borne its proportionate share of the costs of the receivership, be paid in full to the plaintiff;" and the \$1,247.19 is designated therein as the "second fund." The receiver paid in all to the plaintiff the sum of \$2,759, but she claimed that the further sum of \$283.32 was due her from the mortgage fund of \$5,226.58. The receiver disputed this claim; whereupon the plaintiff filed a petition in the superior court, praying for an order requiring the receiver to forthwith pay to her said sum or whatever sum was due her. In response to the petition, the receiver filed a report, showing that, after payment of the judgments heretofore mentioned, the costs of litigation, and the expenses of keeping goods, he had in his hands only the sum of \$155.52. The court nevertheless ordered him to pay to the plaintiff forthwith the sum of \$283.32, from which order this appeal is prosecuted. The receiver claims that he made the disburse-

ments set forth in his report under the order of the court, except the expenses of litigation and of storage of goods; that no item of his report was questioned or disputed; and that, inasmuch as he only had \$155.52 in his hands at the time of the hearing of the petition, it was neither just nor reasonable to order him to pay over a larger sum.

But the question here is whether the rights of the parties are to be determined by the decree, or by the preceding findings and conclusions of the court, which appear to us not to be altogether consistent therewith. It seems that the court based its action in this proceeding upon the decree rendered in the cause, which, as we have seen, ordered the first fund of \$5,226.58, less its proportionate share of the costs of the receivership, to be paid in full to the plaintiff; and directed the second fund of \$1,247.19, after adding to it the net proceeds of the sale of goods on hand, less its proportionate share of the expenses, to be applied: First, upon the judgment in favor of Selwyn & Co.; and, second, upon the judgment of the Gilbert Clock Company, which two judgments were paid by the receiver before he had disposed of the goods of the second class remaining on hand, and before the decree was filed. According to the decree, the order appealed from was right, but according to that part of the previous conclusions of law which the receiver, perhaps too hastily, followed, it was wrong. But we think the court was justified in looking to the decree as the final determination of the rights of the respective parties. In all probability the court in rendering its decree would have taken into consideration all payments previously made by the receiver in accordance with the directions of the court, if the receiver had called its attention thereto at or before the final determination of the case. The court based its judgment upon the facts as they appeared at the time of the trial, and, for aught that appears in the record, it knew nothing of the subsequent transactions of the receiver. Nor did the receiver at any time request a modification of the decree, although nearly two years elapsed before the filing of this petition.

From the standpoint of the receiver, it appears that the order under consideration is arbitrary and unjust, but when we consider that the decree, and not what preceded it, determined his and the plaintiff's rights, it seems clear to us that the order should not be reversed. We see no reason why the mortgage fund should bear any portion of the expenses accruing after the trial, as, at that time, it was all in the hands of the receiver, and nothing further was required with respect thereto but to properly pay it out. The subsequent expenses ought to be charged to the second fund in the hands of the receiver. It may not be improper here to suggest that, under the circumstances, the receiver ought to be allowed to pay the

necessary expenses of this proceeding out of the proceeds of the estate in his hands. The order is affirmed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

(11 Wash. 713)

STATE ex rel. RUCKER v. STALLCUP,
Judge.

(Supreme Court of Washington. April 29,
1895.)

WRIT OF PROHIBITION—WHEN GRANTED.

Where defendant is entitled to have the action tried in the county of his residence, having complied with the statutory provisions necessary to entitle him to such removal, the court will be prohibited from proceeding further in the case, except to cause it to be certified in the proper county.

Application on the relation of Wyatt J. Rucker against John C. Stallcup, Judge of the superior court of Pierce county, for writ of prohibition to prevent defendant from proceeding to the trial of a certain cause. Granted.

Crowley, Sullivan & Grosscup, for petitioner.
Stiles, Stevens & Tillinghast, for respondent.

PER CURIAM. From the return of the respondent it appears that the petitioner had done nothing in the case which he sought to have removed to the county of his residence, except to attempt to comply with the provisions of the statute necessary to entitle him to such removal; and that, at the time to which the preliminary order in this proceeding related, he had fully complied with such provisions. This being so, we think the case falls within the principle announced in *State v. Superior Court of Pierce Co.*, 9 Wash. 668, 38 Pac. 206; and that, under the rule therein announced, the petitioner was entitled to have the case removed in accordance with his demand. It follows that the superior court of Pierce county must be perpetually prohibited from further proceeding in the case, except to cause it to be certified to the superior court of Snohomish county.

(11 Wash. 676)

JUCH v. HANNA.

(Supreme Court of Washington. April 24,
1895.)

CONTINUANCE—DISCRETION OF COURT—ASSIGNMENT OF CAUSES—ORDER OF HEARING.

1. The refusal of a continuance in order to obtain an absent witness, on the ground of want of diligence, is within the sound discretion of the lower court.

2. The fact that other causes have been assigned for hearing on the same day, and that as assigned they precede plaintiff's cause, does not require the court to dispose of such prior assignments first.

Appeal from superior court, King county;
J. W. Langley, Judge.

Petition by Emma Juch against John W.

Hanna to set aside a judgment. From a judgment dismissing the cause, plaintiff appeals. Affirmed.

Blaine & De Vries, for appellant. E. C. Hughes, H. H. A. Hastings, and L. B. Stedman, for respondent.

GORDON, J. The appellant filed a petition in the superior court for the purpose of having a judgment recovered against her and one Charles E. Locke set aside and vacated. The petition was verified on December 30, 1892. Issue was joined on May 3, 1893. On August 28, 1893, the appellant, by her attorneys, noticed the cause for trial; and, pursuant to such notice, the cause was assigned for trial on the 7th day of December, 1893. On that day a motion for continuance was filed by appellant, supported by the affidavit of one of her counsel. The affidavit shows that appellant is a resident of the state of Connecticut; "that the evidence of said plaintiff and the said Charles E. Locke is material for [appellant's] cause; and that the facts which [appellant] can prove by said witness Charles E. Locke cannot be proved by any other person or persons." The affidavit then sets out what the said Locke would testify to, if present, and, proceeding, says: "That, immediately upon the setting of the above-entitled cause for trial, affiant telegraphed to appellant to ascertain the whereabouts of said Locke, and when the deposition of plaintiff and said Locke could be taken, and that on the 22d of November affiant received a telegram from said appellant referring affiant to the said Charles E. Locke for dates and details in regard to the taking of said deposition, and affiant immediately telegraphed said Locke in regard to the taking of said deposition, but as yet has received no reply from him," etc. Appellant's motion for a continuance was overruled, and exception taken.

It appears from the bill of exceptions that four causes had been assigned for trial on said December 7th, in the following order, and numbered, respectively, 13,530, 6,882, 15,227, and 15,775, the first of which, when called, was passed for reassignment, pursuant to stipulation of parties. The second cause was postponed until 2 o'clock of said day. At that hour said cause was again called for hearing, and passed because it appeared that some of the witnesses for one of the parties in that cause were not then present. The court then called the present cause for trial, "against the objection of plaintiff's [appellant's] counsel," who were also counsel for plaintiff in cause No. 6,882. Continuing, the bill recites: "That E. F. Blaine, counsel for plaintiff in each of said causes, stated that he was ready to proceed with cause No. 6,882, but that he was not ready and could not proceed with the trial of cause 15,227 [the case at bar], for the

reason that he had expected to try cause No. 6,882 at that hour; that he was unable to proceed with the trial of Juch v. Hanna because of the absence of witnesses and material evidence on behalf of plaintiff therein [appellant]. The court, being convinced that the only absent evidence and witnesses were those referred to and named in the affidavit of continuance, above referred to and made a part hereof, peremptorily called said cause for immediate disposition; and the plaintiff [appellant] offering nothing in support of her petition, nor any new cause for the continuance of the hearing thereof, the court then and there ordered the same to be dismissed for want of prosecution." From the judgment of dismissal this appeal is taken.

An application for a continuance rests in the sound discretion of the trial court, and the examination of the record satisfies us that the learned trial court did not abuse its discretion in overruling the motion. Where an application for a continuance is for the purpose of securing testimony, it should show that diligence has been used to procure such testimony. This case had been pending nearly a year prior to the time appointed for trial. It was commenced by the appellant. If the evidence of Locke was deemed material, knowing his residence and whereabouts and the materiality of his evidence, ample time had elapsed in which to have procured it. But no effort appears to have been made to procure it, and the cause was assigned for trial on the application of appellant's counsel.

Without further discussion, we deem it sufficient to say that we think the application was devoid of merit; and the same is true of the objection made to the disposition of the cause when it was reached for trial on that day. The mere fact that other causes had also been assigned for hearing upon the same day, and preceded in the order of assignment the cause of appellant, would not justify the assumption of counsel that it was the duty of the court to actually hear and dispose of said prior assignments before taking up appellant's cause. The entire matter rested in the discretion of the trial court. This court will presume that the disposition made of the other causes assigned for trial upon that day was justified by the circumstances surrounding them.

Appellant's motion for a continuance having been overruled, in the absence of any further showing of cause for continuance or delay, or any suggestion that appellant had other witnesses or proof to submit upon trial, or that she desired to do so, the judgment of dismissal was properly entered, and it is affirmed.

HOYT, C. J., and ANDERS, SCOTT, and DUNBAR, JJ., concur.

(11 Wash. 679)

BRUNDAGE v. BURKE et al.

(Supreme Court of Washington. April 29, 1895.)

USURY—WHAT CONSTITUTES—PAYMENT UNDER ORAL CONTRACT.

1. Hill's Code, §§ 2795, 2796, fixes the legal rate of interest at 10 per cent., but provides that any other rate of interest agreed on in writing shall be legal. *Held* that, where a borrower paid interest in excess of 10 per cent. in fulfillment of an oral contract to pay such excessive interest, he is not entitled to have the excess of interest paid over 10 per cent. applied as usurious in payment of the loan. Dunbar, J., dissenting.

2. Usury, to be available as a defense, must be pleaded.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by C. C. Brundage against H. C. Burke and another. There was a judgment for defendants, and plaintiff appeals. Reversed.

Pratt & White, for appellant. Ralph Simon, for respondents.

ANDERS, J. On June 10, 1891, the respondents, who were defendants in the court below, borrowed \$300 from the appellant, and, to secure the payment of the same, they executed and delivered to him a bill of sale of certain personal property, consisting of household furniture and other effects. The rate of interest to be paid on the loan was not evidenced by any writing, but the parties agreed orally that it should be 5 per cent. per month. This action was brought to foreclose the bill of sale, upon the theory and understanding that the same was, in effect, a chattel mortgage. The complaint sets forth all the facts necessary to constitute a cause of action, and prays judgment for the principal sum of \$300 and costs, and for a decree foreclosing the bill of sale, and that the property therein described be sold, and the proceeds thereof be applied in payment of plaintiff's claim and costs. The defendants admitted all of the averments in the complaint, except that the said \$300 had not been paid, and affirmatively alleged "that the debt and demand sued for by plaintiff herein has been fully paid and discharged." Upon this issue alone the cause was tried. The defendants, having the affirmative of the issue, proved that at the end of each month, for six successive months subsequent to the date of the loan, they promptly paid \$15 as interest thereon, and that thereafter they made further payments from time to time on account of interest, up to July 15, 1893, after which time nothing further was paid. The aggregate amount of all the payments so made was \$341. Upon this evidence the court denied plaintiff's motion for judgment, and, it appearing to the court that the whole amount paid by defendants was equal to the sum loaned, together with interest thereon at the rate of 10 per cent. per annum, it gave judgment for defendants for costs, from which plaintiff appealed.

By the statute in force at the date of the

loan, the legal rate of interest in this state was fixed at 10 per cent. per annum; but there was a further provision that "any rate of interest agreed on by parties to a contract, specifying the same in writing, shall be valid and legal." 1 Hill's Code, §§ 2795, 2796. These two sections comprehend the whole law on the subject of interest, and it will be seen that no penalties or forfeitures were imposed or mentioned. There was no restriction whatever as to the rate of interest that might be recovered if specified in writing, and it was not made unlawful to receive and retain any specified rate of interest. If 5 per cent. per month had been contracted for in writing, there could be no question but that it could have been collected; for the law itself says that such a contract is valid and legal, and no court would be warranted in declaring it invalid. The oral contract in this instance was not enforceable, simply because it was oral; and the question to be determined is whether such a contract can be repudiated after it has been completely executed, and the interest paid thereunder, in excess of 10 per cent. per annum, recovered back, or, which is the same thing, applied in payment of the principal debt, at the instance of the debtor. Many cases are cited by respondents in support of the affirmative of this question; but they are all predicated upon the fact that usurious interest was paid, and in such cases the rule contended for by respondents may be said to be general, if not universal. See 27 Am. & Eng. Enc. Law, p. 963. But, in order to ascertain whether the doctrine announced in these cases is applicable to the case at bar, it is necessary to determine whether the respondents did in fact pay usurious interest. If they did, it must be conceded that their contention must prevail. The legal definition of "usury" is: "The taking of more interest for the use of money than the law allows." 3 Pars. Cont. (8th Ed.) p. 116; Dunham v. Gould, 16 Johns. 367. Now, in this case, the plaintiff did not receive more interest than the law allowed, because he was not prohibited from taking any amount defendants saw fit to give. The defendants were under no obligation to pay 5 per cent. per month under their oral contract, but, having voluntarily done so, there is no law in this state which will enable them, directly or indirectly, to recover it back. If they had promised in writing to pay this interest, and had then refused, the law, as we have said, would compel them to comply with the terms of their agreement; and we think that their oral agreement, after it was fully executed, became as valid and irrevocable as if it had been reduced to writing in the first instance. In regard to executed contracts, which are required to be in writing in order to be enforced, Mr. Bishop, in his work on Contracts (section 634), says: "A contract which cannot be enforced, because not conformable to statutes requiring it to be in writing, is rendered, by voluntary execution, good; neither party can undo what

has thus been done." While this rule of law is generally recognized by the courts, some of them hold that it is not applicable to cases of voluntary payments of illegal interest, because such payments are considered as having been made under moral duress. See *Bank v. Hodgdon*, 62 N. H. 300. Other courts hold that even usurious interest, which has been voluntarily paid, cannot be recovered back. *Woolfolk v. Bird*, 22 Minn. 341; *Quinn v. Boynton*, 40 Iowa, 304; *Latham v. Association*, 77 N. C. 145. It has often been said that the object and policy of usury laws is to protect the needy borrower from the rapacity of the money lender. But as the policy of the law, upon any purely legislative question, must be sought for in the law itself, it would seem that the legislature of this state did not deem it either necessary or politic to prohibit the lender from taking, or the borrower from giving, any rate of interest which might be agreed upon between them. A statute of Minnesota provided that "no contract for a greater rate of interest than twelve dollars upon one hundred dollars for a year shall be valid for the excess of interest over twelve per cent." Rev. St. 1866, c. 10, § 1. But it prescribed no penalty for making such a contract, and the supreme court of that state, in speaking of the policy indicated by that statute, said: "In some of the states a recovery of excessive interest, voluntarily paid, is justified on grounds of public policy. The public policy indicated by our statute will prevent a recovery by the creditor of the excess stipulated for, but it does not require that the debtor shall be disabled to pay such excess, or to give away his money, if he chooses to make that use of it." *Woolfolk v. Bird*, 22 Minn. 341. That language, we think, expresses the policy foreshadowed by our own statute.

The further points are made by appellant that there is no usury law in this state, and that the defense of usury, in order to be available on the trial, must be pleaded. Properly speaking, we had no usury law at the time of this transaction, and that when usury is relied upon as a defense it must be pleaded as well settled as a legal proposition everywhere. We think the defense entirely failed in their defense, and that plaintiff's motion for judgment should have been sustained. The judgment must therefore be reversed, and the cause remanded, with directions to enter judgment for appellant in accordance with the prayer of the complaint.

HOYT, C. J., and GORDON, J., concur.
DUNBAR, J., dissents.

(11 Wash. 684)

**SOLICITORS' LOAN & TRUST CO. v.
WASHINGTON & I. R. CO.**

(Supreme Court of Washington. May 1, 1895.)

MORTGAGES—FORECLOSURE.

Under Code Civ. Proc. § 501, relative to the sale of real property under execution, and under the general rule of equity relative to such

sales, a purchaser of a part of mortgaged premises before foreclosure is entitled, in case of a foreclosure sale, to an order directing the sale of all of the mortgaged premises still owned by the mortgagor, before offering for sale that portion claimed by him.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by the Solicitors' Loan & Trust Company against Wilson Meads and Mary A. Meads, his wife, the Washington & Idaho Railroad Company, and others, to foreclose a mortgage. Judgment for plaintiffs. From the portion of the judgment refusing the prayer of the defendant Washington & Idaho Railroad Company that the land be sold in parcels so as to protect its interests, it appeals. Reversed.

H. M. Herman, for appellant. C. B. Upton and Fenton & Henley, for respondent.

ANDERS, J. On September 5, 1888, Wilson Meads and Mary A. Meads, his wife, executed and delivered to the Solicitors' Loan & Trust Company a mortgage on an 80-acre tract of land in Spokane county, described as the "east half of the northwest quarter of section 29, in township 25, north, range 44 east," to secure the payment of their promissory note of that date for \$350. Subsequently they sold and conveyed by warranty deed to the Washington & Idaho Railroad Company a strip of land 100 feet wide, and extending diagonally across the north half of the mortgaged premises. The railroad company thereafter constructed a railroad upon this right of way upon a grade of from two to four feet above the natural surface of the ground, fenced it on each side, and dug a ditch some two or three feet deep along, and parallel with, the grade. Between four and five acres were thus cut off from the main body of the original tract, and the right of way included something over two acres thereof. The terms and conditions of the note and mortgage not having been complied with by Meads and wife, the respondent instituted this action to foreclose its mortgage. The mortgagors, the railroad company, and some judgment creditors were made parties defendant, and a default judgment was taken against all of the defendants except the railroad company. It appeared, and filed an answer, in which it alleges its ownership of a strip of land 100 feet wide over and across the premises described in the complaint; that the value of the tract of land covered by plaintiff's mortgage is largely in excess of what is necessary to secure the payment of the amount due upon the mortgage, including interest, costs, and attorney's fees; and that a sale of said premises in parcels can be made without injury to the interests of the parties thereto; and praying the court to ascertain and find that the property can be sold in parcels, and to direct the sale of the tracts separated from each other by the defendant's right of way separately, and prior to the sale of the land conveyed to defendant, if a sale thereof be found necessary.

The court refused to order the land to be sold in parcels, and the only question to be determined on this appeal is whether it erred in so doing. Numerous authorities are cited by the learned counsel for appellant to sustain his contention that it was the duty of the court to ascertain whether the mortgaged premises could be sold in parcels, and, if so, to direct so much only to be sold as might be necessary to pay the amount due plaintiff. There can be no doubt that it was the duty of the court to protect the interests of the railroad company, so far as it could be done without impairing the right of respondent under its mortgage. The latter had a right to have the lien of its mortgage protected in the fullest manner possible. *Wilts. Mortg. Forec.* § 490. And if it was the duty of the court, after ascertaining that the respondent's mortgage was valid, and prior in point of time to appellant's deed, to do anything beyond ordering a sale of the property to satisfy the mortgage debt, it was to see that appellant was not injured by an improper method of sale.

It is said in *Niles v. Harmon*, 80 Ill. 396, cited by appellant, that: "Where the owner of land mortgaged conveys a portion of it, it is his duty to protect the grantee against the mortgage, and in foreclosing the mortgage it is just and right that it should be satisfied, if may be, out of the portion of the land which remains to the mortgagor, and that it should be first charged with the debt. This protects the interest of the purchaser of the part, and makes the mortgagor but pay his own debt out of his own land. It saves such purchaser from loss and injury, and does no harm to any one else." The rule there laid down as to the order of sale in cases where the mortgagor has sold and conveyed a portion of the mortgaged premises has long been recognized and enforced by courts of equity, and should be adopted and followed in this case, unless it is clearly in contravention of the provisions of our statute. Section 627 of the Code of Procedure provides that "in rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action." This is, in effect, what the court did in this instance; but it will be observed that this section of the statute does not purport to designate the order of sale. It does not, therefore, follow that the judgment must be sustained merely because it is in conformity with the general language of the statute. If the mortgagor had been the owner of the whole of the mortgaged premises at the time of the trial, the judgment, as entered, would not be open to criticism, for the reason that, in such cases, it is the duty of the sheriff, rather than that of the court, to determine, in limine, whether the mortgaged premises should be sold in parcels or otherwise. In reference to this question the supreme court of California, in *Jones v. Gardner*, 57 Cal. 641, cited by respondent, said: "The court was not bound to

ascertain at the trial whether it would be to the advantage of defendant to have the lots sold separately. It may be the duty of the sheriff to make sale of the lots separately, and it would seem to be the right of the mortgagor to direct the order of the sale; but defendant is not called on to plead that it would be to his disadvantage to have the lands sold in gross, and such a plea creates no material issue." And in *Piel v. Brayer*, 30 Ind. 332, it was held, under a statute similar to ours, that, where the whole sum secured by the mortgage is due, no such question as whether the court in a foreclosure proceeding is required to ascertain whether the property cannot be sold in parcels can properly be presented to the court. These decisions are based upon the principle that, where the law has confided the method of conducting sales to a public officer, it must be presumed that he will obey the law, and, until he fails so to do, the court is not bound to, and will not, interfere in behalf of an interested party. Accordingly, in the case above cited from Indiana, it was held that it is the duty of the sheriff to sell according to law, even though the decree of the court direct otherwise. But these cases are not authority upon the point now under consideration, for the reason that the rights of a purchaser of mortgaged property were not there passed upon or considered. The Code of Procedure prescribes the manner of enforcing decrees of foreclosure, and is as follows: "Sec. 630. The decree may be enforced by execution, as an ordinary decree for the payment of money. The execution shall contain a description of the mortgaged property. The sheriff shall endorse upon the execution the time when he receives it, and he shall thereupon forthwith proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment. Interest and costs, upon giving the notice prescribed in § 500 relating to sales of property under execution." And as to sales under execution it is provided in section 501 that "when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately or otherwise as is likely to bring the highest price; or, when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be sold separately." Where the real property to be sold does not consist of known lots or parcels the rule is that "the sheriff shall offer the land for sale, the lots and parcels separately or together as he shall deem most advantageous. All land except town lots shall be sold by the acre." Section 504. See, also, section 505. Section 634, cited by appellant, is clearly inapplicable to the facts of this case, as will appear by reading it in connection with the preceding section. It will be seen, by an examination of these several sections of the Code, that none of them contain anything inconsistent with the equitable rule contended for by appellant. They refer generally, so far as foreclosure pro-

ceedings are concerned, to sales where no part of the mortgaged property has been alienated. In fact, section 501 seems to recognize the right of one claiming a portion of the property which is to be sold to have his part sold separately. We think the appellant was justly entitled to an order directing the sheriff to sell, according to law, all of the mortgaged premises remaining to the mortgagors, before offering for sale that portion conveyed to and owned by appellant. *Foster v. Bank*, 34 N. J. Eq. 48. That portion of the judgment appealed from is therefore reversed, and the cause remanded, with instructions to direct the property to be sold in the order above indicated.

HOYT, C. J., and GORDON, J., concur.

(11 Wash. 690)

HADLOCK et al. v. SHUMWAY et al.
(Supreme Court of Washington. May 4, 1895.)
LABORER'S LIEN—CONVERSION OF TIMBER INTO LUMBER.

Laws 1893, p. 428, § 2, giving a lien for labor performed in converting timber into lumber and shingles, and defining lumber to be "every article . . . manufactured from sawlogs or other timber," authorizes a lien on shingle bolts for labor performed in converting the timber into such bolts.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by William Hadlock and others against John Shumway and others. Judgment for plaintiffs, and defendants appeal. **Affirmed.**

C. K. Bonestell, for appellants. Sinclair & Smith, for respondents.

SCOTT, J. This action was brought to foreclose a lien on shingle bolts, for labor performed thereon. Judgment was rendered for plaintiffs, and defendants appealed. The Belfast Shingle Company was the owner of a tract of timber land in Skagit county, and entered into a contract with defendant Shumway to convert the timber thereon into shingle bolts. Shumway employed plaintiffs to perform the labor. The act under which the right of lien is asserted is found in Laws 1893, p. 428. Appellants contend that the right to a lien on shingle bolts is conferred only by section 1 of said act, and that the plaintiffs could not assert a lien thereunder for the reason that they were hired to perform the labor by Shumway, who was himself an independent contractor, and not the owner of the timber or the bolts when manufactured. However this may be, we think a lien upon shingle bolts is authorized by section 2 of said act. This section confers a right of lien upon all persons performing work in manufacturing sawlogs or other timber into lumber and shingles, and defines, "lumber" to be "all logs or other timber sawed or split for use," and "every article of whatsoever nature or description manu-

factured from sawlogs or other timber." It is contended that this section does not apply, for the reason that the timber was not manufactured into shingles, and that the words "sawed or split for use" cannot be held to include shingle bolts which cannot be used until they have been actually converted into shingles. But it seems to us that the intent of the act was to give a lien in cases of this kind, and we think the position of the respondents must be sustained. A shingle bolt is a manufactured article, within the spirit of section 2. It is prepared for a special purpose, and after preparation is practically worthless for any other purpose than to be converted into shingles. The shingle bolt is valuable, not so much for the timber it contains, as for the result of the labor performed upon it in giving it certain dimensions and a particular character of its own. **Affirmed.**

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

(11 Wash. 697)

LOCKWOOD, County Treasurer, v. ROYS.
(No. 1,648.)

(Supreme Court of Washington. May 11, 1895.)
TAXATION OF REAL ESTATE—MANNER OF LISTING FOR TAXATION.

1. The provision of Laws 1891, c. 40, § 48, that the assessor shall determine the value of each piece of real property listed for taxation, and shall enter the value thereof opposite each description of property, is for the benefit of the property owner, and therefore mandatory, and a failure to comply therewith invalidates the assessment.

2. The omission of the assessor to enter the value of each piece of realty opposite its description, as provided by Laws 1891, c. 140, § 48, cannot be supplied by such action on the part of the treasurer.

Appeal from superior court, Pacific county; W. W. Langhorne, Judge.

Proceedings by Sumner F. Lockwood, county treasurer, against L. W. Roys, for judgment and sale of property for delinquent taxes. From a judgment against his property, said Roys appeals. **Reversed.**

Bogle & Richardson, Richard K. Boney, F. Campbell, and Hoxie & Richardson, for appellant. Marion D. Egbert, Pros. Atty., and Lowen E. Ginn, for respondent.

DUNBAR, J. This is a proceeding brought under the provisions of the act of the legislature enacted March 15, 1893, being chapter 124, p. 323, of the Session Laws of 1893. The county treasurer of Pacific county had undertaken to obtain judgment in the superior court of Pacific county, and to sell, by virtue of such judgment, the real property of the appellant for the delinquent taxes claimed to be due thereon; and, on the day fixed for the hearing of said application, the appellant, under the provisions of the law, filed his objections to the rendition of the judgment. Upon the hear-

ing, the objections were overruled, and judgment was rendered against appellant's property for the sale thereof for delinquent taxes for the year 1891.

Numerous objections were filed by the appellant in the court below, and numerous assignments of error are made here. We think the record in this case shows that this property was not uniformly assessed, either with reference to the different lots embraced in the list, which were owned by appellant, or with reference to other property. There is one principal objection, however, to the mode of assessment in this case, which, it seems to us, is fatal to respondent's contention; and that is that, as the record shows, the assessment was not made in accordance with the provisions of the law on a material point, viz. it appears that the lots were grouped, and that, instead of a value having been assessed on every particular lot, the value was attached as a whole to certain groups of lots, and that the lots grouped and valued thus were in many instances not contiguous to each other, but were separated by alleys, and frequently by intervening lots. Thus, several lots would be mentioned in the assessment roll, and at the bottom of the group, whether of 6, 8, 10, or 12 lots, the aggregate value of all the lots would be carried out. This assessment was made under the Laws of 1891, and section 48, c. 140, p. 298, provides that the assessor "shall actually view and determine, as nearly as practicable, the true and fair value of each tract or lot of real property listed for taxation, and shall enter the value thereof, including the value of all improvements and structures thereon, opposite each description of property." So that the question arises here, what is a "description of property" contemplated by the law? And the further question becomes important, viz. what is such a substantial departure from the provisions of the statute as would render an assessment void? In other words, is this provision of the statute mandatory or directory? If mandatory, then it is presumed to involve a substantial right, and must be strictly obeyed. Mr. Cooley, in his work on Taxation (2d Ed., p. 400), in speaking of this proposition, says: "It is also generally made imperative that separate and distinct parcels of land shall be assessed separately. This is certainly essential where the lands are resident or seated, and in the occupancy of different persons, each of whom has a right to know exactly what demand the government makes upon him. A failure to observe this requirement is not a mere 'omission, defect, or irregularity,' which can be overlooked, under a statute which provides that assessments for taxation shall be valid 'notwithstanding any omission, defect, or irregularity' in the proceedings. The like separate assessment is also essential in other cases if the statute requires it." Now, it will be observed that our statute does require it without any limitation of ownership, such as is sug-

gested by the learned author above. The same section, however, further along, proceeds as follows: "Nay, when the two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceedings. It cannot be held in any case that it is unimportant to the taxpayer whether this requirement is complied with or not. Indeed, it is made solely for his benefit; it being wholly immaterial, so far as the interest of the state is concerned, whether separate estates are or are not separately assessed. And, where a requirement has for its sole object the benefit of the taxpayer, the necessity for a compliance with it cannot be made to depend upon the circumstances of a particular case, and the opinion of a court or jury regarding the importance of obedience to it in that instance. That method of construing statutes would abolish all certainty." This statement has been quoted in almost every case of this character that has been decided, most of the courts indorsing it, while some few have criticised its soundness. We think, however, that the learned author might have added another and more cogent reason for enforcing this rule, viz. that the person whose land is taxed has a right to know just what charges are made against each particular parcel or separate piece of land, and how much money it would require to remove the lien from such parcel of land. He might desire to redeem one lot, either because he wished it for a home, or because he thought that it was worth redemption; while another lot in the same neighborhood might not, in his judgment, be worth redeeming. Town lots, especially in this country, are as much articles of merchandise as any species of property which can be mentioned, and they do not necessarily bear any relation to each other in value. Lots on one side of a block may be very valuable and very desirable on account of their topographical situation, while those on the other side of the block, or even immediately alongside, might be comparatively worthless, for the same reason; and certainly it is the right of a taxpayer, when the law makes the taxes on his lots a lien upon them, to have the lien on any particular lot limited to the amount of the taxes which that particular lot represents. In this instance it seems to us that the assessor absolutely disregarded the plain and mandatory provisions of the law.

In *Young v. Joslin*, 13 R. I. 675, it was held that where a statute provided that taxes on real estate should be assessed to the owners, and separate tracts or parcels should be separately described and valued as far as practicable, this provision was for the benefit of the taxpayer, and mandatory. It is insisted by the respondent that this case is not parallel with the one at bar, because it appears that the taxes for three separate pieces of land had all been assessed to one

piece; but it seems to us that the principle is the same here, for practically the burdens imposed on all the lots rest on each lot separately, and the taxes that were assessed on all the lots would have to be paid before any one lot would be relieved from the lien. Besides, the argument of the case shows conclusively that it was decided on the proposition that, where one owns several tracts or parcels of land, they must be listed and valued separately, else the proceedings will be void; citing Blackwell on Tax Titles to sustain that proposition, and citing also the language of Cooley which we have referred to above. In *Hayden v. Foster*, 13 Pick. 499, it was held that, "where separate and distinct real estates belong to the same owner, they are to be considered as distinct subjects of taxation, and must be separately valued and assessed; and each estate is subject to a lien for the payment of that portion only of the owner's tax which shall be assessed on such particular estate." The respondent, in his criticism on the author cited by the appellant, is unable to see the bearing of this case on the point discussed here. But it seems to us that it is so directly in point that it would be idle to discuss it. *Nason v. Ricker*, 63 Me. 381, decides this question squarely. There it was held that "each lot of land is a distinct subject of taxation, and liable to a lien upon it for the payment of taxes upon it, and that hence a valuation and assessment in gross upon two distinct parcels is void, because it deprives the owner of the privilege of redeeming either separately." The decision in this case is based, we think, upon a better reason than is given in any of the other cases mentioned, viz. that the owner had a right to redeem each of the lots by paying the taxes specifically assessed on each without being obliged to pay the tax upon the other lot also, which, as the court says, constituted no lien upon the lot which he might wish to redeem, and that the assessment and valuation of both lots in gross, if upheld, would deprive the owner of this right by compelling him to pay the taxes upon both lots to have the right to relieve either from the lien imposed by the tax upon it. The court very wisely adds: "The law does not contemplate nor will it sanction the aggregation of the several separate and distinct estates owned by a nonresident proprietor into one valuation and assessment." Of course, it does not change the principle nor vary its proper application that the several separate and distinct estates are owned by a resident proprietor.

We have examined all the cases cited, both by appellant and respondent; and while there is some conflict of authority on this proposition, and while the rule is more liberal, so far as the action of assessors is concerned, in not holding assessments void where mere technical omissions are made, than it was a few years ago, yet we think the overwhelm-

ing weight of authority, both ancient and modern, is to the effect that a separate valuation of distinct parcels of land, when required by the statute, is made for the benefit of the owner, and involves a substantial right, and that, when he is deprived of such substantial right, the assessment is invalid and void. The statutes cited in most of these cases, while varying slightly in phraseology, are substantially the same, and the decisions are based upon broad grounds and general principles. We think in this instance that the substantial rights of the owners were violated, and that no assessment was made upon which a levy could be based. The contention that the treasurer afterwards carried out in detail these valuations is of little importance. The testimony in this case shows that even then the valuation was based upon the supposition that the lots were of uniform value. But, under the law, the treasurer was not authorized to substitute his judgment of the value of the property for that of the assessors. The authorities are pretty uniform in holding that this is a judicial qualification which cannot be transferred. The judgment will therefore be reversed, and the cause remanded, with instructions to the lower court to declare the assessment on this property illegal.

HOYT, C. J., and SCOTT, J., concur.

(11 Wash. 704)

LOCKWOOD, County Treasurer, v. ALLYN.
(No. 1,649.)¹

(Supreme Court of Washington. May 11, 1895.)

Appeal from superior court, Pacific county; W. W. Langhorne, Judge.

Proceedings by Sumner F. Lockwood, county treasurer, against Frank Allyn, for judgment and sale of property for delinquent taxes. From a judgment against his property, defendant appeals. Reversed.

Bogle & Richardson, Richard K. Boney, F. Campbell, and Hoxie & Richardson, for appellant. Marion D. Egbert, Pros. Atty., and Lowen E. Ginn, for respondent.

DUNBAR, J. It was stipulated that, if the motion to dismiss in this case should be overruled, the case should follow the disposition of case No. 1,648 (*Lockwood v. Roy*, 40 Pac. 346). We think, as this was an action under the statute, that there is no merit in the motion, and the judgment will therefore be reversed, for the reasons given in the opinion just rendered in the above-mentioned case.

HOYT, C. J., and SCOTT, J., concur.

(8 Colo. A. 160)

CONLY v. FRIEDMAN.²

(Court of Appeals of Colorado. April 8, 1895.)

SALE—CHANGE OF POSSESSION.

Where personal property is transferred by a debtor to a third person on his promise to pay a claim, and a receipt is given therefor, credit being entered on the books of the firm holding

¹ For opinion on rehearing, see 40 Pac. 616.

² Rehearing denied May 13, 1895.

such claim, and the property is placed under lock in a vacant room, the possession of said property was acquired in an open manner, as against persons claiming under a subsequent attachment against the former owner.

Appeal from Arapahoe county court.

Replevin proceedings by Aaron Friedman against John Conly. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Bottom, for appellant. Alfred Muller, for appellee.

BISSONNET, J. Friedman & Co. were wholesale liquor dealers in the city of Denver, and had an account against John Sauve, who ran a bar in the Windsor Hotel. Sauve became embarrassed, and unable to pay his bills, whereupon Friedman & Co. commenced a suit by attachment to recover their debt, which amounted to some \$263. A levy was made, and personal property, consisting of whiskeys, wines, cigars, and mineral waters, was taken by the constable. After the levy Friedman and Sauve negotiated for the adjustment of the debt. It was agreed between them that Sauve should turn over to Friedman in liquidation of the claim some of the goods which had been seized. These were to be taken in payment of the bill. The arrangement was acceded to, and the goods were turned over to Friedman, who receipted the account to Sauve. The goods were not turned over to the firm of Friedman & Co., but to Aaron Friedman, who agreed to take care of the indebtedness with the firm. In other words, under the circumstances, Friedman became the purchaser of the goods from Sauve under an agreement to liquidate the firm account as a consideration for the transfer. The arrangement was completely executed in all of its particulars, for the goods were delivered to Friedman. Sauve's bill was receipted. He was credited on the firm books with the amount of the debt, and Friedman was personally charged as a member of the firm with its amount. The attachment was released, the suit dismissed, and the parties virtually stood in the relation of vendor and vendee of the goods. When the transaction was completed, Friedman took the goods, and put them in an unoccupied room in the basement of the hotel, and locked them up. The door was locked by a hasp and staple and a padlock. Friedman carried away the key, and from that time forward no other person had access to the room. Friedman put on the door a notice that the goods therein stored were his property. He informed the manager of the Windsor Hotel of what he had done with reference to the occupancy of the room, which was in the basement of the house, and the manager agreed, so far as was necessary, to hold the goods for Friedman, and consented to their storage. Some little argument is built up on the contention that this room was only accessible through the saloon, and therefore was of necessity to

be considered a part of it. Evidence was offered tending to show a resale of some of these goods by Friedman to Sauve for use in the business. Afterwards other creditors commenced suit by attachment, the hotel attempted to seize the portable personal property to pay the rent, and the present appellant, who was an officer with a writ of attachment, forced the fastenings on the door, and seized the goods which had been sold to Friedman. A return was demanded, and on the refusal suit in replevin was brought, but the officer or his clients gave a forthcoming bond, and retained possession. Proof was offered concerning the value, and Friedman obtained judgment both in the justice and county court, where the case went by appeal.

The only practical question which is discussed by counsel, or which is involved, respects the possession which Friedman took of the property. By a long series of adjudications of both the appellate courts of the state, it has been decided that a purchaser of personal property under such circumstances must acquire possession of the goods which he buys, and his possession must be open and notorious, as against other persons who have or may acquire rights in or to the same property. The fundamental question always is whether it is clearly disclosed by the testimony that the possession was one which the law will permit the court to consider as satisfactory and valid. This case was tried by the court without a jury, which rendered judgment for the appellee. We therefore have a right to assume as a basis of our own conclusion whatever facts are clearly disclosed by the record, as well as the necessary inferences therefrom which the court below had a right to draw for the purpose of rendering the judgment which it did. Friedman's possession seems to us to have been very clearly and satisfactorily established. On a sufficient and valuable consideration, the goods were turned over to him upon his undertaking to satisfy the claim of his firm against Sauve for the amount of the debt which he owed. Every necessary thing was done by Friedman to carry out in good faith his part of the agreement. The goods were delivered to him. He took actual possession of them, and did not leave them either in Sauve's place or under his control or direction. By the consent of the manager of the house, they were stored in one of the basement rooms of the hotel, and were locked up, and the key carried by Friedman. It was not shown that Sauve had any control whatsoever of this place, or that it was a part or parcel of the premises which he occupied. If it had been, possession of it was surrendered by Sauve, and by the consent of the person who had a right to dispose of its occupancy Friedman was given power to use it. When he put the goods in there, locked them up, and took the key away, leaving a notice on the door

that the goods were his, his possession became absolute, open, notorious, and exclusive, within the scope of all the decisions of the state. A similar question was recently considered by this court, and the court, speaking by Judge Reed, held a substantially similar, though possibly less exclusive, possession a sufficient compliance with the law. *Buchanan v. Plow Co.* (Colo. App.; Jan. term, 1895) 39 Pac. 899. The only other proposition to which reference is made by counsel respects the defects found in the affidavit in replevin. We do not regard the affidavit of necessity defective, and, if it were, the appellant does not seem to be in a condition to avail himself of any defects which may be found in it. *Wells*, Repl. § 185; *Cobbey*, Repl. § 728. We can discover no error in the proceedings which invalidates the judgment, and it will accordingly be affirmed. Affirmed.

(21 Colo. 177)

RUST et al. v. STRICKLAND.

(Supreme Court of Colorado. May 6, 1895.)

REVIEW ON APPEAL—SPECIFIC PERFORMANCE—DILIGENCE.

1. Where the evidence is conflicting, a judgment will not be disturbed, if it does not appear that the trial court was actuated by prejudice or bias.

2. Defendants agreed to convey to plaintiff an interest in two mining claims on condition precedent that the latter pay the expenses in procuring patents for a number of claims, as such expenses should accrue. Plaintiff paid money from time to time to one of defendants, who was the active person in procuring the patents, and who alone knew what steps had to be taken, the amount of expenses, and the status of the account, but who did not inform plaintiff. *Held*, that plaintiff, having paid several hundred dollars towards expenses, and having tendered any balance that might be found due thereon, was entitled to a conveyance of the promised interest, though he had not strictly complied with the contract in making the payments as they accrued.

Appeal from court of appeals.

Action by D. W. Strickland against William R. Rust and another for specific performance of a contract to convey real property. From a judgment of the court of appeals (28 Pac. 141) affirming a judgment for plaintiff, defendants appeal. Affirmed.

C. S. Wilson, E. C. Stimson, and L. S. Smith, for appellants.

CAMPBELL, J. This action was brought by the plaintiff, who is the appellee, to compel the defendants to convey to him a certain interest in mining property, which the plaintiff claimed by virtue of a contract which was made between plaintiff and Millner, one of the defendants. Upon trial to the court without a jury no specific findings of fact were made, but the court made a general finding to the effect that the plaintiff was entitled to the relief sought. Upon such finding a decree was rendered directing the defendants to make the conveyance demanded upon

the payment by the plaintiff to said defendants of \$60, which, upon an accounting, the court found to be due. An appeal from such judgment to the court of appeals resulted in its affirmance, and from the judgment of the latter court the defendants come here with their appeal.

There are several parties defendant in the action, and questions are here raised and urged other than the principal question in the case, but they do not interfere with the decision of the only real controversy, which is between the plaintiff and Millner, the original parties to the contract, the proper construction of which contract, in the light of the evidence, settles this case. The right of the plaintiff to an interest in this property was, by the contract, a conditional one. The agreement was that, if the plaintiff should pay the expenses for procuring patents for the two mining claims in controversy, the patentees would convey to him an undivided one-quarter interest in and to each thereof as soon as the receiver's receipt for the same should be obtained. It is contended that such payment of expenses was to be made as they accrued from time to time, and it will be conceded that such is a fair construction of the contract. It may likewise be conceded that such payment was a condition precedent to the existence of any right of the plaintiff to any part of the property. The questions here are, then: First. Did the plaintiff make payment of these expenses as they accrued? Second. If not, has he shown any good reason in equity which excuses a strict and full compliance with this contract, and which, nevertheless, entitles him to enforce its performance, if he is still capable of fully complying with its provisions? Third. Was the case one in which an accounting might properly be had? Fourth. Was the decree one in law warranted? The first question is purely one of fact; the others, questions of law and fact. The principal effort of appellants' counsel is apparently devoted to the attempt to demonstrate that the trial court made a mistake in its findings of fact. It is true that the evidence was conflicting upon most of the questions at issue, but there was some evidence to sustain the findings as to every material point in controversy, and there is nothing in the record to show that the trial court, in its findings, was actuated by prejudice or bias. Under the familiar rule of this court, therefore, we cannot, under such circumstances, reverse the judgment upon the ground of the insufficiency of the evidence, even if we differed from the court below as to the preponderance thereof.

There is no question that the plaintiff paid a portion of the expenses of procuring a patent as they accrued. The defendants concede this, and the court must have expressly found that he paid more than \$300 on the same. The evidence tends to show that at the same time there were several similar con-

tracts between the same parties, and that Millner was the active person in the procuring of the patents for all the claims covered by these different contracts. He, rather than the plaintiff, knew what steps had to be taken, and were taken, to procure patents, what was the amount of the expenses, and what applications upon account of the patenting of these two particular claims had been made by him out of the moneys paid to him, or to his order, from time to time, by the plaintiff, upon this and the several other similar transactions. At the time of the payments to Millner there seem to have been no specific directions by the plaintiff as to the manner of the application of the money, or to what particular account it should be credited, and no statement was ever rendered by Millner to the plaintiff as to what disposition was made of the moneys thus paid to him, nor did he ever inform the plaintiff what were the expenses of patenting these claims in controversy. The plaintiff contended and swore that he had paid in full at least all these expenses, and possibly more than such expenses actually amounted to; but, considering the circumstances, as above stated, he averred in his pleadings, and also in his testimony, a willingness to pay, and made a tender to pay, any balance that might be found due upon such expenses upon the taking of an account. Throughout this matter there was a looseness and unbusinesslike method in their dealings and in the keeping of their several accounts by the plaintiff and Millner, which might well render it difficult for either to know how the account stood. In these circumstances the case was a proper one for an accounting. From the conflicting testimony the court found that \$60 was still due on the expenses of procuring a patent for these two claims, and we are not disposed to say in the light of the evidence that this was not as fair an ascertainment as could be made. Then, too, assuming the correctness of the finding of fact, as we do, the plaintiff has shown a valid reason for not having strictly and fully complied with his contract with respect to making these payments as they became due, and it would be inequitable to refuse relief when it is in the power of the plaintiff now fully to perform in accordance with his offer to do so, particularly when it was the fault of Millner, rather than that of plaintiff (if there was any fault on the part of either), in not giving to the plaintiff information as to the status of the account, which, as to some of its items, Millner alone seemed to possess. Having the right to an undivided one-quarter interest in and to the property, provided he paid the expenses for procuring the patent therefor, and having by the findings of the court paid more than \$300 thereof, and offering to pay the balance of about \$60 which the court found still to be due on such expenses, and it appearing that Millner, rather than plaintiff, was in fault for the failure of plaintiff to pay all of the

expenses as they accrued, we think that the plaintiff is entitled to the benefit of his contract, and that a conveyance of the interest in question should be made. For these reasons the judgment of the court of appeals is affirmed. Affirmed.

(21 Colo. 115)

WILSON et al. v. BATES.¹

(Supreme Court of Colorado. April 20, 1895.)

SECOND APPEAL—REVIEW.

1. Questions fully considered and settled in an opinion rendered in a former appeal in the same suit are not open for further review.

2. When the final decree of the court below is in accordance with the instructions of the appellate court, and warranted by the evidence, it cannot be further questioned on appeal.

Error to district court, El Paso county.

Action by Mary B. Bates against Alfred Wilson and others. A decree was entered by the district court in conformity with the judgment on appeal (24 Pac. 99), and the cause was referred to a notary to take and report evidence. From a judgment rendered upon the evidence so taken, defendants bring error. Affirmed.

Hugh Butler, for plaintiffs in error. W. T. Hughes, L. C. Rockwell, and George N. Hurd, for defendant in error.

GODDARD, J. This case, so far as it involved the rights and interests of the respective parties to the capital stock of the Woodmass of Alston Mining Company, which constitute the real subject-matter of the litigation, was considered by this court on an appeal from a judgment of the district court of El Paso county in favor of plaintiffs in error, rendered June 26, 1886. Upon that review, after an exhaustive examination of the evidence, and a thorough discussion of the law applicable to the facts established thereby, these rights were settled and determined. The judgment of the district court was reversed, and the cause remanded, with directions to that court to enter judgment in conformity with the views therein expressed, and to proceed to an accounting between the parties. On the 31st day of July, 1890, such decree was entered by the district court, and the cause was referred to a notary public to take and report evidence for the purpose of such accounting. Final judgment was rendered upon the evidence so taken on the 14th day of July, 1893. To review this judgment and the decree rendered July 31, 1890, the defendants prosecute this writ of error.

The questions presented by the first six assignments of error, and to which much of the very able argument of counsel for plaintiffs in error is directed, are not open for consideration upon this review, having been fully considered and settled in the opinion rendered upon the former appeal, and reported in 14

¹ Rehearing denied May 20, 1895.

Colo. 140, 24 Pac. 99. By these assignments it is sought to again put in issue the interest of defendant in error to any part of the capital stock, and her right to carry out and complete the contract of her husband, George C. Bates, and, upon performance thereof, to share in the surplus, if any there should be, after an accounting. In the former opinion the learned commissioner, speaking for the court, said: "The contract being a valid one, and sustained by sufficient consideration, and having been entered into prior to the purchase, it necessarily follows that, when Gwynn and Moynahan conveyed their title to A. H. and R. W. Wilson, the property was acquired charged with a trust of which the three parties to the precedent agreement were beneficiaries. The subject of the trust was the property in controversy. The terms of the trust were settled by the contract. The rights of the beneficiaries to participate in the proceeds of the mines were dependent upon the performance of their several undertakings. Before Bates could participate in the proceeds of the property, the defendants were entitled to receive the entire amount of money which they had advanced to pay the purchase price. When that sum had been realized by them, Bates was entitled to be reimbursed for the expenditure made by him in and about obtaining the patents and the satisfaction of the trust deed. The performance of these undertakings, however, were none of them to be conditions precedent to the acquisition of an interest in the enterprise. If, by the operation of the mines, a sufficient amount was realized to pay the amount advanced by the Wilsons as cash payments, and the balance of the purchase price as it became due, they were clearly entitled to make that application. If, after the payment of those sums, there remained sufficient of the net proceeds to pay the expense of obtaining patents and the payment of the McBride trust deed, then Bates became entitled to such proceeds. . . . Performance of the several covenants and agreements made by them was not a condition precedent, but a condition subsequent, to the acquisition of an interest in the enterprise. It was a condition which did not affect the legal title of the parties, but their right to enjoy the equitable interest and benefits of the estate created by the contract. The agreement was not in the nature of a contract by the Wilsons to sell and convey to Bates an interest in the property. Bates acquired the interest as soon as the property was purchased pursuant to the contract." And in conclusion directed a decree which should contain, among other things, the following: "Such decree should be so framed as to restrain defendants from interfering with plaintiff in the exercise of her right as a stockholder of the defendant corporation, or from preventing her from making application for patents, in the name of and through the corporate organization, and should require defendants, as officers of that company, to execute all papers necessary in

that behalf. It should provide for an accounting between the parties, upon which accounting, among other matters, all sums expended by defendants in the purchase of the property should be allowed, including the amount paid to redeem from the sale under the foreclosure decree; also all sums expended in the operation and development of the property. The amount paid by complainant to secure the certificate of sale should be allowed to her, unless already returned. The decree should also provide that, after United States patents have been obtained, all sums necessarily expended by Bates in his lifetime in that behalf should be allowed to complainant; that all further sums necessarily expended in obtaining the patents be charged against the interest of complainant; and that, after such accounting, the net proceeds of the property be divided between the parties according to their respective interests in the capital stock of the defendant corporation,—the interest of complainant being one-third, and that of defendants two-thirds." The court herein clearly recognizes the right of defendant in error to complete and carry out the contract of George C. Bates, and decides that upon the performance of his undertakings she shall be entitled to participate in the proceeds of the property. The court below, in its final decree, finds and adjudges that at the time of the taking of the evidence upon the accounting she had complied with and performed these conditions. Her right, therefore, to one-third of the capital stock of the company, and to the profits accruing thereon, cannot be further questioned by plaintiffs in error.

The further assignments of error refer to the disallowance of numerous items claimed by plaintiffs in error, and to the allowance of certain amounts in favor of defendant in error, by the court below, upon the accounting between the parties. We deem it unnecessary to notice in detail the various items thus questioned, since, from a careful reading of the evidence, we are satisfied that the conclusions arrived at by the court below are just and equitable between the parties; and we are clearly of the opinion that neither upon these assignments nor upon the cross errors assigned by defendant in error should the final judgment of the court below be disturbed. The judgment is accordingly affirmed. Affirmed.

(21 Colo. 192)

GLATZEL v. BINSCHADLER.

(Supreme Court of Colorado. May 6, 1895.)

PRESUMPTION ON APPEAL — SUFFICIENCY OF EVIDENCE — WANT OF JURISDICTION — WAIVER.

1. Where the record recites that defendant moved to dismiss an appeal from a justice to the county court, on the ground that the justice had no jurisdiction over the person of defendant, and also on the ground that plaintiff's evidence was insufficient, and plaintiff has failed to preserve the evidence by bill of exceptions, the judgment will not be reversed on a showing that the justice had jurisdiction.

2. Defendant, by appearing in the county court on appeal from a justice's court, and defending on the merits, waives the objection that the justice did not have jurisdiction of his person.

Error to San Juan county court.

Action in a justice's court by Robert Glatzel against Anna Binschadler. There was a judgment on appeal to the county court dismissing the action, and plaintiff brings error. Affirmed.

Frazier & Whitelaw and Joseph C. Helm, for plaintiff in error.

GODDARD, J. This action was originally commenced before a justice of the peace. Judgment was rendered for \$56.55 and costs. From this judgment, defendant appealed to the county court. On the trial of the cause in the county court, upon the close of plaintiff's testimony, a motion for a nonsuit was sustained, and the action dismissed, at plaintiff's costs. This motion does not appear in the record, and we are not advised upon what grounds the same was based, except by a recital in the transcript, as follows: "The plaintiff, having given evidence in support of his claim, does now here rest his cause of action. The defendant then moved to dismiss his cause of action, for the reason that no jurisdiction as to the justice of the peace before whom the suit was originally brought, or as to the jurisdiction of the court, had been proved as demanded by the defendant at the opening of the case, and upon the further grounds that any promise of defendant to pay for the goods sold by plaintiff was void by the statute of frauds, and that there is no proof in this case that the goods sold were used in the family of the defendant and her husband."

Counsel for plaintiff in error insists that the court below dismissed the action for want of jurisdiction in the justice of the peace, and contends that for this reason the court committed a fatal error, since it appears from the record that the action was brought upon a money demand in amount within the jurisdiction of the justice, and, if the justice had no jurisdiction over the person of defendant, she had waived this objection by appearing and going to trial, on the merits of the cause, in the county court. There can be no question as to the correctness of counsel's contention, if it was clear that the court dismissed the action for the reason thus assumed; but inasmuch as the record is silent as to the specific grounds of the motion, and from the recital above set forth it appears that other grounds were relied on which, if found to exist, would justify the dismissal of the action, to wit, the insufficiency of the evidence to sustain a recovery against defendant, and the evidence not being preserved by a bill of exceptions, we must assume that it was insufficient, and that the motion for nonsuit was granted for that reason. Parkison

v.40P.no.5—23

v. Boddiker, 10 Colo. 503, 15 Pac. 806; Leach v. Lothian, 10 Colo. 439, 15 Pac. 816.

Upon the record before us, we cannot say that the court erred in dismissing the action, and the judgment will therefore be affirmed. Affirmed.

(21 Colo. 140)

LIPE v. FOX et al.¹

(Supreme Court of Colorado. April 20, 1895.)

APPEALABLE ORDER—VACATION OF AWARD TO WIDOW.

1. An order vacating an award to a widow of her statutory allowance as excessive is not a final judgment, which the widow may have reviewed by writ of error or appeal.

2. The fact that in such order costs were taxed against the widow does not render the order final, no execution being granted to enforce payment.

Error to Arapahoe county court.

Error by Elizabeth Lipe against Emeline Fox and others to review an order vacating an award to her of her statutory allowance. Dismissed.

W. C. Kingsley and R. H. Gilmore, for plaintiff in error. R. W. Bonyng, for defendants in error.

PER CURIAM. The plaintiff in error is the widow of Clark Lipe, deceased. During the course of administration of his estate, and on the 22d of September, 1893, the appraisers, appointed by the county court, at the instance of the widow, to set aside her statutory allowance, filed their report, making an award to the widow, which award was approved by the court. The value of the personal property of the estate exceeded the amount of the award, but was insufficient to pay all the claims of the creditors. Three days thereafter the defendants in error, whose claim against the estate had theretofore been allowed, filed a motion in the matter of the estate to set aside such appraisal and approval on the ground, *inter alia*, that the award was excessive. Upon hearing of the application, which was resisted by the widow, the court granted the motion, set aside the appraisal and approval of the same, and ordered a new appraisal to be made, and taxed the costs of the hearing to the widow. From such order the widow is here by writ of error.

When the transcript of the record was filed in this court the defendants in error moved to dismiss the writ of error upon the ground that the order or judgment sought to be reviewed was not a final judgment. The motion was overruled, as it was deemed best to defer determination until argument upon the final hearing of the case. The defendants in error now renew their motion. The county court had the authority to entertain the application to set aside the widow's award, under its supervisory power over es-

¹ Rehearing denied May 6, 1895.

tate matters. No greater weight can be given to the claim for the widow's allowance than to an ordinary claim of a creditor, although the former is preferred, and must first be paid. When the award of the appraisers is made, it possesses no greater virtue than does the verdict of a jury in an ordinary civil action; and, though the statute does not expressly provide that the award of the appraisers shall be approved by the court, such is the practice here, as in Illinois, from which our statute is borrowed, and, when the court does approve the award, such approval carries with it no greater dignity than attaches to a judgment in an ordinary civil action. *Miller v. Miller*, 82 Ill. 470; *Marshall v. Rose*, 86 Ill. 374. This court has repeatedly held that orders made granting or refusing new trials on applications to vacate judgments are not final judgments, from which an appeal can be taken or to which a writ of error lies. *Higgins v. Brown*, 5 Colo. 345; *Owen v. Goling*, 7 Colo. 85, 1 Pac. 229; *Wheeler v. Garrett*, 13 Colo. 140, 21 Pac. 1021. There is nothing in this judgment that partakes of the nature of a final judgment, unless it be that costs are taxed to the widow; but a judgment for costs, although under some circumstances it may be, yet, as a general rule, is not of itself, a final judgment. Costs are often taxed as incidents of an order clearly interlocutory, and the costs awarded in this matter are of the same character. No execution was granted to enforce their collection, and the mere award of costs as an incident of an order interlocutory in its nature and purpose cannot make final that which is clearly intermediate. *Elwell v. Johnson*, 74 N. Y. 80; *Freem. Judgm.* § 16, and cases cited; *Young v. Stonebreaker*, 33 Mo. 117; *Adams v. Trigg*, 35 Mo. 190; *Robinson v. Hall*, 35 Hun, 214. In *Dusing v. Nelson*, 7 Colo. 184, 2 Pac. 922, this court said: "If the order entered in a cause does not put an end to an action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory, and not final. To be final, it must end the particular suit in which it is entered." Granting that in the matter of the administration of an estate the order of the court approving the award to the widow is a final judgment, this order vacating the judgment confirming the award is not final. It does not determine what amount the widow shall ultimately have, but expressly leaves such ascertainment open for further proceedings in the same court and in the same matter. It provides for a new appraisal, and the final judgment as between the widow and the defendants in error can be rendered only after the report of the new appraisers has been filed in, and the approval of the same made by, the county court. If reviewable errors should be committed, or have been committed, in any interlocutory proceedings

leading up to such final judgment, they can be reviewed only when such final judgment itself is properly brought to this court. There is nothing in the other portions of the judgment that will aid that portion in which costs are taxed against the widow, so as to make it a final judgment. Such costs, if improperly taxed (and possibly it was wrong to award costs against her), may be readjusted by the county court when final judgment as to this award is rendered, or may be reviewed in this court when such final judgment is properly before us. The hardships which counsel for plaintiff in error predict as possible to the widow in case it should be held that the order or judgment below is not a final judgment are imaginary rather than real. They contend that, unless the widow can sue out her writ of error to such a judgment or appeal therefrom, then, when such award made to her is set aside at the instance of one creditor, and costs taxed to her and a new award made, all of the other creditors may be dissatisfied with the new appraisal and new award made under such order of the court, and each creditor in succession may file a motion to set aside the award made at the instance of any other dissatisfied creditor, and so an indefinite number of judgments for costs might be taxed against the widow from which she could not extricate herself. But each creditor is interested in and affected by the award made to the widow for her statutory allowance, and when any one creditor is dissatisfied with an award that has been made, and properly moves the county court to have the same set aside or corrected, the county court, upon the application of the widow, might very properly require all of the creditors to be made a party to such proceeding, so that the rights of all who are interested may be adjudicated at the same time. If she should neglect, however, to make this timely application for an order, she herself would be at fault. On the other hand, if this judgment should be held and determined to be a final judgment, and if upon final hearing in this court such judgment should be affirmed, this would be equivalent to holding that the action of the county court was correct. Then, when the remittitur is filed below, the county court would proceed to carry out its former order, a new appraisal would be made, and let us suppose that the court would approve the award of the new appraisers. Such order of approval would certainly be a final judgment, which the party against whom the order went might have reviewed by appeal or writ of error in this court, and the result would be two final judgments upon the same claim, in the same case, and two reviews in the appellate court, which, in the nature of things, could not be. *Hagerman v. Moore*, 2 Colo. App. 83, 29 Pac. 1014. The writ of error is dismissed. Writ dismissed.

(21 Colo. 188)

ARNETT v. LINHART et al.¹

(Supreme Court of Colorado. May 6, 1895.)

CONVEYANCE OF WATER RIGHTS — INTEREST IN DITCH—APPROPRIATION OF WATER—ACTION FOR DAMAGES—DEFENSES.

1. A deed conveying land and water rights in which the water rights are described "as one-half interest in a certain ditch" reserves in the grantor the use of one-half the water appropriated by the ditch, whether the entire water right is appurtenant to the land conveyed or not.

2. The fact that a person entitled to the use of one-half of the water of an irrigation ditch is denied such right by the other owner is no defense to an action by the latter for damage caused by the former digging another trench and appropriating all the water.

Appeal from district court, Arapahoe county.

Action by Mary M. Arnett against Eliza Linhart and another. There was a judgment for defendants, and plaintiff appeals. Reversed.

Hipp & Tesch, for appellant. E. W. Waybright, for appellees.

GODDARD, J. This is an action brought by Mary M. Arnett against Eliza and David Linhart to recover damages resulting from the interruption of the use of an irrigating ditch, and the consequent loss of water for irrigation purposes, and for certain equitable relief. Upon the conclusion of plaintiff's evidence, the court below sustained a motion for nonsuit, and dismissed the action, at plaintiff's cost. The assignment of errors challenges the correctness of this ruling. From the record it appears that on the 8th day of April, 1886, defendants conveyed, by warranty deed, to plaintiff a certain piece of land, containing about 11 acres; and also a water right, the extent of which is in dispute between the parties, plaintiff contending that she is the owner of the entire water right, and defendants claiming an undivided one-half of the same. Since the controversy in this case arose out of these conflicting claims, and a part of the relief sought involves an adjudication of these respective rights, we deem it best to determine this question at the outset. Plaintiff insists that, the water right involved having been used upon the land prior to her purchase, it therefore became and was an appurtenance thereto, and passed to her by the conveyance of the land. Whatever may be the rule governing the transfer of water rights that, under the particular circumstances, are appurtenant to the land conveyed, when no express mention thereof is made in the deed, it certainly can have no application to a case where, by the terms of the deed itself, such right is expressly granted or reserved. Although a water right may be appurtenant to the land, it is the subject of property, and may be transferred either with or without the land. *Strickler v. City of Colorado*

Springs, 16 Colo. 61, 26 Pac. 313. Being, therefore, a distinct subject of grant, and transferable either with or without the land, whether a deed to land conveys the water right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed; or, when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land. In the case at bar the deed to plaintiff expressly limits and determines the extent of the water right conveyed to her. Its language is: "That the said parties of the first part, for and in consideration, * * * have granted, bargained, sold, and conveyed * * * all the following described lot or parcel of land and water rights. * * *" After a description of the land by metes and bounds, the water right referred to is described as follows: "And also a one-half ($\frac{1}{2}$) interest in a certain ditch taken from a certain gulch known as 'Dad Clark Gulch,' said ditch being now constructed."

By expressly conveying a one-half interest in the ditch, the grantors manifestly intended to convey a like interest in the water right, and reserve a one-half interest in that right as well as in the ditch itself; otherwise the reservation of an interest in the ditch would be absolutely worthless. We conclude, therefore, that the plaintiff is the owner of a one-half of the ditch, and entitled to the use of one-half of the water appropriated thereby. The ditch is known as the "Linhart Ditch No. 2," and appropriates the entire flow of water in Dad Clark gulch. It appears that defendants, upon being denied the right to use any water flowing in this ditch, in the fall of 1888 constructed another ditch for the purpose, as they allege, of taking their share of water from the Dad Clark ditch. This latter ditch is known as the "Linhart Ditch." Upon the trial plaintiff introduced testimony to the effect that by means of this new ditch defendants diverted all the water from Dad Clark gulch; and by reason of its location, it being upon a steep hillside, the water in running through it washed sand and dirt into ditch No. 2, thereby filling it, and preventing the plaintiff from using any water on her land during that fall; that, by being so deprived of water, her crops and fruit trees were damaged, and she was put to the expense of cleaning out the ditch, etc. This testimony was undisputed, and, upon the motion for a nonsuit, must be taken as true. It is clearly sufficient to sustain a recovery in some amount. The claim of appellees, that by reason of plaintiff's conduct in wrongfully preventing them from using water through ditch No. 2 they were compelled to build the new ditch, and that she is therefore estopped from claiming damages that resulted to her thereby, is untenable.

¹ Rehearing denied May 22, 1895.

ble. They could have enforced their right to use their portion of the water through ditch No. 2 by instituting proper proceedings, and it is no defense to their liability for the injuries, if any, that she sustained by the construction and use of a new ditch, that she refused to allow them to use their share of the water through ditch No. 2. And, furthermore, upon the pleadings, the plaintiff is entitled to have the priority of record between the respective ditches adjudged and determined. We think the court below erred in sustaining the motion for a nonsuit. The judgment is accordingly reversed, and cause remanded. Reversed.

(21 Colo. 124)

JUNCTION CREEK & N. D. D. & I. DITCH CO. et al. v. CITY OF DURANGO.

(Supreme Court of Colorado. May 6, 1895.)

IRRIGATION—ENLARGEMENT OF PRIVATE DITCH.

Act Feb. 12, 1881 (Sess. Laws, p. 164; Gen. St. 1883, § 1716 et seq.), provides that no person having constructed a private irrigation ditch through land of another shall prevent another person from enlarging or using such ditch in common with him on payment of a reasonable compensation. *Held*, that the ditches subject to enlargement are strictly private ditches, and therefore a city cannot compel an irrigation company carrying water for sale to its patrons to permit it to enlarge its ditch for the purpose of supplying its citizens with water for the same purposes.

Appeal from district court, La Plata county.

Proceeding by the city of Durango against the Junction Creek & North Durango Domestic & Irrigating Ditch Company and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

This is a proceeding instituted by the city of Durango to enforce the right to enlarge and jointly use a ditch belonging to the Junction Creek & North Durango Domestic & Irrigating Ditch Company. The city predicates its right to the relief sought upon an act of the general assembly approved February 12, 1881 (Sess. Laws, p. 164; Gen. St. 1883, § 1716 et seq.), which provides: "(1) That no tract or parcel of improved or occupied land in this state, shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property, to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch. (2) Whenever any person or persons find it necessary to convey water for the purpose of irrigation through the improved or occupied lands of another, he or they shall select for the line of such ditch through such property the shortest and most direct route practicable, upon which said ditch can be constructed with uniform or nearly uniform grade, and discharge the water at a point where it can be conveyed to and used upon the land or lands of the person or

persons constructing such ditch. (3) No person or persons having constructed a private ditch for the purposes and in the manner hereinbefore provided, shall prohibit or prevent any other person or persons from enlarging or using any ditch by him or them constructed in common with him or them, upon payment to him or them of a reasonable proportion of the cost of construction of said ditch." It appears from the record that the Junction Creek & North Durango Domestic & Irrigating Ditch Company is a corporation organized under the laws of this state for the purpose of building and maintaining the ditch in question, and to carry and conduct the water from Junction creek through the same to persons in North Durango, and to other persons along the line of said ditch, for domestic and irrigation purposes. The object sought to be accomplished by the city in enlarging the ditch is to supply water from the same source, to the same persons, for the same purpose. The court below held that the case was one that fell within the foregoing statutory provisions, and that the city, by virtue thereof, had the right to enlarge and use the ditch jointly with the company, for the purpose mentioned. Upon proceedings duly had, damages were assessed, and final decree rendered.

Russell & McCloskey, N. C. Miller, and F. W. Ingersoll, for appellants. Wilson & McCloskey, for appellee.

GODDARD, J. (after stating the facts). The record is somewhat voluminous, and numerous errors are assigned, but the foregoing statement is sufficient to present the most important, and, as we think, the decisive, question in the case, and that is: Can the city, by virtue of the statute above quoted, acquire the right to enlarge and use the ditch in question for the purpose of supplying its citizens with water for irrigation and domestic use? We think this must be answered in the negative. The owners of ditches subject to enlargement and joint use under the statute are strictly private ditches, and such as are used to convey water across the land of another to irrigate the adjoining land of the person or corporation owning the ditch. This is clearly manifest by the language of the act, and also from its object and purpose. Prior to its enactment, the right to condemn the right of way for separate ditches through the land of another for the purpose of irrigating the land below and adjoining, by persons owning the same, was practically unlimited; and to limit this right, and protect the servient estate from the burden of unnecessary ditches, the act in question was passed. It in no way attempts to confer the right upon persons other than those already described in the prior statute, or to enable them to exercise the right under conditions other than those therein mentioned. Gen. St. § 1712. Section 2 of the act mentioned recognizes that the ditches under contemplation were such only as convey water to be used

upon the land of the person constructing the ditch. The ditch sought to be enlarged in this case does not come within this category, but is used for the carriage of water for hire to the people generally, and is at least quasi public. The company, in its capacity as carrier, is a quasi public servant or agent, and is "charged with what the decisions term a public duty or trust." *Wheeler v. Irrigation Co.*, 10 Colo. 582, 17 Pac. 487. It is clothed with a franchise to convey water from Junction creek to persons in North Durango; and, if the proposed action of the city can be upheld, such franchise would not only be invaded, but virtually destroyed. Whether the city, by virtue of its chartered powers, can condemn the entire ditch and franchise of the company, we are not called upon to decide. We think it clear that it cannot, by condemnation proceedings, acquire the right to enlarge and use it in conjunction with the company. The judgment will therefore be reversed, and the cause remanded, with directions to the court below to dismiss the proceeding. Reversed.

(21 Colo. 185)

**BOARD OF COM'RS OF KIOWA COUNTY
v. DUNN et al.**

(Supreme Court of Colorado. May 6, 1895.)

TAXATION OF CATTLE OF NONRESIDENTS — CONSTITUTIONAL LAW.

1. Act Feb. 1, 1879, § 1, providing that nonresidents grazing cattle in any county in the state shall pay certain fixed sums per head therefor in lieu of taxes on such animals, is void, as conflicting with Const. art. 10, § 3, which declares that "all taxes shall be uniform upon the same class of subjects, * * * and shall be levied and collected under general laws."

2. The charge assessed by Act Feb. 1, 1879, § 1, against nonresidents, for grazing cattle within the state, is a tax for revenue, and not a license tax, and cannot be upheld as a proper exercise of the police power.

Appeal from district court, Kiowa county.

Action by the board of county commissioners of Kiowa county against Dewey Dunn and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

The board of county commissioners of Kiowa county, on the 26th day of September, 1891, filed their complaint in the district court of Kiowa county against the defendants in error, wherein they in substance allege that the defendants in error (defendants below) are nonresidents of the state of Colorado; that they are the owners of 1,904 head of cattle; that about the month of July they brought said cattle into Kiowa county, Colo., and have since said time kept and herded the same in said county for grazing purposes; that, by virtue of the provisions of an act entitled "An act to protect the grazing lands of Colorado from the stock of nonresidents," they were required to pay to the county treasurer of said county the sum of 50 cents per head, and to make, acknowledge, and file with the county clerk of said county a certificate showing the num-

ber of animals so grazed, and the brands of same, before bringing said animals into said county and state; that defendants neglected and refused to pay said 50 cents per head, and failed to cause said certificate to be executed and filed; that as provided in said act, by reason of such neglect and refusal to pay as above set forth, they were required to pay for each head so herded and grazed the sum of \$2; prays judgment for the amount of \$3,808, for costs, etc. To this complaint defendants demurred, because said complaint does not state facts sufficient to constitute a cause of action, because the law under which plaintiff claims its cause of action arises is unconstitutional and void. The court below sustained the demurrer, and dismissed the case, at plaintiffs' costs. To reverse this judgment, this writ of error is prosecuted.

Slade & Torbit, for appellants.

GODDARD, J. (after stating the facts). The only question presented upon this record is the constitutionality of the act approved February 1, 1879, entitled "An act to protect the grazing lands of Colorado from the stock of non-residents." So much of the act as is necessary to be considered in determining this question reads as follows:

"Section 1. Any person or persons being non-residents of this state may keep and herd, for grazing purposes, cattle, horses, mares, geldings, mules, asses, or sheep in any county in this state, for the period of one year thereafter, by first paying to the treasurer of the county wherein the said stock may be kept and herded, the sum of fifty cents for each and every animal so kept and herded in said county: provided, that the sum of twenty cents only shall be collected on each and every sheep so kept and herded as aforesaid: and provided, also, that the said fifty and twenty cents, respectively, shall be in lieu of all taxes upon said animals, whether for county, school or state purposes, during the period preceding the first day of May in each and every year."

Section 5 provides that, upon failure of any nonresident owner of the animals specified in section 1 to pay the amount of money per head as is therein provided, he shall forfeit and pay the sum of \$2 per head for each and every head of stock so kept and herded, except sheep, upon which latter animals shall be forfeited and paid the sum of 50 cents for each and every head thereof, which said sum may be recovered in an action of debt, in the name of the county.

Section 3, art. 10, of the constitution of Colorado provides:

"Sec. 3. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for

taxation of all property, real and personal," etc.

The act in question clearly contravenes this provision of the constitution. It undertakes to tax the stock in question, because owned by nonresidents, in a different manner from which similar property belonging to resident owners is taxed. It is well settled that the property or business of a non-resident cannot be taxed in a different manner or at a different rate than that of a resident. Section 2833 of our revenue act recognizes this, and provides that "all personal property shall be listed in the county where it shall be on the first day of May of the then current year; but if the owner resides out of the state, or fails to return his property to the assessor, it shall be listed and taxed where it may then be: provided, that horses, mules, cattle and sheep, running at large and not being worked, shall in all cases be returned and assessed in the county in which they are being herded or kept on the first day of May in each year." In providing for the taxation of property of a nonresident by a different mode and for a different amount from that of all other property of the same kind when owned by a resident, this act is in violation of the plain mandate of the constitution, and cannot be upheld. It is insisted that, if the act may not be sustained as an exercise of the power to levy a revenue tax, yet it, nevertheless, may be upheld as a valid police regulation imposing a license tax. While a license tax may be levied upon such business or occupations as are proper subjects of municipal regulation and control, and the purpose of such tax is for regulation or restraint, yet, when all the elements of regulation or restraint are wanting, and the primary purpose of the act is the raising of revenue only, then it loses its character as a license tax, and becomes a tax for revenue. "Only those cases where regulation is the primary purpose can be specially referred to the police power." Cooley, *Tax'n*, 397. For this reason the act under consideration cannot be upheld as a legitimate exercise of police power. We think the court below properly sustained the demurrer and dismissed the action at plaintiffs' costs. The judgment is accordingly affirmed. Affirmed.

(21 Colo. 181)

KELLOGG v. KELLOGG.

(Supreme Court of Colorado. May 6, 1895.)
SUIT TO SET ASIDE DEED — UNDUE INFLUENCE—
VERDICT OF JURY—EFFECT.

1. A suit to set aside a conveyance for undue influence, being in the nature of an equity case, the court is not bound by the verdict of the jury therein, and its action in giving or refusing instructions is not subject to review.

2. A conveyance procured from a wife by her husband through threats to take her children away from her, and to prevent her seeing them again, is voidable, as obtained by undue influence.

3. The right to the custody of small children, as between father and mother, depends upon attending circumstances; and, where the father is given such custody the mother has a right to visit them.

Appeal from district court, Garfield county.

Suit by Fannie M. Kellogg against Matthew Kellogg to set aside a conveyance on the ground of undue influence. From a judgment for plaintiff, defendant appeals. Affirmed.

J. L. Hodges and J. W. Dollison, for appellant.

HAYT, C. J. The parties plaintiff and defendant were, at the time of the transaction complained of, husband and wife, and the plaintiff seeks relief from her husband from a conveyance made directly from her to him, on the ground that he exercised an undue influence over her, and thereby acquired an unconscionable advantage. It appears from the evidence that plaintiff and defendant had been living together as husband and wife up to the day before the execution of the deed, when the plaintiff for some reason left the home of the defendant, and, separating herself from him, took lodgings at an hotel near by. She at this time had in her custody and control two small children, the issue of her marriage with the defendant; the eldest being four years of age, and the youngest a mere infant. The defendant, learning of her whereabouts, sought an interview with her, for the ostensible purpose of recovering a suit of clothes that the plaintiff had inadvertently carried away with her effects, and also two deeds belonging to the defendant. It is apparent, however, from the evidence that the main, if not the sole, purpose of this interview was to procure from the plaintiff a deed to the property here in controversy, the same being described as "lots numbered one and two in block G, in the town of Rifle, in Garfield county," this property being the sole and individual property of the plaintiff. At first she objected to deeding the property to the defendant. Thereupon, according to the evidence of the plaintiff and her witnesses, he told her, unless she executed to him a deed to the property, that he would take the children from her, and she would never see them again. Plaintiff states that she was so frightened by this threat that she finally deeded the property to her husband, in order to retain the custody of the children. The defendant denies making threats as claimed by plaintiff, and alleges that the deed was made by the plaintiff as her free and voluntary act. The question of fact thus raised was submitted by the court to a jury by the following interrogatories: "Was the plaintiff induced by threats to execute the deed mentioned in complaint? Was the plaintiff in such distress of mind and heart at the time of the execution of the deed as to affect or destroy the freedom of her will?" Both of these ques-

tions were answered in the affirmative. The findings of the jury upon these questions of fact were adopted by the court, and a decree rendered requiring the defendant to deed the property to plaintiff. There is abundant evidence in the record to sustain these findings, and under the well-settled practice they cannot be disturbed in this court. A reversal of the decree is, however, urged—First, on account of the refusal of the district court to instruct the jury upon the law at appellant's request; and, second, upon the claim that the judgment of the court below was contrary to law.

As to the first of these assignments of error, it is only necessary to call attention to the fact that, this being a case in the nature of an equity case, the action of the jury was simply advisory, and the court, in its discretion, might have modified the findings, or set the same entirely aside, and substituted its own conclusions upon the facts as well as the law. In these cases the giving or refusing to give instructions is within the discretion of the court, and its action in this regard is not subject to review. *Porter v. Grady*, 21 Colo. —, 39 Pac. 1091.

Coming now to the second branch of the discussion, the law is well settled in this state that a married woman may dispose of her property, real and personal, without reference to any restraint or disabilities of coverture imposed by the common law. She may in all respects treat the property as if she were sole, deeding the same directly to her husband without consideration, if she so desires; but such transactions are scrutinized by the courts with great care. In this case the jury found that the deed was forced from the wife by threats made by the husband. It appears that she was not, therefore, free to exercise her own will in the transaction, but acted merely as an agent of the grantee in executing the deed. He, a strong, vigorous man; she, a weak woman, with two small children clinging to her for support. The custody of those children was more precious to her than wealth, and it should not be a matter of surprise that she yielded to his threats, and deeded to him the only property she possessed, outside of her wearing apparel. The evidence shows that the value of this property at the time was not less than \$1,500, while the only consideration paid or promised was the sum of \$10, which he gave her to meet her present necessities. A more unconscionable transaction cannot well be imagined. Courts of equity always interfere to protect the weak against the strong, and relieve from a conveyance for an inadequate consideration, extorted by threats sufficient to overcome the will of the grantor. *Turner v. Turner*, 44 Mo. 535; *Anthony v. Hutchins*, 10 R. I. 165; *Yard v. Yard*, 27 N. J. Eq. 114; *Taylor v. Taylor*, 8 How. 183. It is urged in this case that the father, being the natural custodian of the children, had a right to take

them from the mother, and that his threat to do a thing lawful in itself cannot be made the basis for setting aside a conveyance. In answer to this argument it is to be said: First. That the right to the custody of small children, as between father and mother, depends upon a variety of circumstances, the good of the children being a paramount consideration; and it is not to be taken as undisputed that the father is entitled to such custody in all cases; and, where the custody is awarded the father, provision is made for visits by the mother, while here the threat was that the mother should never again see the children. Second. If it be conceded in this instance that the father had the right to take the children, he cannot justify coercing the mother into stripping herself of all her property upon any such flimsy pretext. It is not pretended that the deed was given in consideration of the custody of the children remaining with the mother. The father was just as much at liberty to claim the children after the deed was executed and delivered as before. The judgment seems to be clearly right, and must be affirmed. Affirmed.

(21 Colo. 109)

LONG v. SULLIVAN.

(Supreme Court of Colorado. April 20, 1895.)

DISMISSAL OF APPEAL—PROCEDURE IN APPELLATE COURT—AMENDMENT OF STATUTE—VALIDITY.

1. Code, § 397, provides that the dismissal of an appeal may, by order of court, be made without prejudice to another appeal or writ of error, but that a dismissal shall operate as an affirmance of the judgment, unless another appeal or supersedeas be taken or allowed within 30 days. *Held*, that plaintiff in an action on an appeal bond is entitled to judgment where the appeal shows that more than 30 days have elapsed since the dismissal of the appeal, and the answer merely denies a failure to prosecute the appeal.

2. Act 1891, §§ 4-6, creating the court of appeals, provides that "writs of error from or appeals to the court of appeals shall lie to review final judgments within the same time and in the same manner" as may be provided by law for such reviews by the supreme court; that certain cases shall be transferred from the supreme court to the court of appeals; and requires that court to adopt rules similar to those of the supreme court. *Held*, that Code, § 397, relating to the dismissal of appeals in the supreme court, applies to those taken to the court of appeals.

3. Const. art. 5, § 24, provides that no law shall be revived or amended, or the provisions thereof extended or conferred, by reference to its title, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and republished at length. *Held*, that the act creating the court of appeals does not conflict with such section because it fails to re-enact and republish certain sections of the Code of Civil Procedure, previously applicable to the supreme court alone, which it makes applicable to the court of appeals.

Appeal from district court, Arapahoe county.

Action by James W. Sullivan against Robert Long as surety on an attachment bond. From a judgment for plaintiff, defendant appeals. Affirmed.

The cause was heard in the district court

upon the amended complaint and answer and motion for a judgment upon the pleadings. This motion was sustained, and judgment rendered in favor of appellant. The defendant brings the case here upon appeal.

The pleadings are as follows: "The plaintiff complains of the defendant, and alleges: (1) That on, to-wit, the 20th day of October, A. D. 1891, at a term of the district court then being holden within and for the Second judicial district in the county of Arapahoe, and state of Colorado, a judgment was rendered in favor of the above-named plaintiff against one W. E. Myers and others for the sum of seventeen hundred and seven dollars and fifty cents (\$1,707.50), and seventy-five dollars (\$75.00) attorneys' fees and costs of suit, and that on the 19th day of December, A. D. 1891, the said W. E. Myers appealed from said judgment to the court of appeals of said state. (2) That upon said appeal the said defendant made and filed with the clerk of the said district court, for the use of the plaintiff, his written undertaking, of which the following is a copy, to wit: "Know all men by these presents that we, W. E. Myers and R. A. Long, of the county of Arapahoe, and state of Colorado, are held and firmly bound unto J. W. Sullivan in the penal sum of three thousand dollars, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at Denver, Colorado, this 14th day of December, in the year of our Lord one thousand eight hundred and ninety-one. The condition of the above obligation is such that whereas, the said J. W. Sullivan did, on the 20th day of October, one thousand eight hundred and ninety-one, at a term of the district court then being holden within and for the Second judicial district in the county of Arapahoe, and state of Colorado, obtain a judgment against the above-bounden W. E. Myers et al. for the sum of seventeen hundred and seven $\frac{50}{100}$ dollars, and seventy-five dollars attorneys' fees and costs of suit, from which judgment the said W. E. Myers has prayed for and obtained an appeal to the court of appeals of said state of Colorado: Now, if the said W. E. Myers et al. shall duly prosecute said appeal, and shall, moreover, pay the amount of the said judgment, costs, interests, and damages rendered and to be rendered against the said W. E. Myers et al. in case the said judgment shall be affirmed in the said court of appeals, then the above obligation to be null and void; otherwise to remain in full force and effect. [Signed] W. E. Myers. [Seal.] R. A. Long. [Seal.]" (3) That the said W. E. Myers has failed to prosecute said appeal, and has failed to pay the amount of said judgment, costs, interest, and damages, and on, to wit, the 28th day of January, A. D. 1892, proceedings were had in the said court

of appeals by which said appeal was dismissed, and a remittitur was issued to the district court of Arapahoe county, and that said judgment is still due and unpaid, to the damage of the plaintiff in the sum of three thousand dollars (\$3,000.00). Wherefore the plaintiff demands judgment against the said defendant in the sum of three thousand dollars (\$3,000.00) for the costs of this action, and for such other and further relief as to the court shall seem proper."

The defendant, for answer to the amended complaint herein, "denies that the said Myers failed to prosecute said appeal mentioned in said complaint; but defendant avers that said appeal was duly prosecuted, and that there was no judgment rendered or to be rendered against the said Myers in the said court of appeals, and that the said judgment theretofore rendered by the district court was not affirmed by the court of appeals. The costs of the court of appeals have all been paid by the said defendant. Wherefore defendant asks that said suit be dismissed at the cost of the said plaintiff."

J. P. Brockway and Robert Given, for appellant. O'Donnell & Decker, for appellee.

HAYT, C. J. (after stating the facts). The condition of the bond is that the appeal shall be duly prosecuted, and the amount of the judgment of the district court paid, with costs, in case such judgment shall be affirmed. It is alleged in the complaint that the appeal was dismissed from the court of appeals, and a remittitur issued by that court to the district court. Section 397 of the Code provides: "The dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error; but unless another appeal or supersedeas be taken or allowed within thirty days after such dismissal, the dismissal of an appeal or writ of error shall operate as an affirmance of the judgment of the trial court." The complaint, which was not filed until April 11, 1892, alleges that the appeal was dismissed by the court of appeals on the 28th day of January, 1892. It is thus shown that more than 30 days had elapsed after the dismissal of the appeal before the bringing of the present suit, and hence, by the very terms of the statute, the dismissal amounted to an affirmance of the judgment of the district court, and the liability of appellant upon his bond attached, unless it appears that another appeal or supersedeas was taken or allowed within 30 days after such dismissal. It was not necessary to allege in the complaint that no appeal had been taken within the 30 days, as this was a matter of defense which should have been pleaded by the defendant. Whether this appeal was duly prosecuted or not is immaterial, as it sufficiently appears from the pleadings that the judgment of the district court was affirmed, and it would not, therefore,

avail the defendant if it be admitted that he prosecuted the appeal with due diligence. It is contended that section 397 of the Code has no application to the court of appeals. This contention is based upon two propositions: First, that the act creating the court of appeals does not, in terms, attempt to make the section applicable in cases appealed to that court; and, second, that if it does so attempt, the statute is in violation of section 24 of article 5 of the state constitution: "Sec. 24. No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length." A conclusive answer to the first proposition is to be found in the act creating the court of appeals. This act was passed for the purpose of relieving the overburdened docket of this court. The first section of the act limits the right of this court to review the final judgments of inferior courts in certain cases. Section 2 creates the court of appeals; section 3 provides for the appointment of the judges; section 4 for the jurisdiction of that court, and contains, *inter alia*, the following clause: "Writs of error from, or appeals to, the court of appeals shall lie to review final judgments, within the same time and in the same manner as is now or may hereafter be provided by law for such reviews by the supreme court." Section 5 makes provision for the transfer of certain cases from the supreme court to the court of appeals; and section 6 requires the court of appeals to adopt rules, but that the same shall be similar to the rules of the supreme court, so far as practicable. These sections of the act show beyond controversy that it was the intention of the legislature to provide a practice for the court of appeals similar to the practice in the supreme court. This conclusion also finds support in those provisions of the act which allow certain cases to be transferred from the supreme court to the court of appeals, and certain other cases to be transferred from the court of appeals to the supreme court. This transfer of cases from one court to the other presents of itself a strong argument in favor of the uniformity of practice contended for by appellee.

Is the act inconsistent with section 24 of article 5 of the constitution? The section is a part of the Code of Civil Procedure of the state of Colorado, entitled "An act for an act to provide a code of procedure in civil actions for courts of record in the state of Colorado, and to repeal all acts inconsistent therewith." Laws 1887, p. 97. The act contains 445 sections, and is the general law of this state governing practice in civil cases. If appellant's contention be sustained, then, every time a new court is created, the entire Code must of necessity be re-enacted to make it operative in such court, and our al-

ready cumbersome statutes would be increased in volume until it would be difficult to ascertain the law upon a given subject. Certainly, this ought not to be required, if, under any reasonable construction, a different conclusion can be reached. If the question were a new one in this state, the hardship and expense that would result from such a conclusion should be given weight; a fortiori, must importance be given to this in view of the fact that a contrary construction has been indulged by the legislative and executive departments from the inception of the state government, and the practice sanctioned by repeated decisions of this court. To now reverse this practice would destroy the efficiency of many of our courts, and unsettle judgments that have up to this time been accepted without question. The argument of counsel in this case is the same as that made by him in the case of *Railroad Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714. The court then went into an elaborate discussion of the subject, the purpose, object, and meaning of the constitutional provision, in an endeavor to show that the position of counsel was not supported by sound reason, and found no indorsement in the adjudicated cases. It would be idle to repeat, and of no benefit to attempt to enlarge upon, the reasons advanced by Chief Justice Beck, the writer of the opinion in the former case. The doctrine in that case was not entirely new in this state, as it had previously received the sanction of this court in response to a legislative question. In *re House Bill*, 9 Colo. 625, 21 Pac. 472. The constitution of the state of New York contains a provision in effect the same as the provision invoked in this case. It reads: "No act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act." Const. N. Y. art. 3, § 17. The court of appeals of that state, in the case of *People v. Banks*, 67 N. Y. 568, say: "Reference is made to such laws, not to affect or qualify the substance of the legislation or vary the terms of the act, but merely for the formal execution of the law. * * * It would be a serious evil to compel the ingrafting upon and embodying in every act of the legislature all the forms and the details of practice which may be necessarily resorted to to carry any one statute into effect, when the same proceedings are provided for by the General Statutes of the state, and are applicable to hundreds of other cases, and with which the legislators may be supposed to be reasonably familiar. This objection we think not available to the defendant." The same conclusion was reached in *Re Union Ferry Co.*, 98 N. Y. 139. The judgment of the district court must be affirmed. Affirmed.

(21 Colo. 144)

AIRY v. PEOPLE.

(Supreme Court of Colorado. April 20, 1895.)

COUNTY OFFICERS — COMPENSATION — FEES AND SALARY—VALIDITY OF ACT—CLASSIFICATION OF COUNTIES.

1. Sess. Laws 1891, p. 307, entitled "An act to provide for the payment of salaries to certain officers, to provide for the disposition of certain fees," etc., and fixing the salaries of certain public officers, and providing for the disposition of the fees collected for services performed in their official capacities, is not unconstitutional, as embracing more than one subject.

2. Const. art. 14, § 15, providing that the general assembly shall by "law" fix the compensation of certain officers, according to the population within their respective counties, and that "such law" shall fix the scale of fees to be charged, does not require that the assembly shall fix such fees and salaries by one "act."

3. Const. art. 14, § 15, providing that the general assembly shall classify the counties of the state according to population, and fix the salaries of certain officers within their respective counties, and also providing that such law shall fix the scale of fees to be charged for their services, does not require the classification for fixing both fees and salaries to be made by the same method, and thereby render unconstitutional Sess. Laws 1891, p. 307, because, in fixing the salaries of the officers in a certain county, it was placed in the fourth class, whereas it should have been placed in the third class, if the classification had been made according to the federal census by which the scale for fees was fixed.

4. Sess. Laws 1891, p. 200, providing for a scale of fees to be charged by public officers for their services, a number of the provisions of which, as contained in the bill as passed by the house, were omitted after its introduction into the senate, was not passed in violation of Const. art. 5, § 17, providing that the original purpose of a bill shall not be changed in its passage through either house.

5. Only persons whose rights are affected by the provisions of an act can question the constitutionality of such provisions.

6. Under Const. art. 14, § 15, providing that certain public officers shall be compelled to pay over all fees "above the amount" of their salaries, the general assembly can only compel such officers to pay into the treasury the fees collected by them in excess of their salaries, and therefore Sess. Laws 1891, p. 307, in so far as it requires all of such fees to be paid into the treasury, from which fund the salaries of the officers are to be paid, is invalid.

Error to La Plata county court.

James P. Airy was convicted of failing to pay into the county treasury fees collected by him for official services, and brings error. Reversed.

Prior to the year 1891, in this state, the only compensation given to county and precinct officers, with the exception of county assessors, was the fees prescribed by the legislature, and collected by such officers in the discharge of their official duties. In response to a general demand of the people for the substitution of the salary for the fee system, and for a reduction of the fees to be collected by such officers, the Eighth general assembly passed two acts—one relating to fees, the other to salaries. The salary act is the one in question here, but the nature of the objections urged against it is such that both must necessarily be considered in this opinion in or-

der to make clear our position. The titles of these acts, being material to the discussion which will follow, are given here in full. That of the former is "An act concerning fees, providing penalties for violation of this act, and to repeal all acts and parts of acts in conflict with the same." Sess. Laws 1891, p. 200. That of the latter is "An act to provide for the payment of salaries to certain officers, to provide for the disposition of certain fees, and to repeal all acts inconsistent therewith." Id. p. 307. By the former act, all the counties of the state were divided into five classes, according to population as ascertained by the federal census of the year 1890. The fees prescribed under each class are different from the fees under any of the others, and a material reduction in the amount of charges was made from that which theretofore prevailed. By the latter act, salaries were provided for district attorneys, and for county and precinct officers named therein. Sections 4, 5, 6, and 19 to 25 thereof relate more particularly to the subject of fees than to that of salaries. Section 20 provides that the officers named therein, while receiving salaries, shall make to the chairman of the board of county commissioners a report in writing, under oath, on the first Monday of each month, of all the fees, commissions, and emoluments of their office, of every name and description whatsoever, and of all necessary expenses of clerk hire and other expenses, for the month ending at the time of said report. Section 22 provides that the fees collected by the county officers shall be paid over to the county treasurer, and shall be kept by him in separate funds, and the salaries fixed by the act shall be paid out of said funds, and no others, upon warrant drawn upon the county treasurer to the credit of the officer entitled thereto. Section 24 provides a penalty for the failure of an officer to pay over to the county treasurer the fees so collected. The plaintiff in error in this case was elected county clerk and recorder of La Plata county in 1893, and entered upon the discharge of his duties as such in January, 1894. Up to the 7th day of May, 1894, he had collected as fees of his office \$1,200. At no time did he make any report, as provided by section 20; nor did he pay over to the treasurer of the county any of the fees charged and collected by him, as provided for by section 22. For failure to comply with the two sections, the district attorney filed against the plaintiff in error an information containing two counts, the first of which charged him with the violation of section 20, in that he failed to make the report therein provided for; the second count charged him with the violation of section 22, in that he failed to pay over to the county treasurer the fees of his office theretofore collected by him. A demurrer to the indictment was overruled by the court, and upon trial the defendant was convicted under both counts, and sentenced under each to confinement in the county jail for 15 days.

Russell & Ritter, H. B. O'Reilly, and Joseph C. Helm, for plaintiff in error. Eugene Engley and Byron L. Carr, Atty. Gens., and H. T. Sale, F. P. Secor, Galbreath & Searcy, and Arthur Cornforth, for the People.

CAMPBELL, J. (after stating the facts). The defendant comes here from that sentence by writ of error, his assignments of error containing numerous specifications. He is represented here by different counsel; and, while they all argue that the salary act is unconstitutional, they do not altogether agree as to what provisions of the constitution are violated, nor are they in harmony as to the reasons therefor.

It is urged by one counsel that the act is in conflict with section 15 of article 14 of the constitution, (1) in that the principle of classification laid down therein was not observed; (2) because all provisions for fees and salaries must be included in one act, and this is not complied with in the act in question. By another counsel it is contended that the act violates the same principle of classification, and that, as it contains provisions for salaries and disposition of fees, it is in violation of section 21 of article 5 of the constitution, in that not only the body of the act, but the title, contains more than one general subject. All of defendant's counsel contend that on its passage through the senate the title of the bill and the bill itself were so amended as to change the original purpose of the bill as it was introduced in the house. The three sections of the constitution, therefore, to which our attention has been called, and the determination of which must decide this case, are: First, section 21 of article 5; second, section 15 of article 14; and, third, section 17 of article 5; and they will be considered in the order named.

The substance of section 21 is that no bill shall contain more than one subject, which shall be clearly expressed in its title. Section 15 is as follows: "For the purpose of providing for and regulating the compensation of county and precinct officers the general assembly shall by law classify the several counties of the state according to population, and shall grade and fix the compensation of the officers within the respective classes according to the population thereof. Such law shall establish scales of fees to be charged and collected by such of the county and precinct officers as may be designated therein for services to be performed by them respectively; and where salaries are provided, the same shall be payable only out of the fees actually collected in all cases where fees are prescribed. All fees, perquisites and emoluments above the amount of such salaries shall be paid into the county treasury." Section 17 is that no bill shall be so altered or amended on its passage through either house as to change its original purpose.

Let us consider the first objection in the light both of reason and authority. We con-

cede that, when the legislature elected to treat of fees and salaries in two separate acts, it would be more consistent with its purpose, more logical in method, and more scientific in arrangement to observe this distinction throughout in both acts, and in these particulars to maintain the order into which the general subject thus naturally divides itself. But, desirable as it is to preserve an orderly arrangement and a scientific method in our statute law, yet if, in the enactment of laws, no provision of the constitution is violated by the legislature in selecting methods which flagrantly violate the sense of mathematical accuracy and scientific classification, this court must relegate to the legislature the determination of such questions, and uphold the constitutionality of such enactments. What, then, is the general subject of which the legislature under this salary act has treated? It is clearly the compensation of the public officers named therein. In providing for the compensation of public officers, it is competent for the legislature, not only to provide for their salaries, but also to provide the means whereby such salaries may be paid. Fees and salaries, therefore, are clearly but branches or subdivisions of the general subject of the compensation of public officers. An act entitled "An act to provide for the compensation of public officers" would certainly be broad enough and specific enough to embrace not only provisions for the amount of fees which they might collect and disburse, but also provide salaries for their services to be paid out of the fees collected. If this act had read "An act to provide for the compensation of certain officers, to fix their fees, and prescribe their salaries," we think that only one general subject would be embraced therein, and that is the compensation of public officers, and the first clause of the title would include the other two. The title of this act is one that relates to the payment of salaries and the disposition of fees. It is a fact of which we are bound to take judicial notice that, before this act was passed, there was upon the statute books legislation which authorized officers to collect fees for certain services which, in their official capacities, they performed. The title of this act, as it was passed, provides for the payment of salaries and the disposition of fees. But we think that the act itself might properly have embraced provisions regulating the disposition of fees to be collected by such officers, even though the title itself had not contained the latter clause. We can see no objection, therefore, to one act, containing provisions not only for the payment of salaries, but provisions, also, for the disposition of fees out of which such salary shall be paid; nor can we see any objection to including in the title references to fees as well as to salaries. By way of illustration, take our municipal corporation act, which is entitled "An act in relation to municipal cor-

porations." Under this general title are various articles and subdivisions of the main subject, such as specifying the powers of the corporation, the mode of incorporation, the method for the dissolution of the corporation, and the subdivisions specifying the manner in which ordinances shall be passed. It is true the title of that act is much broader than the title of this salary act; but, for example, suppose that the legislature desired in one act to provide only for the mode of incorporation of a municipality, to specify its general powers and duties, and the manner of its dissolution. Could it not do so without at the same time providing for the various other matters and things which directly pertain to, and are connected with, and naturally germane to, the general subject of municipal corporations? If it could so treat of these three branches or subdivisions of the main or general subject, it would necessarily follow that it might do so under an act entitled "An act to provide for the mode of incorporation, to specify the powers and duties, and to provide for the method of dissolution of municipal corporations." Here would be three branches or subdivisions of the general subject of municipal corporations embraced in one title, and legislated about in one act; but we think, without question, that only one general subject is embraced in the title and included in the act. So in the act before us, while the general subject is the compensation of public officers, two subdivisions or branches of that subject, naturally connected and germane each to the other, and both to the general subject, are expressed and embraced in the title to this act, and included in the act itself.

We are, however, not without authority directly in point in some cases, and clearly analogous and substantially the same in principle in others. In *State v. McCann*, 4 Lea, 1, the supreme court passed upon an act entitled "An act to regulate and equalize the salaries of certain public officers." It provided that certain officers, whom the act itself named, shall thereafter receive as compensation for their services certain salaries. Theretofore, they had collected certain fees for the performance of their duties, and retained them as compensation for their services. The act provided further that the fees which were collected by such officers should be reported, if by state officers, to the state comptroller; if by county officers, to the county judge,—and further required such officers to pay over to the comptroller or county trustee any amount in excess of the salary fixed by the act. In Tennessee there is a constitutional provision like section 21 of article 5 of our constitution. This act, it is true, was held unconstitutional by the supreme court of Tennessee upon other grounds; but upon the question we are considering here the court says that in the act whose general subject is the equalizing of salaries both the subordinate subjects of fees

and salaries may properly be embraced, holding that the act did not contain two subjects, but only two branches or subdivisions germane to and naturally connected with the main subject. In *Gunter v. Dale County*, 44 Ala. 639, it was held that "An act to suppress murder, lynching, and assaults and batteries" was not obnoxious to an article of the constitution which is like our section 21. Of this law the court says: "It contains but one subject, though it deals with several branches of that subject, but they are all attingent and cognate to one subject-matter,—the suppression of certain offenses." A case, however, in this particular directly in point, is *Henderson v. State* (Ind. Sup.) 36 N. E. 257. The act there under consideration was entitled "An act fixing the compensation and prescribing the duties of certain state and county officers, and providing penalties for the violation of its provisions." In considering this act, which provided for the fixing of salaries of state, county, and judicial officers, prescribing their duties, and the fees to be taxed for services performed by them, it was held by the supreme court of Indiana that it does not violate a section of the Indiana constitution which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be included in the title." This is a very instructive case, and, although there was a dissenting opinion by one of the judges, we think that the opinion of the court is a complete and satisfactory answer to the objection urged here to the unconstitutionality of our salary act. It will be observed that the title of the Indiana act was to fix the salaries of certain officers, but contained no reference to fees; and yet the court held that the fees to be collected by such officers might be included in the act, although not specifically mentioned in the title. So with this salary act. The clause thereof "to provide for the disposition of certain fees" might be omitted from the title, and certainly the title of the act would then contain but one subject, viz. salaries; still the act might, under the decision in the *Henderson Case*, supra, and as we think without question, properly contain provisions for a disposition of the fees collected by such officers, providing that they should make a report of such fees to any designated county or state officer, and requiring such fees (certainly in excess of the amount of their salaries) to be paid into the county treasury. In *re Breene*, 14 Colo. 401, 24 Pac. 3, in effect sustains the validity of this act. For other authorities, see *Cooley*, Const. Lim. (6th Ed.) 173, and cases cited. The supreme court of Indiana, in the subsequent case of *State v. Boice*, 39 N. E. 64, held certain sections of this act unconstitutional, but not for the reason here urged. It was because of an improper classification of the counties, which objection, also urged here, we now proceed to consider.

As to the second objection, it is argued that under section 15, because of the use of the

word "law," the legislature must fix the fees of county and precinct officers, and provide for their salaries in one act; and that, when the legislature presumed to pass one act for the fixing of fees and another act providing for the salaries of the officers to be paid out of such fees, it violated the rule prescribed by this section of the constitution. In the first place, it may be said that the unconstitutionality of one act in no sense can depend upon the unconstitutionality of another act of the legislature. In the second place, the word "law," as used in this section, is not synonymous with "act." The law means here law in a general sense,—whatever has been enacted by the legislature, whether it is embodied in one act or in any number of acts; and, so far as the use of the term "law" in this section is concerned, it cannot be construed as compelling the legislature to embody in one act provisions for fees and salaries. It may also be said that the classification provided for in section 15 may or may not be applicable to both fees and salaries. The legislature of Indiana, in carrying out the provisions of a somewhat similar section of its constitution, made a classification of counties in accordance therewith for the purpose of providing salaries; but for the purpose of fixing fees there was no such classification made, the fees in each being the same as the fees prescribed in every other county in the state. But our section certainly applies to the classifying of counties as to fees, and, for the purposes of this case, we will assume that counties are also to be classified for the purpose of providing salaries. But there is nothing in the section which makes it imperative upon the legislature to make the same classification of counties for both purposes. In other words, the classification of the counties for the purpose of fixing fees may be made and based upon the population ascertained by one method, and the classification of the same counties for salaries upon another or different basis. In the fee act the legislature expressly says that the classification of the counties is made upon the basis of the population ascertained by the federal census of 1890. In the salary act the classification of the counties for the purpose of providing salaries is based upon population, but it is not asserted that the population was ascertained by the federal census. Possibly, in a case of this sort, if there was a clear, palpable, and flagrant classification of counties made, not according to population, but clearly in violation of this principle, the court might say that the legislature had made an improper ascertainment, and therefore substitute for its determination the determination of this court.

We are cited in this connection, among others, to the case of *State v. Boice*, supra, which held unconstitutional an act of the legislature which, inter alia, purported to classify counties according to population for the purpose of providing salaries for the county treasurers of all the counties in the

state. The act thus attempting to make the classification omitted Shelby county; and the court held that by doing so the law became in effect a special or local law, and was prohibited by that section of the constitution which forbids the passing of a special or local law when a general law can be made applicable. From this it is argued here that inasmuch as the classification of counties under the salary act is not in accordance with the classification under the fee act (which latter was admittedly made upon the basis of population as shown by the federal census of 1890), and is irregular and unjust in that, in one particular at least, a certain county is placed in the fourth class, whereas it should be placed in the third class, because it contains a larger population than some of the counties assigned in the third class, and by the federal census was larger in population than the other counties which were placed in the fourth class, this classification is the same as no classification at all, or the same as if the legislature had omitted therefrom one or more counties of the state. We do not concede the soundness of this argument. As was said by the supreme court of Indiana: "We know judicially that the population of the omitted county [here, the county alleged to be improperly classified] entitled it to be classified among the counties whose treasurers were given compensation by the act; yet we do not intimate that we could know, or that we have authority to determine, to the exclusion of the legislative decision, as to what class said county should have been assigned, or what the compensation should have been." There is no requirement in section 15 of article 14 which compels the legislature to make the salaries of officers in counties of any particular class different from, greater or less than, the salaries of officers in any other class. For aught that the constitution provides, the legislature might, for example, give to a treasurer in counties of the second class the same salary that is given to a treasurer in counties of the first class; or to a county clerk or sheriff in counties of the fourth class the same compensation that such officer is given in counties of the second class. This being so, there could be no injury to an officer of such alleged misclassified county; and the irregularity complained of being of such comparatively trifling importance, and it being doubtful if the court could substitute for, and make its decision superior to, the legislative decision of this primarily legislative question, we hold that the classification of the counties under the salary act does not violate the provision of the constitution under which it purported to be made. *Longan v. County of Solano*, 65 Cal. 122, 3 Pac. 463.

The third objection is that this act is obnoxious to section 17 of article 5, in that the original purpose of the act, as it was introduced into the house, was changed on its passage in the senate. This contention is based

upon the fact that many of the provisions in relation to fees as contained in the bill as introduced in and passed by the house were omitted from the bill as passed in the senate and concurred in by the house. The principle of this decision wherein it is held that the bill is not obnoxious to section 21 of article 5 sufficiently answers this objection, and in no sense can it be held that the original purpose of the act when introduced as a bill was changed on its becoming an act.

There are a number of other objections urged against the constitutionality of this act, but upon the principle that only the one whose rights are affected by the determination of these questions, and who has some right to and interest in the defeat of the act, can raise them, we do not at this time consider them; nor do we intimate one way or the other what will be the decision of this court when such questions are properly raised in proper proceedings and by proper parties.

There remains one question to be considered; and that is whether or not the plaintiff in error, as county clerk, was obliged to pay into the county treasury the total amount of the fees collected by him before he ascertained whether the amount so collected would be in excess of his salary as fixed by law. Section 15 of article 14 provides that, where salaries are provided, the same shall be payable only out of the fees actually collected in all cases where fees are prescribed, and all fees, perquisites, and emoluments above such salary shall be paid into the county treasury. La Plata county, under the salary act, is placed in the fourth class. The annual salary of plaintiff in error was fixed by the act at \$1,800. When the information was filed, the clerk had collected, according to the charge, only \$1,200. At that time there were no fees in his hands, nor had he collected fees equal to the amount of his salary. Therefore, there was no excess or surplus of fees above his salary to be turned over to the county treasurer. We hold that, under this constitutional provision, the officers named are not obliged to pay over to the county treasurer any of the fees collected by them until after the amount of such fees equals the amount of salary fixed by the act; in other words, that it is only the excess or surplus of fees above salaries which by the constitution and this act belongs to the county, and which only the legislature can compel the officers thus to turn over and pay into the treasury. Such being the case, at the time this information was filed there was no ascertainment, or, rather, there was an ascertainment that the amount of the fees collected was less than the salary fixed, and the clerk had a right to retain them. This does not, however, render nugatory those provisions of the act which require the officer to make a report and keep an account of the fees collected, to enable the county commissioners to determine what amount of fees has been collected, and

when the salary has thereby been paid, so that thereafter any fees collected properly should be turned over into the treasury. We think it an insufficient answer to say that the act of the legislature provides that all fees shall be turned over into the treasury, and that the salary of the officer shall be paid out of such fund thereby created, by warrants drawn upon the treasurer, and thereby the same results are reached as if the officer paid himself out of his own fees, because the constitution has expressly provided what amount of the salary shall be thus turned over. By necessary implication, it follows that the fees collected belong to and are the property of the officer until the amount thereof equals his salary, and that the legislature cannot require the officer to pay into the county treasury any part of the fees collected other than that specified as in excess of the amount of his salary. Under this holding, the defendant was improperly convicted upon the first count of the information. With respect to the second count, which charges the violation of section 20 of this act, which requires the officer to make a report, it is sufficient to say that no penalty has been provided for the violation of said section; and, as the act does not make such failure to report a crime or misdemeanor, the conviction of the defendant thereunder was unwarranted.

The judgment and sentence of the court should be reversed, and the cause remanded, with instructions to dismiss the information. Reversed.

(21 Colo. 156)

SARGENT v. BOARD OF COM'RS OF LA PLATA COUNTY.

(Supreme Court of Colorado. April 20, 1895.)

APPEAL—OBJECTIONS NOT RAISED BELOW—SHERIFF'S FEES.

1. An objection that a statute is unconstitutional because the manner prescribed by the constitution was not observed by the legislature in its passage, cannot be raised for the first time in the appellate court.

2. Under Laws 1891 (Fee Act) § 4, providing that a sheriff shall be entitled to mileage for each mile actually and necessarily traveled in serving process, the sheriff is entitled to such mileage whether the service is performed by himself or his deputy; and, if by the latter, the sheriff must compensate him.

3. Horse hire and meals for a deputy when serving a venire for jurors should be allowed if they were necessary traveling expenses paid.

4. The payment by a county for services rendered by a sheriff at a preliminary examination before a justice of the peace is left to the discretion of the county commissioners. *Mills' Ann. St.* § 699.

5. There is no statutory authority for allowing a per diem fee to a sheriff for attendance before a justice of the peace at the trial of a criminal action.

6. Service by a bailiff or deputy sheriff with a petit jury should be paid by the county as a part of the expenses of the court, and is not to be deducted from the amount to be paid to a sheriff for his deputy's salary.

7. Under Fee Act 1891, § 4, a sheriff is entitled to 10 cents mileage on the aggregate number of miles, coming and going, traveled in serv-

ing a mittimus, and to 20 cents mileage for the number of miles traveled while the sheriff has a prisoner in charge, for transporting him.

8. Neither under the Fee Act 1891, § 4, allowing sheriffs for transporting prisoners, in addition to mileage, actual expenses necessarily incurred, nor under the Salary Act 1891, § 11, allowing actual traveling expenses, can a sheriff traveling on a free pass charge the county for his railroad fare.

9. The mileage prescribed by the Fee Act, § 4, for serving any process, is intended solely as a part of the compensation for such services, all of which is to be applied to the payment of the salary; and the actual traveling expenses of a sheriff provided for in the Salary Act, § 11, are separate from and in addition to that prescribed in the fee act.

10. The county is liable to a sheriff for his railroad fare when he pays the same, being part of the actual expenses necessarily incurred, although he has a railroad pass, which he does not use.

11. Under Fee Act, § 4, allowing 20 cents mileage for transporting prisoners, the sheriff is entitled to recover for such mileage for conveying a prisoner from the place of arrest to the place where the trial was to be held.

12. Where a sheriff has traveled a wearisome journey of 350 miles with a prisoner in charge, the cost of a sleeping-car ticket on his return journey during the night is properly chargeable against the county as a necessary expense.

Error to La Plata county court.

Action by Draper C. Sargent against the board of county commissioners of La Plata County for sheriff's fees. From a judgment against him, plaintiff brings error. Reversed.

The sheriff and the board of county commissioners of La Plata county disagreed as to the amount of fees to which the sheriff was entitled, and this case, embracing such differences, was submitted to the county court upon an agreed statement of facts, accompanied by the proper affidavit of merit. It involves the construction of an act of the legislature concerning fees, which was approved on the 6th of April, 1891 (see Sess. Laws, p. 200), and a portion of the salary act approved on the same day (Id. p. 307). There are seven causes of action set up in the complaint, each being for the recovery of fees alleged to have been earned by the plaintiff in error (plaintiff below) in his official capacity as sheriff of La Plata county. It is conceded that the sheriff performed the services in question. The only dispute is as to the amount of his compensation. Such additional facts as are necessary to an understanding of the case will be stated in the opinion, and it will tend to clearness briefly to state the different causes of action separately, and then consider the controverted items in one discussion.

First Cause: "(1) For transporting prisoners from Durango to Canon City, 350 miles, at 20c. per mile, \$70.00; (2) for mileage in serving mittimus, from Durango to Canon City and return, 700 miles, at 10c per mile, \$70.00; (3) railroad fare for prisoner from Durango to Canon City, \$19.10; (4) railroad fare for sheriff from Durango to Canon City and return, \$38.20; (5) sleeping-car fare for sheriff from Canon City to Durango, \$3.50."

Of this bill there were allowed and paid by the commissioners (which action was approved by the county court) all of the foregoing items, except the fourth, fifth, and one-half of item No. 2.

Second Cause: "(1) Paid by sheriff to his deputy for serving a special venire for jurors in a court of record, in a criminal case, \$2.00; (2) paid for horse hire for deputy in serving said venire, \$7.50; (3) paid for meals of deputy while serving venire, \$.70." The county commissioners allowed and paid to the sheriff the fees and the mileage which the statute prescribed for serving such writs, but the three items set out above were disallowed; both of which rulings the county court affirmed.

Third Cause: "(1) For similar items to those embraced in the second cause of action, \$8.20; (2) mileage in transporting a prisoner 38 miles at 20c. per mile, \$7.60; (3) mileage in serving a subpoena, 38 miles at 10c. per mile, \$3.80; (4) mileage in serving warrant of arrest, 38 miles at 10c. per mile, \$3.80." Items 3 and 4 were allowed; 1 and 2 were disallowed. In this case all of the fees which were allowed were ordered by the county commissioners, and so ordered by the county judge, to be turned over to the county treasury.

Fourth Cause: The fees embraced in this bill were for services rendered by the sheriff at a preliminary examination before a justice of the peace, and were disallowed by the board and the court.

Fifth Cause: The fee claimed was for one day's attendance by the sheriff before a justice of the peace in a trial of a criminal action, and was disallowed by the board and the court.

Sixth Cause: "For one day's services of a bailiff with a petit jury in a court of record, \$3.00." This bill was allowed, but the amount ordered to be turned over by the sheriff to the county treasurer. The sheriff was charged therewith, and the amount was deducted from the amount to be paid the sheriff for his deputy's salary for the year 1893.

Seventh Cause: For the same class of services as those embraced in the first cause, except that here the railroad fare for which the sheriff put in his bill was, as a matter of fact, paid by him, although at the time he had a free pass over the railroad. The board of commissioners disallowed this claim, but the court allowed it.

From the judgment against him on the whole case the sheriff is here upon writ of error.

Russell & Ritter, W. A. Reese, and Wells, Taylor & Taylor, for plaintiff in error. Galbreath & Searcy and Arthur Cornforth, for defendant in error.

CAMPBELL, J. (after stating the facts). The plaintiff in error for the first time urges in this court that the fee act is unconstitutional, in that the manner of its passage, pre-

scribed by the constitution, was not observed by the legislature; but this point was not raised in the court below, nor is it preserved in the record, or in the assignment of errors. Under the decision of *Mareau v. Stanley* (Colo. Sup.) 39 Pac. 1086, plaintiff in error cannot now be heard to make this objection. Hence the questions to be determined in this controversy involve merely the construction of section 4 of the fee act and section 11 of the salary act. The provisions applicable to this case are as follows: From said section 4: First. "Milage for each mile actually and necessarily traveled, in serving each writ, subpoena or other process, in counties of the * * * fourth class, ten cents." Second. "For transporting prisoners, besides actual expenses, necessarily incurred, per mile, in counties of the * * * fourth class, twenty cents." From section 11 of the following two excerpts: Third. "The sheriffs in the several counties in this state shall receive as their only compensation for their services rendered, an annual salary, to be paid quarterly out of the fees, commissions and emoluments of their respective offices, and not otherwise." Fourth. "In counties of all other classes [than those of the first class] he [the sheriff] shall be allowed actual traveling expenses which shall be paid out of and not exceeding a mileage at the rate of ten cents per mile, actually and necessarily traveled in the performance of duty." It must be remembered that in the discharge of his official duties the sheriff gets no per diem except for his attendance upon courts of record when in session, and even this is to be accounted for by him, and turned into his fee fund. He gets a salary, but whether or not that salary is paid depends upon whether the fees to be charged and collected by him will, in amount, be sufficient therefor. The fees which he is entitled to charge under the fee act are certain compensation by way of lump sums for the doing of the various things required of him, and mileage at a certain rate per mile necessarily traveled in the performance of such duties. There are many services performed by the sheriff, for which, if the fee act alone is considered, he gets either no compensation at all, or a fee less in amount than the actual cost to the sheriff in the rendering of such service. A large part of a sheriff's official duty consists in summoning jurors, serving process upon parties, and subpoenas upon witnesses in civil and criminal cases. To do this he must travel, frequently in counties where there are no railroads, and where the actual traveling expenses exceed the compensation which the fee act prescribes for such services. The fees for transporting prisoners and for certain other duties as prescribed in this act were doubtless based upon this fact, known to the legislature; and, while the compensation in a given case may seem disproportionately large to the service rendered in that case, yet, considering the fact to which we have just adverted, and the general nature and scope of the sheriff's offi-

cial duties, the fees prescribed in this act, together with the provision for traveling expenses found in the salary act, may be considered as a fair way of equalizing his compensation.

Bearing these considerations in mind, we will proceed first to dispose of the controverted questions embraced in causes of action Nos. 2, 4, 5, and 6.

1. Under the second cause of action, the sheriff was paid by the county the fee and mileage prescribed by the fee act for serving a venire for jurors. A deputy sheriff served the writ. The compensation prescribed is given for the service, whether performed by the sheriff or his deputy; and out of such fees the sheriff must, if the writ is served by his deputy, compensate the latter. The first item was properly disallowed. The second and third items, if they were necessary parts of the traveling expenses paid, should have been allowed, but the facts given are too indefinite to enable us to pass upon this question.

2. Services such as were rendered and described under the fourth cause of action relate to a preliminary examination before a justice of the peace, and the costs thereof are to be paid or not by the county commissioners, in their discretion; and we are not at liberty to review the same. *Mills' Ann. St. § 699; Sess. Laws 1889, p. 100; Board v. Graham, 4 Colo. 201.*

3. The fee claimed by the sheriff as stated in the fifth cause of action was for one day's attendance by him before a justice of the peace in the trial of a criminal action. While a constable is allowed a per diem for his attendance at a trial before a justice of the peace, we find no statutory authority for giving to the sheriff any such compensation. He is allowed his per diem for attendance before a court of record, but not before a justice of the peace.

4. As to the sixth cause of action, it appears that at the trial of a criminal action in a court of record a bailiff was appointed to attend the jury in its deliberations. Three dollars were allowed by the board of commissioners as a per diem for such services; but this amount was ordered by the board to be covered into the county treasury, and the same was to be deducted from the amount to be paid to the sheriff for his deputy's salary for the year 1893. The county court, however, ruled otherwise, and held that the sheriff was not to be charged therewith. The construction put upon this by the commissioners necessarily makes of the bailiff a deputy sheriff, and puts him on a salary. Such is not a fair interpretation. The bailiff frequently, as a matter of fact, is not a deputy sheriff. No salary is provided for him by the statute, and only a per diem is allowed, and this only while he serves as a bailiff. Even if the bailiff was a deputy sheriff, it was not proper to order this money handed over to the treasurer. *Board v. Branson, 4 Colo. App. 274, 35 Pac. 750.* Indeed, we are cited to no statute that authorizes the

sheriff to appoint a bailiff for a court of record. We know that the practice in some of the district and county courts is for the court at the beginning of the term to make an order authorizing the sheriff to appoint necessary bailiffs for the term. But, however appointed, or what may be the character of his office, the services of the bailiff are necessary for the orderly and proper conduct of the business of the court, and the expenses incurred thereby should be paid by the county as part of the expenses of the court, the same as expenses incurred by the employment of a janitor to care for the court room.

5. The items embraced in the first, third, and seventh causes of action may be disposed of together. It will be observed from the foregoing statement of facts that the court allowed to the sheriff as one item the sum of \$35 for mileage for returning from Canon City to Durango. This allowance must have been based upon the provision of the statute first above quoted. Our construction of these provisions is that the fee to the sheriff of 20 cents per mile, mentioned in the second quotation, is compensation, not for serving the mittimus, and based upon the mileage actually traveled in serving the writ, but it is for the labor and time, the care, the risk, and the danger incurred in transporting prisoners, although the amount thereof is determined by the number of miles traveled while the sheriff has the prisoner or prisoners in charge. This seems to us clear from the fact that no such fee, upon the basis of 20 cents per mile traveled, is given to the sheriff upon his return trip to his home from the place where the prisoner is left. The court below evidently so held, because it awarded to the sheriff the compensation for his return journey, not upon the basis of 20 cents per mile, but upon the basis of 10 cents for each mile traveled. This latter allowance, however, could be made only under the clause of section 4, which is first set out above, and which is given to the sheriff as a compensation for serving the warrant or mittimus; and the amount thereof is, by the statute, to be determined by the number of miles actually traveled in serving it. In serving the writ the sheriff must travel both to the place where it is served and back to his home, and so the mileage, under the first provision quoted, which is compensation for serving the writ, is to be reckoned upon the aggregate number of miles traveled both coming and going.

Another item in dispute is the sum of \$33.20 for the sheriff's railroad fare going from Durango to Canon City, and returning therefrom. The facts were that the sheriff had a free pass over the railroad, and did not pay to the railroad company the amount which he presented in his bill; but he contends that this amount (which is admittedly the correct railroad fare) comes within the meaning of the phrase "actual expenses, necessarily incurred." On the other hand, the county contends that, inasmuch as this

amount was not actually paid, or liability therefor incurred, by the sheriff, it cannot come within this provision. We are cited to no authority upon this point. The question of charging for railroad fare under such circumstances may, in one view, be regarded as a question of ethics, rather than of law; and so, possibly, in this regard, beyond the pale of this court's jurisdiction. Yet it is in a very important sense strictly a legal question, and one which we must determine. It will be observed that this claim is predicated by the sheriff upon the second provision cited. The language is, "actual expenses necessarily incurred." This implies that such expenses, if not actually paid, at least that the liability therefor has been incurred, by the sheriff, before he can collect the same from the county. This particular language of the statute is not so elastic as to include as part of the actual expenses of the officer a claim for railroad fare which the sheriff has neither paid nor obligated himself to pay, although, had he not made use of his free pass, such outlay would have been necessary. Nor can it be said upon this case as made that such railroad fare not paid comes within the clause "actual traveling expenses," found in the fourth quotation. The case before us is that the sheriff rode upon a free pass, and this implies that no money consideration therefor was paid, and no actual equivalent of any other sort given for the pass. So we conclude that where a sheriff travels upon a free pass he may not, in his account, charge and receive credit from the county for the amount of the railroad fare which he would have been obliged to pay had he not traveled upon a free pass. The only real difficulty is not so much to determine the meaning of either of these phrases alone, but rather what meaning shall be given to the provisions for mileage found in both. It is clear, however, that under this fourth clause the sheriff must be compensated for his actual traveling expenses. But out of what mileage these traveling expenses are to be paid is rendered somewhat uncertain by the use of the word "mileage," contained in separate acts apparently bearing upon the same subject. Are there, by these provisions in two separate acts, intended two mileages for the sheriff,—one in section 4 of the fee act, which, together with the lump sum prescribed, is to be his compensation for serving the particular writ, and, in addition thereto, a separate mileage fee, out of which are to be paid his actual traveling expenses; or is the "mileage" specified in the two acts one and the same mileage, and limited, in counties of the fourth class, to 10 cents per mile? These acts were approved upon the same day. It must not be presumed, unless the construction clearly requires it, that either is inconsistent with, or repeals any portion of, the other. While these two acts throughout do not maintain

the distinction which the legislature apparently had in view of separating the general subject of compensation of public officers into the subordinate subjects of fees and salaries, yet, in the main, the one relates to fees, the other to salaries. The former prescribes what charges the officers may make, and what fees they may collect, out of which their salaries are to be realized; the latter fixes the salary, and the maximum of the total remuneration. If there is only one mileage allowed to the sheriff under these two provisions, then, whenever, in performing his duty, he is obliged to travel, he must, from such mileage fee, if it is ample enough, first deduct the costs of travel, and only the balance is the compensation for his services. If the costs of travel exceed the one mileage fee, then he may not only not get anything for his services, but be entirely out of the money paid for traveling expenses. If there are two mileages contemplated, then, when the officer travels, he gets the one mileage prescribed in the fee act, which, together with the lump sum therein prescribed, is his total compensation for serving the writ; and out of the mileage prescribed in the salary act he gets an additional amount, equal to the costs of his travel, but limited in counties of the class we are considering to 10 cents per mile. If such traveling expenses are less than such mileage at the rate of 10 cents per mile, the officer does not get the full mileage, but only his actual outlay; if greater, only the amount of the mileage is paid. The traveling expenses paid by the sheriff, when refunded to him by the county, simply make the sheriff whole for what he has been obliged to pay out; and it should not come out of that mileage which, by the fee act, is intended merely as part of the compensation which the county, in the eye of the law, has agreed to pay him for what his services are supposed to be actually worth. The evident intent of the legislature was to create by the fee act a mileage fee, all of which belongs to the officer as part of his compensation for services actually rendered, and no part of which should be applied to the officer's necessary traveling expenses. By the salary act another mileage fee was provided for, separate and distinct from that in the fee act, out of which the officer was to be repaid his actual traveling expenses, and no more. The salary act was intended to provide a compensation to public officers, and among them to a sheriff, for the performance of official duties. Such compensation, however, must be paid out of the fees prescribed, and out of them only. The amount of the salary is therein fixed. The act, moreover, goes further than this, and provides that, in addition to his salary, the actual traveling expenses of the sheriff shall be paid, providing they do not exceed what is called a mileage at the rate of 10 cents per mile in counties of the fourth class. Whatever the practical operation of the act

may be, we must not presume that the legislature intended to require public officers to do work for the public the performance of which will compel them to give not only their time, without getting any compensation therefor, but also require them to expend their money in accomplishing it. But, if the actual traveling expenses are to be deducted from and come out of the mileage fee which is prescribed as a compensation to the officer for his services, we have the result that the fund created by the collection of the fees prescribed, and out of which the salary must be paid, is to be reduced before paying the salary by the application of a portion thereof to the payment of traveling expenses incurred by the officer, and which the legislature evidently intended the latter should have in addition to, and over and above the amount of, the fixed salary; and we have also the result that, instead of the officer receiving his salary and this additional compensation, whenever the fees collected are less than the traveling expenses,—which sometimes may occur,—the officer gets neither his traveling expenses nor anything to apply upon the salary. It is important always to bear in mind that it is out of the fees, and the fees only, that the salary is to be paid. It must have been intended by the two acts to fix the fees so that they would probably amount to the salary and traveling expenses; or, in other words, full compensation to the public official, and nothing more. Whenever the total amount of fees from all sources is greater than the salary and the traveling expenses, the question we are now discussing is unimportant; but when the amount of fees is less than the salary, or less than the salary and the traveling expenses, it becomes material to the officer to know whether there are two mileage fees provided or only one. We conclude that the mileage fee prescribed for the sheriff in section 4 of the fee act for serving any process is intended solely as a part of the compensation for such services, all of which is to be applied to the payment of his salary; and that the actual traveling expenses of the sheriff provided for in section 11 of the salary act are to be paid out of and not exceeding a mileage fee at the rate of 10 cents per mile actually and necessarily traveled in the performance of his duty, which fee is separate and distinct from, and in addition to, that prescribed in the fee act. This seems to us the only permissible construction. If such traveling expenses are provided for in the fee act, then there was no necessity for this part of the salary act, and the legislature, had it not intended to provide a separate, distinct, and additional fund out of which the traveling expenses of the officer were to be paid, could easily have added in the salary act that the mileage fee intended as the one out of which such expenses were to be paid was one of the mileage fees provided in the fee act; but

no such reference is found, and we must give effect to all the language of the act, if it can be reasonably done. A mileage fee is created in the salary act, and, as it is not limited to any mileage found in the fee act, either the mileage allowed for serving process or mileage for transporting prisoners, we conclude that it was in addition thereto, and is limited to the payment of actual traveling expenses.

By sustaining the validity of the salary act, as we have done in another case, the compensation of the sheriff for his services cannot, in any event, exceed the amount fixed by this act; and, whatever fees are collected, which, in amount, exceed the salary and traveling expenses, belong to and become the property of the county, and so no excessive compensation can be received under these two acts, nor can any burdensome claim be imposed upon the county, or extortionate charge exacted of litigants, that will go into the pockets of public officials. It must also be borne in mind that these mileage fees, if earned by the officer, must be collected by him of litigants if in civil cases, and that the various statutory conditions that make the county liable for costs in criminal cases must have happened before the sheriff gets credit from the county therefor; so that, in compensating the sheriff, he is not only limited to his salary and actual traveling expenses, but to get these he must first have collected from the parties to suits the various items of fees which go to make up, and out of which only, his compensation is paid.

In the seventh cause of action the sheriff transported a prisoner from Durango to the state reformatory at Buena Vista, and as part of the actual expenses necessarily incurred by him is an item of \$37.90, which he actually paid for railroad fare in going to and returning from Buena Vista. At the time he had in his possession a free railroad pass, but did not use it. The board of county commissioners refused to allow this item, on the ground that, inasmuch as the sheriff had a free pass, which he might have used in making this journey, but did not, he should not be allowed, as traveling expenses, the railroad fare paid by him. This ruling is a sort of moral compulsion by the county to influence the sheriff to make use of what some people regard as a questionable practice upon the part of a public officer. We do not consider such a construction of the law to be warranted, and hold that the proper railroad fare should be paid by the county when it has been paid by the sheriff.

Item No. 2 in the third cause of action is for transporting a prisoner by the sheriff, whom the latter arrested and conveyed from the place of arrest to the court before trial was had. As we understand the contention of the county, it is that any fee for transporting a prisoner cannot be allowed, unless the prisoner has been convicted, and then taken to

the penitentiary. Such contention, however, we do not consider to be sustained by giving any such restrictive meaning to the word "transporting." The fee is for the necessary "conveying" of a prisoner, either before or after conviction, and the bill should have been allowed if all other statutory conditions of the liability of the county were present.

In item No. 5 in the first cause of action the sheriff put in a claim for \$3.50, which he paid as sleeping-car fare from Canon City to Durango upon his return trip from conveying a prisoner to the state penitentiary. The county claims that this is not a necessary expense; the sheriff claims that it is. In construing the words "necessary" or "necessities," courts have held that whatever is convenient, usual, or adapted to the end, proper or customary under similar circumstances, may come within the definition of such expressions. *Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co.*, 5 Wis. 173; *U. S. v. Harmon*, 147 U. S. 268, 13 Sup. Ct. 327. In these days of modern travel, sleeping cars are not absolute necessities, though they certainly are convenient and customary, and are frequently used by those who travel long distances. We are advised by the facts of this case, as well as by our own knowledge, that the distance from Durango to Canon City is 350 miles, and by the route usually traveled is a tiresome and wearisome journey over two mountain ranges. In going from Durango to Canon City, when the officer has a prisoner in charge, he must be constantly on the watch to see that the prisoner does not escape; and we think that, taking into consideration these circumstances, the use by him upon his return journey of a sleeping car during the nighttime is not only customary, but is proper and convenient, and reasonable, within the meaning of the statute, as a legitimate part of the necessary expenses incurred by the sheriff. We must not be understood as holding that the sheriff who transports prisoners to the penitentiary may make use of the most luxurious accommodations at his disposal, nor must it be inferred from the foregoing that for every short and ordinary trip upon such business the sheriff may avail himself of the use of a sleeping car, and include it in his actual expenses, and collect the same from the county. The liability of the county depends in part upon the facts and circumstances of each case, and the decision of this particular question must be limited to the facts of this case.

The foregoing considerations dispose of all of the controverted items in this case, and all other matters which are raised here, and relate to this controversy, have been settled by us in the case of *Airy v. People* (decided at this term) 40 Pac. 362. We have not, upon our own judgment, fixed the fees or prescribed what compensation public officers should have for their services, but have simply declared what determination the legislature, in its wisdom, has reached upon these questions as expressed in these two acts. We

have proceeded in our discussion upon the assumption that all of the statutory conditions which fix the liability of the county exist,—if the case is a civil one, that the officer has collected the prescribed fees, and turned the money above the amount of the salary into the county treasury; if criminal, that the facts exist which must be present in order to call for payment by the county of the costs incurred. *Branson v. Board* (Colo. App.) 37 Pac. 957. The statement of facts is not sufficiently definite as to these precedent conditions to enable us to enter judgment here upon all the claims presented, but from the foregoing opinion it follows that the judgment of the county court must be reversed, and the cause remanded, with instructions to the court to proceed in accordance with the views expressed in this opinion. Reversed.

(22 Nev. 342)

STATE v. HARTLEY.

(Supreme Court of Nevada. May 23, 1895.)

CONSTITUTIONAL LAW—NUMBER OF GRAND JURORS—CHALLENGING JURORS—HOMICIDE—VIEW OF PREMISES BY JURY—INSANITY—INSTRUCTIONS.

1. Section 8 of article 1 of the constitution declares: "No person shall be held to answer for a capital or other infamous offense * * * except on presentment or indictment of a grand jury." *Held* that, when the people adopted these provisions of the bill of rights, they had in view a grand jury as it existed under the common law and the statutes at the time the constitution was adopted: *Held*, further, that the acts of the legislature of 1893, providing that ten persons shall constitute the grand jury, and that eight of the number may find an indictment, are unconstitutional.

2. Under the common law, the statutes, and constitution, the defendant may waive his objections to the qualifications of jurors; and if he fail to challenge before the jury is completed, knowing of the disqualification, he waives his objections, and is estopped from demanding, as matter of right, a new trial on the ground of such disqualification; and, in contemplation of the constitution, he has not in such case constitutional grounds for the objection that he has not been tried by a constitutional jury.

3. On appeal a party cannot complain of the ruling of the court in denying his challenge to a juror for cause if it appear that, when the jury was completed, his peremptory challenges had not been exhausted.

4. A view of the premises is not taking evidence in the case. It is means provided by the statute to enable the jury more satisfactorily to weigh the evidence given in court. When the action of the court is taken and the view is made on motion of the defendant, and no request or expression of a desire on his part to be present was made, his absence is not ground for new trial, nor is the absence of the judge legal cause of complaint.

5. *Held*, that the accused is presumed to be sane until the contrary is shown; and, where there is no evidence tending to show insanity of the defendant at the time of the commission of the alleged offense, the action of the court in refusing to give instructions asked for by the defendant or in giving instructions of its own motion on the subject of insanity will not be reviewed by the appellate court.

6. The court instructed the jury: "In considering the weight and effect to be given to her evidence, in addition to noticing her manner and the probability of her statement, taken in con-

nection with the evidence in the case, you should consider her relations and situations under which she gives her testimony, the consequences to her relating from the result of the trial, and all the inducements and temptations which would ordinarily influence a person in her situation. You should carefully determine the amount of credibility to which her evidence is entitled. If convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." *Held*, correct.

7. The court instructed that if the defendant shot at the deceased with the intention to kill him, and not in necessary self-defense, then certain facts enumerated in the instruction would not constitute any defense to the shooting. *Held*, as applied to this case, that the instruction was not misleading, nor prejudicial to the defendant, because it only recited a part of the facts relied upon by defense, nor was it a charge upon a matter of fact.

(Syllabus by Bonnifield, J.)

Appeal from district court, Washoe county; A. E. Cheney, Judge.

Alice M. Hartley, having been convicted of murder, appeals. Affirmed.

R. M. Clarke and Goodwin & Dodge, for appellant. The Attorney General and W. E. F. Deal, for the State.

BONNIFIELD, J. On the 26th day of July, 1894, the defendant, Alice M. Hartley, killed M. D. Foley, in her rooms, in the building of the Nevada bank, in the town of Reno, Washoe county, Nev., by shooting him with a pistol, for which she was indicted for the crime of murder on the 3d day of August, 1894, by the grand jury of that county. Subsequently she was tried in the district court of said county, found guilty of murder in the second degree by the verdict of the trial jury, and by the judgment of the court was sentenced to serve a term of 11 years in the state prison. The defendant appeals from the judgment of the district court, and from the order of the court denying her motion for new trial. The record is replete with objections made and exceptions taken by the defendant to the proceedings and rulings of the trial court from the beginning to the termination of the case.

1. The grand jury: In the Statutes of 1893 (page 31) it is provided that 12 persons shall be summoned to appear as grand jurors, and out of the number so summoned the court shall select 10 persons, who shall constitute the grand jury. By the same statutes (page 43) it is provided that an indictment shall not be found without the concurrence of 8 grand jurors. The grand jury to which objection is made was selected and impaneled under the provisions of the General Statutes (section 3795), which require that 24 persons shall be selected and summoned, and of this number the court shall select 17 persons to constitute the grand jury. Sections 4106 and 4107 require the concurrence of 12 grand jurors to find an indictment. The contention of the defendant is that the grand jury should have been organized in pursuance of the provisions of the Statutes of 1893, and, not having been

so organized, that it was an illegal body. At common law, the grand jury may consist of any number between 12, as the minimum, and 23, as the maximum, and an indictment found without the concurrence of at least 12 grand jurors is invalid. As to these common-law rules, all the elementary writers on the subject are agreed, and they are recognized by a great number of the courts of last resort. Of these we cite 2 Hawk. P. C. 295; Hale, P. C. 161; Co. Litt. 156b; 1 Chit. Cr. Law, 306; Forsyth, Jury Tr. 178; Cooley, Bl. 304; Story, Const. § 1784; King v. Marsh, 1 Lead. Cr. Cas. 260; State v. Davis, 2 Ired. 153; Com. v. Wood, 2 Cush. 149; Low's Case, 4 Greenl. 439; Hudson v. State, 1 Blackf. 317; People v. Hunter, 54 Cal. 65; State v. Symonds, 36 Me. 128; State v. Ostrander, 18 Iowa, 435. "No man can be convicted at the suit of the king of any capital offense unless by the unanimous voice of twenty-four of his equals and neighbors; that is, by twelve at least of the grand jury in the first place assenting to the accusation, and afterwards by the whole petit jury of twelve more finding him guilty upon his trial." Cooley, Bl. (3d Ed.) 304. At the time of the adoption of the constitution of Nevada, wherein it is declared, "No person shall be tried for a capital or other infamous offense * * * except on presentment or indictment of a grand jury" (article 1, § 8), the provisions of the General Statutes (sections 3795, 4106, 4107) which are declaratory of the common law were in force, being enacted by the territorial legislature of 1861. We, therefore, conclude that, when the people of this state adopted this constitutional provision, they had in view a "grand jury," as it existed at common law and under the statutes at the time of the adoption of the constitution. It is so held by this court with reference to the right of trial by jury in construing the third section of the same article of the constitution. State v. McClear, 11 Nev. 39. The reasoning in that case is applicable to the question at bar. Defendant's counsel cite a great number of authorities to the effect that a grand jury may consist of a less number than 23, but we are not referred to any authority holding that the number may be less than 12, or that less than 12 can find an indictment under the common law or constitutional provision similar to ours. The authorities cited are not in point. So, waiving all question as to how the objection to the grand jury should have been raised, or whether it was properly raised by the various motions and objections made in the case, we are of the opinion that the district court did not err in holding that the said Statutes of 1863 are unconstitutional, and that the grand jury which found the indictment was a legal body.

2. The trial jury: The defendant's counsel urge as objections to the trial jury that "seven of the jurors were prejudiced against the defendant, and were disqualified under the

common law and under the constitution and statutes of Nevada," and that "the right to have an impartial—that is, a constitutional—jury cannot be waived by the defendant, much less by the defendant's attorneys." Their objections go to the jurors Kinney, Coffin, Halsh, Palmer, Fulton, Bryant, and Johnson. In answer to questions asked by defendant's counsel touching their qualifications as jurors, several of them, each, frankly answered that he had formed an unqualified opinion as to the guilt or innocence of the accused. Under this state of facts, the defendant and her counsel failed to challenge any of the six jurors first above named, but accepted them without objection. It is now urged by counsel with great earnestness and ability that, by reason of the disqualification of these jurors, the defendant did not have a fair and impartial trial,—a trial by jury as guaranteed by the constitution. This contention will not stand the test of reason and authority. At the time of the adoption of the constitution of this state, the manner of impaneling trial jurors, and the mode of determining their qualifications, and the right of the defendant to waive his objections to the qualifications of the jurors, and the consequences of such waiver under the statute and common law, were well understood.

The common law: "When the trial is called on, the jurors are sworn as they appear to the number of twelve, unless they are challenged by the party. Challenges may be here made on the part of the king or on the part of the prisoner, either to the whole array or to the separate polls, for the very same reason that they may be made in civil cases." 4 Cooley, Bl. (3d Ed.) 350; 2 Hale, P. C. 293. "No juror can be challenged without consent after he hath been sworn either in criminal or civil cases, unless it be for some cause which happened since he was sworn." Bac. Abr. "Juries," 305. "If a party have cause of challenge, and know of it in time enough before trial, if he do not challenge he shall not have a new trial." Id. 306.

The statute: By the statute enacted in 1861, and in force at the time our constitution was adopted, it was provided that "a challenge to an individual juror must be taken when the juror appears, and before he is sworn; but the court may, for good cause shown, permit it to be taken after the juror is sworn, and before the jury is completed." Gen. St. § 4214. This statute is confirmatory of the above common-law rules.

From the citations it is clear that, both under the common law and the statute existing at the time the constitution was adopted, a defendant could waive an objection to a juror, and that he did waive it unless the challenge was taken prior to the jury being completed; and especially was this the case when the ground of challenge was then known. As already noted, it was the right

of trial by jury as it then existed that the framers of the constitution provided should remain inviolate forever, and there is no reason to suppose they intended any change in the rule as to waiver. These views may be fortified by reference to the decided cases.

The decisions: In the case of the State v. Pritchard, 16 Nev. 101, in considering the above section (4214) of the statutes, the court say: "The state, as well as the defendant, is required to interpose its challenges before the jury is completed. This provision of the statute must be complied with. Whenever it appears from the examination, upon his voir dire, that a juror is disqualified by reason of the existence of any fact which is made the ground of challenge, the juror must be challenged, as specified in the statute; otherwise the party, whether the state or the defendant, will be considered as having waived the right of challenge." "If a defendant accept a juror without objection whom he knows to have formed or expressed an unqualified opinion, he cannot after verdict raise this objection. If he willfully take his chances with such juror, he must abide the result." State v. Anderson, 4 Nev. 265; Bronson v. People, 32 Mich. 34. "The constitution secures to an accused person the right to be tried by an impartial jury, and the legislature has no power to deprive him of such right; but it can regulate its administration by determining and declaring when and how a juror's partiality shall be ascertained." State v. Marks, 15 Nev. 33.

Not only must the defendant make his objections and take his challenges before the jury is completed, as appears from the above authorities, but the particular ground of challenge must be stated. State v. Squaires, 2 Nev. 230; State v. Raymond, 11 Nev. 106; State v. Gray, 19 Nev. 212, 8 Pac. 456; State v. Vaughan (decided at the last term of this court) 39 Pac. 733. The authorities cited by counsel are cases mainly in which the courts had under consideration the rights of the defendant where the discovery was made after trial that a disqualified person had sat on the jury, and in cases where the juror was challenged for cause, and his challenge denied by the lower court. Such authorities are not in point in this case as to these six jurors, for the defendant was fully informed of the alleged disqualification before trial, and before the jury was completed, and no objection was raised and no challenge taken to any of them.

It is therefore evident from the great weight of the authorities, and from the statute and common law, that a defendant can waive his objections to the qualifications of jurors, and if he fail to challenge before the jury is completed, knowing of the disqualification, he is estopped from demanding, as matter of right, a new trial on the ground that the jury were not omni exceptione majores, and that, in contemplation of the constitution, he has not in such case, after

verdict, constitutional ground for the objection that he has not been tried by a "constitutional jury."

3. Juror Johnson: The juror Johnson was challenged upon the ground, as it is alleged, "of having formed an unqualified opinion as to the guilt or innocence of the defendant." The challenge was denied, and exceptions taken. The ruling of the court denying the challenge is assigned as error. When the jury was completed, the defendant had not exhausted her peremptory challenges, but had one left, which she did not use at all. In Thompson on Trials (section 115) it is said: "The sound and prevailing view is that a party cannot on error or appeal complain of a ruling of the court in overruling his challenges for cause if it appear that, when the jury had been completed, his peremptory challenges were not exhausted, since he might have excluded the obnoxious juror by a peremptory challenge; and therefore the error is to be deemed an error without injury." State v. Elliott, 45 Iowa, 486; Palmer v. People, 4 Neb. 68; Sharp v. State, 6 Tex. App. 650. Many other cases might be cited holding the same rule. In note 1 to section 115, Thompson says: "There is some slight and ill-considered authority to the effect that no obligation rests upon a party to make use of his peremptory challenges for the purpose of excluding a juror unsuccessfully challenged for cause." Our opinion as to the true rule of practice in such case accords with "the sound and prevailing view" above named.

4. View of the premises: In strict conformity to the provisions of section 4257 of the General Statutes, and at the repeated requests of the attorneys of the defendant, made in her presence, the court ordered that the jury view the place where the homicide occurred. W. H. Caughlin, the sheriff, was designated by the court to conduct and show the jury the premises. The sheriff and his two deputies were sworn to take charge of the jury during recess of the court, and recess was then taken for the purpose of the jury making the view. Neither the judge, the clerk, the defendant, nor either of her attorneys was present at the view. The defendant and her attorneys were present in court when said orders were made and recess taken as aforesaid, and knew that said view was about to be taken without the presence of said judge and clerk, and without the presence of the defendant and her attorneys, and without the presence of either of them; and no objection was made thereto, and no suggestion concerning the same was made by the defendant or her attorneys. It was claimed on motion for new trial, and was pressed by counsel in argument here, that the district court committed fatal error in permitting said view to be had without the presence of the judge and the defendant. Concerning a view of the premises made by the jury in the absence of the judge and the defendant, there is great

diversity of opinion found in the decided cases, based upon different grounds. It is held by high authority that the judge and officers of the court, as well as the defendant, must be present; that a view is taking testimony in the case, and, when made in the absence of the defendant, is in violation of his constitutional right of being confronted by the witnesses against him; and that such right cannot be waived. Other authorities, of equal high standing, and with greater force of reasoning, hold that the right of the defendant to be present with or without the presence of the judge and court officers, if such right exists, is statutory, and not constitutional, and may be waived; that the defendant in a criminal case who asks the benefit of the provisions of a statute must take the benefit just as the statute gives it; that the view is not taking evidence in the case, and is not intended to be so, but simply to enable the jury the better to understand the testimony given in court; that whatever the nature of the rights of the defendant may be in such case, and from whatever source such rights may be derived, he may and does waive the same when the action of the court is taken and the view made on his request, and without suggestion that he desires to be present at the view; and that in such case it is too late to complain after verdict. *Shular v. State*, 105 Ind. 290, 4 N. E. 870; *State v. Reed* (Idaho) 35 Pac. 706; *State v. Lee Doon* (Wash.) 34 Pac. 1103; *State v. Adams*, 20 Kan. 311; *State v. Ah Lee*, 8 Or. 217; *State v. Moran*, 15 Or. 262, 14 Pac. 419; *Blythe v. State*, 47 Ohio St. 234, 24 N. E. 268; *Carroll v. State*, 5 Neb. 32.

5. The instructions: The defendant's counsel assign as error the action of the court in refusing to give certain instructions asked by them, and in giving certain instructions of its own motion, on the subject of insanity. No witness testified to any fact tending to show insanity of the defendant on the day of the homicide, and no opinion was expressed by any witness to that effect. No fact or circumstance was developed at the trial in indicating that she was ever of unsound mind; but, on the contrary, in her detailed statement of the conversations had between herself and the deceased in their last interview, and of the acts and movements of each party, and the incidents and circumstances occurring before, during the time of, and after, the fatal tragedy, her testimony shows that upon that day and that occasion her reasoning faculties were in full vigor, and her keen business qualifications were unimpaired and in full activity. The theory of the defense seems to be that the grievous wrongs and atrocious crimes testified to by the defendant as having been inflicted by the deceased upon herself six or seven months before the fatal day, in drugging and forcing her to his illicit embraces, upon two occasions, and his refusal on the day of the homicide to sign and give her a paper, duly witnessed, exonerating her to her

friends from blame, and acknowledging the paternity of the child she was then carrying as the result of his said illicit intercourse with her, ought to be sufficient to establish her irresponsibility on the ground of insanity, whether or not there is any evidence tending to show insanity at the time of the killing. Such is not the law. It is not sufficient that insanity may exist in the realm of imagination. The rules governing in cases where the defense of insanity is interposed are well established. In the case of the *State v. Lewis*, 20 Nev. 333, 22 Pac. 241, it is held, on reason and authority, that: (1) "The accused is presumed to be sane until the contrary is shown." (2) "Insanity is an affirmative proposition, and the burden of proving it is upon the defense." (3) "Insanity, as a defense to crime, must be established by a preponderance of the evidence." (4) "If the defendant have capacity and reason sufficient to enable him to distinguish right from wrong as to the particular act in question, and has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, he is, in the eye of the law, of sound mind and memory, and should be held responsible for his acts." It requires pertinent, competent, and satisfactory evidence to establish insanity, as any other alleged fact in the case. It is a well understood rule that, if there is no evidence given tending to establish an alleged fact, no instructions need be given on the matter. "Where there is no evidence that the defendant was insane, instructions upon the subject of insanity will not be reviewed." *People v. Wheeler*, 65 Cal. 77, 2 Pac. 892.

The instructions given by the court were correct as propositions of law, and the contention of counsel that, the court having instructed the jury on the subject of insanity, it should have given those asked for by them, is not tenable. The error, if any, was in submitting the question of insanity to the jury when there was no evidence tending to establish that plea. The instructions authorized the jury to consider the question of insanity raised by the defendant in her counsel's opening statement to the jury, and raised nowhere else and in no other manner, so far as the transcript shows. The submission of the question to the jury can certainly be no just cause of complaint on the part of the defendant under the state of facts and the evidence. It was giving an opportunity to the defendant to escape conviction on the plea of insanity without any evidence to support it.

6. Instructions as to defendant's testimony: Counsel claim that the instructions given concerning the defendant's testimony are error. We think not. The statutes (section 4562) make the accused a competent witness in all criminal cases at his own request, but not otherwise; "the credit to be given to his testimony being left solely to the jury, under the instructions of the court." The instructions complained of were considered

and approved in *State v. Hymer*, 15 Nev. 49; *State v. Hing*, 16 Nev. 307; *State v. Streeter*, 20 Nev. 403, 22 Pac. 758; and in many cases in other state courts.

7. Instruction on facts cited: The court instructed the jury that even though they should find that at the time of the shooting, and prior thereto, the deceased had perpetrated certain wrongs upon the defendant, enumerating them at considerable length, but that she shot at him, not in self-defense, but with the intention of killing him, these facts constituted no legal excuse or justification for the shooting. The defendant objects to this instruction, first, upon the ground that it is misleading, because it recites only a part of the facts relied upon by the defendant as constituting her defense. But, admitting that it does only recite a part of them, we do not see that it could have worked the defendant any injury. It informs the jury that, as matter of law, certain facts constitute no defense to the indictment. If other facts existed which did constitute a defense, they were not excluded from the attention of the jury; and, if they did not constitute a defense, their omission was rather in defendant's favor, as it left the jury at liberty to infer that they did. There is no intimation that the court considered these the only facts in the case, nor does the language justify such an inference. Furthermore, if the instruction is right as far as it goes, the fact that it does not cover the whole case does not make it erroneous. If other facts existed which the defendant's attorneys wished particularly called to the jury's attention, they should have requested an instruction upon them.

Next, it is objected that it "charges the jury as to the effect of the evidence, and charges them that the evidence relied upon constitutes no excuse or justification." In this connection we must remember what the issue in this case was. The killing being admitted, the only legal excuse or justification there could be was accident or self-defense. Both of these are carefully excluded by the instruction. The jury were told that if the "defendant knowingly, intentionally, and not in necessary self-defense" shot at deceased with the intention to kill him, then the other facts enumerated constituted no excuse or justification. That the instruction states the law correctly cannot be gainsaid. While it was in the power of the jury to acquit the defendant, because of the treatment she testified to having received at the hands of the deceased, as stated in the instruction, they had no legal right to do so. When one human being has been killed by another, what shall constitute excuse or justification for the act is carefully stated in the statute, under the heads of "Involuntary Manslaughter" and "Self-defense." These defenses the statute describes affirmatively; that is, if certain facts are found to exist, then the party doing the killing is

excused or justified. This instruction simply puts the matter negatively; that is, that certain facts which do not march up to the standard established by the statute were not sufficient. The court intimated no opinion as to whether these facts existed or not, nor what their effect might be in connection with other facts. It was in no sense a charge upon a matter of fact, but purely one of law. All instructions must be given in view of a certain state of facts, and whether the court enumerates these facts or leaves the jury to infer them can ordinarily make no difference, so long as no attempt is made to influence or control their conclusions as to what the facts are. *State v. Loveless*, 17 Nev. 424, 30 Pac. 1080; *State v. Watkins*, 11 Nev. 30; *State v. Anderson*, 4 Nev. 263; *Territory v. Burgess*, 8 Mont. 57, 78, 19 Pac. 558; *Hemingway v. State*, 68 Miss. 371, 409, 8 South. 317; *Kitchens v. State*, 41 Ga. 217. But, while we find no error in the instruction as applied to this case, we do not wish to be understood as unqualifiedly approving it. It approaches the border line of error, and under some circumstances might require a reversal of the case.

Several other alleged errors are assigned, which we do not consider of such moment or merit as to demand special attention. We have discussed the prominent points in the case, while we have given the entire record calm and mature consideration. We have found nothing in it militating against the correctness and legality of any of the proceedings of the trial resulting in the judgment we are asked to reverse. While there are many matters and things disclosed in the testimony of the defendant that may justly awaken human sympathies, the sworn duty of the court, in its judicial administration of the matters submitted for its consideration and final determination, requires that it shall in all cases recognize the wise rules of law, well grounded and long established, so essential for the protection of the rights and safety of the community and of the individual, and that it shall make no distinction therein on account of the sex of the party involved or other personal considerations. Every reasonable request of the defendant was granted by the court below during the progress of the trial, so far as the record shows. She was defended by able counsel of her own choice, and tried by a jury of their selection, which to her and them, before trial, were satisfactory. A wide range was granted to the defendant in bringing before the jury her complaints of the wrongs and alleged crimes committed against her by the deceased, long months before the fatal tragedy. No legal avenue was closed to her in making her defense. Her counsel contested nearly every inch of ground traversed by the prosecution. The jury, under the solemnity of their oaths, found the defendant guilty, from the evidence, of murder in the second degree, for

which crime the judgment of the court has been duly made and given. Finding no material error in the record, our duty will not allow us to stay the hand of the law. The judgment of the district court is hereby affirmed.

BIGELOW, C. J., and BELKNAP, J., concur.

(16 Mont. 205)

LEGGATT v. PRIDEAUX.

(Supreme Court of Montana. May 20, 1895.)

ACTION AGAINST PUBLIC OFFICER — RECOVERY OF PENALTY—RECEIVING ILLEGAL FEES—DEFENSES.

1. Ignorance of a public officer that fees collected by him were illegal is no defense to an action for the statutory penalty.

2. The fact that a person, knowing fees demanded from him by a public officer are illegal, keeps silence, and allows him to collect them, is no defense in an action by him against the officer for the statutory penalty.

3. Nor is a tender back by the officer of the illegal fees collected any defense.

4. The fact that fees were voluntarily paid is no defense in an action against a public officer for receiving them, under Laws 1891, p. 241, § 9, fixing the fees for certain officers, and making any such officer "who shall receive" any illegal fee liable for 10 times the amount thereof.

Appeal from district court, Beaverhead county; Frank Showers, Judge.

Action by John B. Leggatt against Henry Prideaux. From a judgment for plaintiff, defendant appeals. Reversed.

This action (consisting of two actions consolidated) is brought by plaintiff under section 9, p. 241, Laws 1891, against defendant, who was a justice of the peace, for recovery of 10 times the amount of certain fees received by the justice, not specifically provided for by law. The section referred to declares: "That the fees and salaries in this act provided shall be all the compensation by law allowed such officers, for all services which they are required to or by law can perform as such officers. Any such officers who shall receive any fee, or reward, or salary not specifically provided for by law, shall be liable to the county, state or persons paying the same for ten times the sum so paid to such officers, to be recovered by civil action, and shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than one hundred nor more than five hundred dollars, and shall be imprisoned in the county jail for a term of not less than thirty nor more than ninety days." The defendant admitted the excessive charges, but relied upon (1) ignorance of the law; (2) that plaintiff well knew that the fees were excessive, and willfully kept silent, and permitted the said charge to be made for the bringing of this suit, when, if he had informed defendant of such excessive charge, defendant would have gladly reduced his charge to the legal limit; (3) that prior to a demand, he discovered the mistake, and

immediately tendered the amount of the excessive charges, but plaintiff refused the same. Plaintiff replied, denying any tender of the amount of illegal fees. Counter motions for judgment on the pleadings were made. The court sustained the defendant's motions, and granted judgment, dismissing plaintiff's complaint, and awarding costs to defendant. The action of the court in sustaining defendant's motion for judgment is assigned as error.

W. S. Barbour and Robt. B. Smith, for appellant. Cullen & Toole, for respondent.

HUNT, J. (after stating the facts). The first question presented is whether a justice of the peace who collects fees exceeding those allowed him by law, is liable in a civil action for a penalty of 10 times the amount of such fees, without regard to any corrupt motive or intent in collecting them. The facts of this case show an admitted violation of the letter of the law, and a prima facie liability under its provisions. *Lydick v. Palmquist* (Neb.) 47 N. W. 918. That the justice of the peace believed he had a legal right to charge the fees he did, and acted in good faith in taxing and collecting the fees, constitute no defense. It would be most dangerous to the welfare of society if an officer elected to administer the law could violate it to his own pecuniary advantage, and escape the consequences of his act by pleading ignorance of the statute he had violated. That ignorance of the law is no excuse is a postulate of law, but, unless the maxim is upheld, there would be innumerable problems presented to courts, and he who knew the least might fare the best; or, as is said by the supreme court of California (*People v. O'Brien*, 96 Cal. 171, 31 Pac. 45) "the denser the ignorance the greater would be the exemption from liability." The case is not one where there was a mistake of fact. The court of appeals of New York, in *Gardner v. People*, 62 N. Y. 299, say: "Such mistakes do not excuse the commission of prohibited acts. The rule on the subject appears to be that in acts mala in se the intent governs, but in those mala prohibita the only inquiry is, has the law been violated?" *People v. Brooks*, 1 Denio, 457; *Beckham v. Nacke*, 56 Mo. 546; *Commonwealth v. Simmons*, 98 Mass. 6; *Carr v. Trainor*, 36 Ill. App. 587; *Roberge v. Burnham*, 124 Mass. 277; *People v. Monk* (Utah) 28 Pac. 1115. The receiving of the illegal fees is the gist of the wrong under the statute, and, when such fees are deliberately accepted, the law is violated, and the liability attaches. No less eminent a judge than Chief Justice Gibson of Pennsylvania, in an early case (*Coates v. Wallace*, 17 Serg. & R. 75), wherein a justice of the peace was sued for a penalty in having exacted illegal fees, wrote as follows: "The penalty imposed by this act may

be incurred by exacting fees which are supposed at the times to be legally demandable. By the very words of the prohibitory clause, the taking is the gist of the offense. Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him with an unusual attention to clearness and precision. On any other principle a conviction would seldom take place, even in cases of the most flagrant abuse, for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril; and we are of opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids." The case of *State v. Gardner*, 5 Nev. 312, relied upon by respondent, was a criminal action, where the defendant, who confessedly had no criminal intent, was indicted and convicted of a felony in violating a law for improperly issuing licenses. A majority of the court held that a criminal intent was a necessary ingredient of the offense charged, which was a felony, not a misdemeanor. And the opinion, when scrutinized, is based upon the ground that in considering the fearful consequences imposed if a mere violation of the letter of law would necessitate a conviction, it was impossible to believe that the general rules of the criminal law requiring an evil intent were to be ignored. The case therefore differs from the one at bar. We note, too, that the Nevada ruling is not generally approved of. The court of appeals of New York, in criticizing the opinion, say: "It is evident that a majority of the court struggled to relieve the defendant from a harsh punishment for a comparatively innocent act." *Gardner v. People*, supra. The supreme court of California also decline to follow it. *People v. O'Brien*, supra.

The defense of the silence of the appellant, Leggatt, in not informing respondent of the fact that his fees as justice were excessive, cannot obtain. The very statement of the proposition that an unsuccessful litigant is bound to advise the justice who had decided against him what the law is, illustrates the absurdity of the contention.

The respondent next argues that a tender back, when he discovered his error, should relieve him. We cannot agree with him. To so hold would be to practically nullify the whole object of the law by permitting officials who violate its provisions to escape the consequences by refunding, when their extortions were detected, or when they believed they were about to be detected. The effect would be to say to officials, "You may

charge and retain all the illegal fees you can collect, and, if by chance you are discovered in taxing illegal sums, you need only refund to avoid all penalties for your errors or wrongs." This would not do. *Turner v. Blount* (Ark.) 5 S. W. 589.

Finally, respondent says that the payment of the excessive fees by the appellant was a voluntary one, and for that reason he cannot prevail in this suit. We seriously doubt the correctness of the contention that a payment is voluntarily made where a judgment is rendered and costs are taxed against a party to a suit, and paid by him in obedience to a demand by the justice who rendered the judgment, and who alone could issue process to enforce its collection. *Steamship Co. v. Young*, 89 Pa. St. 786; *Insurance Co. v. Britton*, 8 Bosw. 148-155; *McKee v. Campbell*, 27 Mich. 497. It is unnecessary to pass on the question, however, because we think the doctrine of voluntary payment is not properly applicable to this case. The statute of itself is too plain a guide. The respondent, a justice of the peace, demanded and received excessive fees. The law was explicit in fixing his compensation, but he violated it. The same statute which fixed his fees said to him, "If you violate this law by receiving illegal and excessive fees, the person who pays them to you may recover ten times the sum so paid to you; primarily as a penalty upon you, and incidentally as a remedy to him." *Lane v. State*, 47 N. J. Law, 362, 1 Atl. 476.

We find nothing in the answer which demands any further construction of the statute, the main objects of which are to prevent extortion and imposition. The respondent pleads no fraud or deception on the appellant's part, except that, in order to bring this suit, appellant kept silent, and did not advise him what the law was. But, as said before, there is no obligation upon a litigant to advise a magistrate what his official fees are. He is naturally expected and bound to know them himself; and where his charges exceed the amount the law allows him he cannot escape the statutory responsibilities imposed, either because his extortion was the result of his ignorance, or because the victim of his extortion was more learned, yet failed to counsel him upon the law. It is possible that the enforcement of the penalty in this case is a hardship, and it may be that the severity of the law is great; but with those matters we have not to do. The policy upon which the statute is founded is none the less wholesome; and while, in administering the law, cases occasionally arise which, under certain circumstances, constrain courts to render harsh judgments, yet, in the lapse of time, a due respect for the rigid maintenance of sound principles will prevent the growth of systems of great wrong to the public generally. Being of the opinion that, as the pleadings stood when

the counter motions were made, the plaintiff was entitled to judgment, it follows that the judgment of the district court must be reversed, and it is so ordered. Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

(11 Wash. 706)

SAYWARD v. THOMPSON et al. (CARKEEK, Intervener).

(Supreme Court of Washington. May 11, 1895.)
PURCHASE OF LAND — NOTICE OF PRIOR SALE —
RECORD OF DEED—BREAK IN TITLE—
PATENT FOR LAND.

1. G., having entered government land, sold his rights, and assigned the register's receipt by an unacknowledged indorsement thereon, and the patent was delivered to the assignee; neither the indorsement on the receipt, nor the patent, being recorded. *Held*, that the record of a deed of the land from such assignee did not charge a subsequent purchaser from G. with notice of a previous sale by G., there being a break in the recorded title.

2. A patent from the United States for land need not be delivered or recorded.

3. A subsequent purchaser, without notice, from one who purchased with notice, and whose deed is recorded, is protected against an adverse claim.

Appeal from superior court, King county; R. Osborn, Judge.

Action by William P. Sayward against Warren S. Thompson and Moses Gardner to quiet title to land. Stephen Carkeek intervened, claiming title through a deed from defendant Thompson. From a judgment in favor of the intervener, plaintiff appeals. Affirmed.

Battle & Shipley and Gilliam & Hill, for appellant. Boyd J. Tallman and Blaine & De Vries, for respondent and intervener Carkeek.

GORDON, J. On May 3, 1869, pursuant to the act of congress approved April 24, 1820, one Moses Gardner entered and purchased of the United States, at its land office at Olympia, Wash., the premises involved in this controversy, containing 96.50 acres, lying in King county, and thereupon received the usual certificate, or "duplicate final receipt," from the register and receiver of said office. On May 16, 1870, said Gardner, for a valuable consideration, indorsed upon said certificate the following: "This is to certify that I have sold to G. A. Meigs all my right, title, and interest to the within-described land, for value received,"—which was signed and delivered by him to Meigs. Said indorsement was not acknowledged, nor was it ever recorded in the office of the auditor of King county. On May 2, 1870, a patent from the United States was duly issued to said Gardner for said land, which was subsequently delivered to said Meigs, and said patent has never been recorded in the auditor's office of said county. On November 13, 1877, Meigs executed his deed of

said premises to a corporation known as the Meigs Lumber & Shipbuilding Company, which deed was filed for record on November 23, 1877, and duly recorded in the office of the county auditor of said county; and thereafter, on February 9, 1880, said corporation executed its deed of said land to the appellant, which latter deed was filed for record on April 6, 1881, and duly recorded. On June 27, 1882, said Moses Gardner (his wife joining with him), by deed of general warranty, conveyed said premises to Warren S. Thompson, which deed was filed for record on July 22, 1882, and duly recorded. On February 29, 1888, Thompson executed his deed of said premises to respondent, Carkeek, and the same was duly recorded. This action was brought by appellant against Thompson and Gardner for the purpose of annulling the conveyance from Gardner to Thompson, etc. Respondent, Carkeek, intervened, setting up the conveyance to him by Thompson, and alleging that he purchased in good faith, and paid full value, without any knowledge that appellant claimed any interest in the premises. The court below, among other things, found: "That Carkeek [respondent], at the time of his purchase of said land, in person, examined the records of conveyances in said auditor's office, and found therein a chain of title from Gardner, to and through his grantees, to Thompson." Also that respondent examined the records in the United States land office, and found that the patent to said land had issued to Gardner; that "Carkeek [respondent] did not discover of record in said auditor's office the deeds or conveyances from Meigs to the Meigs Lumber & Shipbuilding Company, or the deed from the latter to appellant, and at the time of his purchase he had no actual knowledge of either of said conveyances." Also that said land has never been in the actual possession of any one, but has at all times been unoccupied and unimproved; that the taxes on said property for the years 1874-75-78, 1880-81, were paid by Thompson, and that all taxes assessed on said property after said year 1881 were paid either by Thompson or respondent, Carkeek, and that no taxes on said property were ever paid by said Meigs or his grantees. The court also found that respondent, Carkeek, was a bona fide purchaser of the land, for full value, and awarded a decree in his favor, canceling and annulling, as clouds on his title, the deeds from Meigs to the corporation, and from it to appellant; from which decree this appeal is taken.

It is contended by appellant's counsel that the record in the office of the county auditor of the deeds from Meigs to the corporation, and from the latter to appellant, constituted constructive notice to Carkeek. The lower court held that they, being out of the chain of title, did not operate as constructive notice, and we think its holding was correct. In section 158, Webb, Record Title, the learned

author says: "Founded in part on this matter of convenience in searching the records, and in part on somewhat broader grounds, is a generally recognized rule that, where there is a break in the recorded title, the registry of a conveyance from a subsequent owner, whose deed or full chain of title is not on record, does not charge constructive notice." Counsel, however, insist that inasmuch as the patent to the land was not of record, nor the "final certificate" of the land officers, there was no chain of title of record, and hence this rule concerning a break in the record title has no application. We think that it was not necessary that the patent to Gardner should have been recorded in the office of the county auditor, nor delivered to him, in order to give it effect. Title by patent from the United States is title by record, and though it is usual to deliver a patent to the claimant, as in case of deeds, yet delivery of it is not necessary. 19 Am. & Eng. Enc. Law, p. 350; *Marbury v. Madison*, 1 Cranch, 137; *U. S. v. Schurz*, 102 U. S. 378. In *Marbury v. Madison*, supra, it is said that: "In all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them." And in *U. S. v. Schurz*, supra, the court say: "The acts of congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer called the 'recorder' is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction,—the legally prescribed act which completes what Blackstone calls 'title by record,'—and when this is done the grantee is invested with that title." As already noticed, the lower court found that before purchasing from Thompson the respondent, Carkeek, examined the records of the land office, and found that the patent from the government for the lands in question had issued to Gardner, and we think the rights of the parties could not be affected by the fact that it was not recorded in the auditor's office.

It is further insisted by appellant that as neither the "final certificate," nor the assignment thereof to Meigs, could have been legally recorded, because not acknowledged, the rule concerning a "break in the chain of title" above referred to is not applicable, the reason for such rule being that the failure to record a prior conveyance constitutes negligence. There was nothing in law which would have prevented the taking of a formal conveyance at the time the appellant chose rather to accept a mere assignment of the "final certificate." The patent issued on May 2, 1870. The assignment was not made until May 16, 1870. And patent had not theretofore right

have conveyed by deed, and the legal title would have vested in his grantee upon the issuing of the patent. *Dillingham v. Fisher*, 5 Wis. 475; *Goodlet v. Smithson*, 30 Am. Dec. (Ala.) 561; 19 Am. & Eng. Enc. Law, p. 334. By omitting to take a formal conveyance, and to have the same recorded, when he might well have done so, we think Meigs was guilty of negligence, and that appellant cannot be heard to say that the paper which Meigs elected to take was not such as the law entitled to be recorded. Equity favors the innocent purchaser. "As every presumption is in favor of the subsequent purchaser, when the former owner is guilty of neglect his title cannot be postponed, except by evidence which taints his conduct with fraud." *Boggs v. Varner*, 6 Watts & S. 469. The doctrine of constructive notice is arbitrary, and, in its operation, equitable limitations and qualifications are difficult of application. As applied to a record, the record is either notice, or it is nothing. Hence it should not receive a more extended application than is rendered necessary from a consideration of the subject upon which it is intended to operate. So considering it, and conceiving that, under our system of registration and indexes which the law requires the auditor to keep, the discovery of the record of these deeds from Meigs to the corporation, and from the latter to appellant, by one striving to ascertain from the record the condition of the title, would be accidental, rather than otherwise, it follows that the effect of the record was not such as to import notice to respondent, Carkeek, of appellant's claim, and did not constitute constructive notice. Nor can it avail appellant that respondent's grantor, Thompson, knew of the record of these deeds, for the law protects a subsequent purchaser without notice, buying from one who purchased with notice, and whose deed is recorded. *Webb, Record Title*, § 154; *Pringle v. Dunn*, 37 Wis. 449; *Wood v. Chapin*, 13 N. Y. 509; *Sydnor v. Roberts*, 13 Tex. 598. We think the cases of *David v. Rickabaugh*, 32 Iowa, 540, and *Bamberger v. Gelser* (Or.) 33 Pac. 609, cited by appellant, are easily distinguishable, upon the facts, and that the conclusion we have reached herein does violence to no principle discussed in either of them. In our opinion the evidence fully sustains the findings, and the decree must be affirmed.

SCOTT, DUNBAR, and ANDERS, JJ., concur. HOYT, C. J., absent and not sitting.

(12 Wash. 21)
TACOMA GROCERY CO. v. BARLOW et al.
(Supreme Court of Washington. May 20, 1895.)

REVIEW ON APPEAL.

The sufficiency of the evidence cannot be questioned for the first time on appeal.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by the Tacoma Grocery Company against Byron Barlow and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Chas. W. Seymour, for appellant. Crowley, Sullivan & Grosscup, for respondents.

HOYT, C. J. The only reason suggested by appellant for the reversal of the judgment grows out of the alleged insufficiency of the evidence to support the verdict of the jury. In the motion for a new trial filed in the lower court, the insufficiency of the evidence to support the verdict was not made one of the grounds for which a new trial was asked. Growing out of this fact, it is contended by the respondents that this court should not investigate this question; and, in our opinion, this contention must be sustained. The attention of the lower court has never been directed thereto, and relief from the judgment asked of it on that ground. The general rule of appellate courts is that they will review only questions which the trial court has passed upon. And this is the rule established by the statutes of this state. The case of *Jones v. Jenkins*, 3 Wash. St. 17, 27 Pac. 1022, recognizes this principle, though this exact question was not decided. The record shows that the notice of the motion for a new trial was sufficiently definite, but that fact cannot aid the appellant, as it is to the motion, and not to the notice thereof, that the attention of the trial court was directed. The judgment will be affirmed.

DUNBAR, ANDERS, and GORDON, JJ., concur. SCOTT, J., concurs in the result.

(12 Wash. 1)

FREEMAN v. AMBROSE et al.

(Supreme Court of Washington. May 14, 1895.)
NEW TRIAL—WHAT CONSTITUTES—SETTING ASIDE DEFAULT.

Setting aside a default and giving defendant leave to file an answer in defense is not the granting of a new trial, within Laws 1893, p. 119, § 1, subd. 6, providing that an appeal may be taken from any order which grants a new trial, and 2 Hill's Code, § 390, defining a new trial to be "a re-examination of an issue in the same court after a trial and decision by a jury, court or referee."

Appeal from superior court, Whatcom county; Jno. R. Winn, Judge.

Action by D. W. Freeman, as administrator of the estate of John J. Gunn, deceased, against Julia C. Ambrose and others. Judgment by default. From an order setting aside the default and the judgment rendered thereupon, and giving defendants leave to file an answer, plaintiff appeals. Defendants move the court to dismiss the appeal

for the reason that the court has no jurisdiction. Granted.

Cade & Freeman, for appellants. Wm. W. Hamilton, for respondent.

GORDON, J. From an order setting aside a default and the judgment entered thereupon, and granting respondent leave to file an answer, this appeal is taken. Respondent moves the court to dismiss this appeal, for the reason that the court has no jurisdiction. This court repeatedly held, prior to the passage of the act of March 8, 1893, that an order vacating a judgment was not a final order, and that no appeal would lie therefrom. *Lillenthal v. Wright*, 1 Wash. 1; *Gower v. Gower*, Id. 16; *Greene v. Williams*, 6 Wash. 260, 33 Pac. 588. But appellant bases his right upon subdivision 6 of section 1 of that act (Laws 1893, p. 119), which provides that an appeal may be taken from any order which "(3) grants a new trial" and contends that the order vacating the judgment in this cause in effect "grants a new trial," and is therefore appealable. We are unable to agree with this contention. A new trial is defined by section 399, 2 Hill's Code, to be "a re-examination of an issue in the same court, after a trial and decision by a jury, court or referee"; and section 400 prescribes the grounds upon which such new trial may be granted. We do not think that setting aside a default and giving a defendant leave to file an answer and defend is the granting of a new trial, within the meaning of the statute. We think it against the policy of the law to give the act a construction that would multiply appeals, and permit litigants to bring their causes here by piecemeal, and especially so since the act itself provides that an appeal from any "final judgment shall also bring up for review any order made in the same action, either before or after the judgment." Laws 1893, subd. 1, § 1, p. 119. The ruling complained of can be reviewed after a final judgment shall have been entered in the cause, and upon an appeal from such judgment a complete and just disposition of the cause can be made. To permit an appeal from an order of this character is to needlessly delay the progress of litigation, frequently amounting to a denial of justice; and in a vast majority of cases it would be productive merely of expense to litigants, and the placing of useless and unnecessary labor upon the court. When, if ever, the legislature shall authorize it, we will yield implicit obedience; but we do not think that such was the design or purpose of the present law upon the subject of appeals, and the motion to dismiss will be granted.

HOYT, C. J., and DUNBAR, J., concur.

(12 Wash. 22)

COLUMBIA & P. S. R. CO. v. BRAILLARD et al.

(Supreme Court of Washington. May 21, 1895.)

DISMISSAL OF APPEAL—LIABILITY ON BOND.

Where respondents excepted to the sufficiency of the sureties on an appeal bond, and the court, pursuant to Laws 1893, p. 125, § 11, found them insufficient, the respondents are not entitled to a judgment against the sureties for costs on a dismissal of the appeal, as the bond thereupon "shall become void." Scott, J., dissenting.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Columbia & Puget Sound Railroad Company against H. E. Brailard and others. From a judgment for plaintiff certain defendants appealed. Plaintiff moved to dismiss the appeal, and for judgment on the appeal bond against the sureties. Appeal dismissed. Motion for judgment denied.

Andrew F. Burleigh, for respondent.

GORDON, J. Respondent, upon a short record, moves for a dismissal of this appeal, for an order affirming the judgment appealed from, and for damages, and that judgment be rendered against the sureties upon the appeal bond, for the reason that said appeal bond was not filed within the time limited by law, and is not such in form or substance as to render it effectual. It appears from the record that the appellants, within five days after serving notice of appeal from the judgment entered below, served and filed an appeal bond conditioned so as to effect a stay of proceedings, and thereafter the respondent excepted to the sufficiency of the sureties upon such bond. It further appears that upon an examination of said sureties the court found them insufficient. Counsel for the appellants concede that the motion to dismiss the appeal must be granted, but insist that judgment should not be directed against the sureties upon the bond. Section 11 of the act approved March 8, 1893, in relation to appeals to the supreme court (Laws 1893, p. 125), provides: "If the judge upon such examination is satisfied that the surety or sureties are qualified as such, to the extent to which they are required by sec. 8 of this act to make affidavit, then he shall make a certificate to that effect endorsed upon or attached to the bond, which shall thereupon stand as a sufficient appeal bond to the effect expressed in the condition thereof; but if he is not so satisfied, or if the sureties fail to attend and justify, then the judge shall in like manner certify to that effect, and thereupon the bond shall become void." It is doubtless true that the word "void," when used in a statute, does not always mean absolutely void for every purpose; and in determining its meaning in a given case regard must be had to the subject-matter of the statute, its scope, purpose, and effect. We think that by refus-

ing to accept the bond as sufficient, and by taking proceedings to have it determined ineffectual for the purposes of an appeal, the respondent is not entitled to judgment against the sureties. Here the appeal is dismissed because the sureties upon the bond are found insufficient, and we think it inconsistent that respondent should be permitted to treat it as an effectual obligation after it has secured an adjudication that it is not such. The motion to dismiss must be granted, and respondent will recover against the appellants its costs; but the application for judgment against the sureties and for damages will be denied.

HOYT, C. J., and ANDERS, J., concur. SCOTT, J., dissents.

(12 Wash. 32)

BARLOW et al. v. CITY OF TACOMA et al.
(Supreme Court of Washington. May 27, 1895.)**PUBLIC IMPROVEMENTS—ASSESSMENTS—ESTOPPEL.**

Though a city fails to obtain jurisdiction to make a special assessment by reason of an insufficient notice, parties who appeared in the proceeding, and objected thereto, and subsequently, in consideration of extension of time for payment, withdrew their objection, are estopped to question the validity of the proceedings. Dunbar, J., dissents.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Byron Barlow, Theodore Hosmer, and others against the city of Tacoma and others to have a special assessment declared void. From a judgment for plaintiffs, defendants appeal. Affirmed as to Hosmer. Reversed as to the others.

James Wickersham, Stacy W. Gibbs, and A. E. Buell, for appellants. Tillotson & Milligan, for respondents.

SCOTT, J. This action was brought to have a special assessment for the improvement of a street declared void, and to restrain its collection. Judgment was rendered in favor of the plaintiffs, and the city has appealed.

Under the decision of this court in the case of Buckley v. City of Tacoma, 9 Wash. 253, 37 Pac. 441, the city failed to obtain any jurisdiction in the premises under the notice given; but the plaintiffs in this action, with the exception of Theodore Hosmer, saw fit to appear in said proceeding and remonstrate against the prosecution of the work, on the sole ground that the same would involve the expenditure of a large amount of money, and that it would considerably inconvenience said parties remonstrating to pay their proportion thereof. Subsequently, in consequence of an extension by the council of the time of payment for 2½ years, these parties withdrew their remonstrance. This action supplied the defect aforesaid in the proceedings, and con-

ferred jurisdiction upon the city to proceed as against said parties, and they are estopped from raising the questions presented.

It is urged that the doctrine of estoppel should not obtain, because it would result in compelling the parties who remonstrated to pay their assessment, while others, who were not estopped, would be under no legal liability to pay; thus resulting in an injustice. This, however, is not a sufficient ground to relieve them from the effects of their action in the premises, which was in effect to consent that the work might proceed as contemplated. Furthermore, it is a matter of common knowledge that in a majority of these cases a great many persons pay voluntarily, without questioning the validity of the proceedings; and occasionally, where the proceedings are regular, it happens that some parties escape payment through defective proceedings upon the part of the city in enforcing collection. And it is apparent, if the doctrine of estoppel is not applied, the same injustice would result in the payment of or collection of a portion of the tax from some of the parties against whom it was assessed, and the escape therefrom by others.

The judgment of the court will be reversed as against all of the parties except Hosmer. As to him it will be affirmed.

HOYT, C. J., and ANDERS, J., concur.

DUNBAR, J. (dissenting). In my opinion, the council not having taken the proper steps to acquire jurisdiction, its action was entirely void, and the withdrawal of the remonstrance would not be sufficient to confer jurisdiction, and therefore all subsequent action was without jurisdiction. The judgment should be affirmed.

(12 Wash. 24)

WASHINGTON BRICK, LIME & MANUF'G CO. v. ADLER et al.

(Supreme Court of Washington. May 24, 1895.)
EXCEPTIONS TO FINDINGS—REVIEW ON APPEAL.

Where the findings in an action, tried by the court alone, to foreclose a material man's lien, are not excepted to as required by St. 1893, c. 60, § 1 et seq., they are not reviewable on appeal.

Appeal from superior court, Whitman county; E. H. Sullivan, Judge.

Action by the Washington Brick, Lime & Manufacturing Company against Pullman Lodge No. 29, Independent Order of Odd Fellows, and others, to foreclose a material man's lien. From a judgment for plaintiff, defendant Pullman Lodge No. 29 appeals. Dismissed.

Thomas Neill and C. M. Stearns, for appellant. Jones, Voorhees & Stephens, for respondent.

DUNBAR, J. This was an action commenced by plaintiff to foreclose a material

man's lien for materials furnished by it to the contractors of a building alleged to belong to appellant. The respondent moves to dismiss the appeal for the reason, among other things, that appellant failed to make or file its exceptions to the findings of fact and conclusions of law made by the court. The findings of the court were as follows: "First, that each of the defendants was regularly and duly personally served within Whitman county, Washington, and appeared herein; second, that each and all the allegations contained in plaintiff's complaint are and is true; third, that plaintiff paid for preparing, filing, and recording claim of lien twenty-five dollars; fourth, that there is due plaintiff from defendants Adler & Sees the sum of \$560.29, and that the same is a lien on the premises described in the claim of lien and complaint, owned by the other defendant." No exception was ever made or filed by appellant to said findings. It was decided by this court in *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440, that, "where an action has been tried by a court without a jury, and findings of fact made by the court, the party aggrieved must except to the findings, in order to raise any question thereon upon appeal." It is conceded by the appellant that under the decision in that case the questions could not be reviewed here, had it not been for the fact, as claimed, that an objection was made to the introduction of the lien notice, and that by reason of the court's overruling such objection, the alleged error of the court in admitting said notice of lien in evidence is before this court for review. It plainly appears that, if the findings of the court were correct, the judgment should be sustained, for, as a proposition of law, the findings are sufficient to sustain the judgment. Section 1 of chapter 60, p. 111, St. 1893, defines an exception. Section 2 provides the cases where an exception is not necessary; but these exceptions, by special provision of that section, do not apply to a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury. Section 3 provides for an exception to the report of a referee or commissioner, or to findings of fact or conclusions of law, in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury, and provides the manner of taking it, viz. by stating to the judge, referee, or commissioner, when the report or decision is signed, that such party excepts to the same, or by filing written exceptions within five days after the filing of the report or decision, etc. There is no indication in this section that the fact that objection has been made to the introduction of testimony, or even exceptions taken to the rulings of the court upon the introduction of the testimony, will relieve from the necessity of making the exceptions to the findings of fact when

such findings are made by the court. Section 7 of the same act provides that "alleged error in any order, ruling or decision to which it is provided in this act that no exception need be taken, or in any report, finding of fact, conclusion of law, charge, refusal to charge, or other ruling or decision which shall have been excepted to by any party as prescribed in this act, shall be reviewed by the supreme court, upon an appeal taken by the party against whom any such ruling or decision was made," etc. The plain inference is that, unless such exception be taken in cases that do not fall within the provision that excuses the exception, the court shall not review such ruling or decision which has not been excepted to. The final decision of the court upon the material matters from which the appeal is taken is merged, so far as the testimony is concerned, in the findings of fact; and if these findings of fact will support the judgment, and no exception has been taken to them, this court, under the statute above cited, is not authorized to review such findings. There being nothing in this case outside of the findings of the court below, the motion will be sustained, and the appeal dismissed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(12 Wash. 15)

LEVY v. FLEISCHNER et al.

(Supreme Court of Washington. May 17, 1895.)
WRONGFUL ATTACHMENT—ACTION ON BOND—EXEMPLARY DAMAGES—PROBABLE CAUSE.

1. Under Code Proc. § 295, providing that, in an action on an attachment bond, plaintiff may recover, if the attachment was wrongfully sued out, and without reasonable cause, the actual damages sustained, and if the attachment was sued out maliciously he may recover exemplary damages, the term "exemplary damages" does not comprehend damages by way of punishment, but only indeterminable actual damages, such as damages to reputation, pride, and feeling.

2. Under Code Proc. § 295, providing that, in an action on an attachment bond, plaintiff may recover actual damages if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground on which it was issued to be true, there can be no recovery where malice was not shown, and the attachment issued on the advice of counsel, with full knowledge of all the facts.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by Lewis Levy on an attachment bond against Fleischner, Mayer & Co., as principals, and R. C. Hill and T. Jackman, as sureties. Judgment for plaintiff. Defendants Hill and Jackman appeal. Reversed.

Cox, Cotton, Teal & Minor and R. E. Moody, for appellants. W. R. Gay and Geo. C. Hatch, for respondent.

DUNBAR, J. This was an action upon an attachment bond given by the appellants to Lewis Levy, respondent herein. The plain-

tiff alleges the actual damage in the attachment proceedings to be \$25, but claims \$5,000 as exemplary damages. Upon the trial of the cause the jury found for the plaintiff in the sum of \$2,010. As the verdict, under the pleadings, could have been for but \$25 for actual damages, on deducting the \$400 allowed by the court as attorney's fees in the present action it will be seen that the verdict for exemplary damages, on a demand for \$25 actual damages, was \$1,585.

This case, in any event, will have to be reversed on the instructions given by the court. Instruction 3 asked for by the plaintiff, and given by the court, was as follows: "Under our attachment law, with reference to these attachment suits, there are two branches of damages: One is known as 'actual damages'; and the other as 'exemplary damages.' By 'actual damages,' the court instructs you that if you find from the evidence that said attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, then you should find, first, for nominal damages in favor of the plaintiff. By 'nominal damages,' the court means any insignificant sum. If you find further, from the evidence, that the goods described in the complaint were actually detained and withheld from the plaintiff for any length of time, and if you find from the evidence that the use of the same during said time was worth any sum, then you may allow plaintiff, for the use of said goods, the actual value of such use during such time, not exceeding \$25; and, if you find from the evidence that the said attachment was maliciously sued out, then you can go further, and find exemplary damages. By 'exemplary damages,' the court means damages by way of punishment to said defendants, Fleischner, Mayer & Co., for acting maliciously. You are the judges of the amount of such damages, if you find from the evidence that plaintiff is entitled to recover such damages." The court, in the latter part of this instruction, has undertaken to define the statutory meaning of the term "exemplary damages." Section 295 of the Code of Procedure provides that, "in an action on such bond [referring to an attachment bond], the plaintiff therein may recover if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained and reasonable attorney's fees to be fixed by the court; and if it be shown that such attachment was sued out maliciously he may recover exemplary damages," etc. The court has instructed the jury that "exemplary damages," as used by the statute, means damages by way of punishment to the defendants. This court, in the case of Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072, entered at some length into the discussion of the principles involved in exemplary damages, and held there that, in the absence of statutory provisions,

exemplary damages in this state would not be allowed; and we are not inclined, in view of the reasons given for the decision in that case, to extend, by implication or loose reasoning, the power of a jury to assess damages by way of punishment under the permission of the statute to assess exemplary damages. This question of exemplary damages is one that has called forth a great deal of discussion by the courts, but we are inclined to think that it was the intention of the legislature, in granting the jury the right to assess this peculiar, and not very well-defined, character of damages, to grant them only the right to assess actual damages, which could not be assessed, in the absence of this provision, under the general laws governing attachments. We do not mean by the term "actual damages" the actual damages expressed by the statute, of course,—such damages as could be definitely determined as the actual loss which the debtor would incur by reason of the attachment, and which loss could be determined or computed,—but an undetermined loss and damage, which is no less actual by reason of its indeterminate character, such as damage to reputation, damage to pride and to feeling, and damage of that character, some of which, it is true, are more or less sentimental, but that it never was the intention of the legislature to place in the hands of the jury the power, without any data whatever, to assess an arbitrary punishment against an attaching creditor, for the mere purpose of punishing such creditor, or as an example to others. One of the most comprehensive and exhaustive opinions which has been handed down on this subject is that of Judge Greene, of the supreme court of West Virginia, in *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485. There, under a statute which is fully as broad, if not broader than ours, the court held, after a searching investigation and review of all the authorities, that the term "exemplary damages" did not comprehend damages by way of punishment. In summing up the opinion, the court, in this case, says: "But, in my judgment, the decided weight of reason, as deduced from these decisions, is opposed to the allowance to the plaintiff, in any case, of any but compensatory damages, and that in no case should any damages be awarded the plaintiff, not as compensation to him, but as punishment of the defendant. In most of the cases above cited the courts have not reasoned at all on the subject, but they have simply announced views of the law; and the language used by them has very generally been so indefinite as really to furnish no safe conclusion as to what was thought by the court of the question we are discussing." With this view of the law, which we are satisfied is the correct one, the instruction above cited was manifestly erroneous.

The motion of the defendants for a nonsuit in this case should have been granted also on other grounds. There was no evidence whatever adduced showing any malice on

the part of the plaintiff in the attachment proceeding. There was no disposition manifested on the part of the plaintiff to injure the defendants, but the whole record shows that the plaintiff carefully and cautiously examined into the standing of the defendants before this action was commenced; that they employed attorneys, not only to examine the law, but the facts of the case in relation to the standing of the debtor, defendant in the attachment proceedings, and that when the action was commenced it was upon the advice of their attorneys, with a full knowledge of all the facts in the case. That one firm of attorneys resided in Portland, and the other in Port Townsend, does not affect the case, one way or the other; and it is well-established law that probable cause is a question of law, this far, at least, that probable cause will be presumed when the action has been commenced by the advice of attorneys to whom have been submitted all the facts in the case. In *Burton v. Railway Co.*, 33 Minn. 189, 22 N. W. 300, the court says: "What facts, and whether particular facts, constitute probable cause, is a question exclusively for the court. What facts exist in a particular case, where there is a dispute in reference to them, is a question exclusively for the jury. When the facts are in controversy, the subject of probable cause should be submitted to the jury, either for specific findings of the facts, or with instructions from the court as to what facts will constitute probable cause. These rules," says the court, "involve an apparent anomaly, and yet few, if any, rules of the common law rest upon a greater unanimity or strength of authority"; citing many authorities. In this case there was no controversy as to the question whether this action was brought by the advice of counsel familiar with the facts, and it must be conceded, then, that probable cause or reasonable cause existed for the bringing of the action. Now, our statute provides that the plaintiff may recover, if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true. the actual damages. Under the statute it is necessary, before a judgment can be obtained on an attachment bond, even for actual damages, that it should appear in the allegations of the complaint, and be established by proof, not only that the attachment was wrongfully sued out, but that there was no reasonable cause to believe the ground upon which the same was issued to be true. A reasonable ground is nothing but a probable cause, and if it be conceded that the probable cause existed, by reason of the fact that the action was brought by the advice of the attorneys to whom the facts were submitted, then it could not be very well established that the action was brought without reasonable cause; and as no actual dam-

ages could be recovered, under the statute, no exemplary damages could be recovered, under the ruling of this court in *Helfrich v. Meyer*, 39 Pac. 455. It was also held there that the costs of the original action could not be recovered in an action upon the attachment bond; citing *Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650.

Many other questions have been raised in this case, some of which, at least, we think are fatal to the respondent's case; but for the errors here commented upon the judgment will be reversed, with instructions to the lower court to grant the nonsuit asked for by the defendants.

HOYT, C. J., and SCOTT, J., concur.

ANDERS, J. I concur in the result.

GORDON, J. I concur in the result, but express no opinion upon the proposition first above discussed.

(107 Cal. 49)

STEEN v. HENDY. (No. 15,644.)
(Supreme Court of California. May 4, 1895.)

REVERSAL—REMAND.

An unqualified judgment of reversal remands the cause for a new trial without an express direction to that effect.

Motion for modification of judgment. Denied.

For former opinion, see 40 Pac. 21.

PER CURIAM. Respondent asks us to so modify the judgment herein as to give express direction that the cause be remanded for a new trial. Such modification is unnecessary, since the effect of the unqualified reversal is to remand the cause for a new trial. *Stearns v. Aguirre*, 7 Cal. 443; *Argenti v. San Francisco*, 30 Cal. 459; *Ryan v. Tomlinson*, 39 Cal. 639.

RANDALL v. DUFF et al. (No. 15,758.)
(Supreme Court of California. May 14, 1895.)

JURISDICTION OF SUPREME COURT.

Under Const. art. 6, § 4, giving the supreme court jurisdiction in cases at law only where the demand, exclusive of interest, amounts to \$300, the court has no authority to review an order made after final judgment, taxing a bill of costs of less than that amount.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by A. W. Randall against Julia R. Duff and others to quiet title. Const. art. 6, § 4, grants the supreme court jurisdiction in cases at law only where the demand, exclusive of interest, amounts to \$300. Defendants appeal from an order made after final judgment, taxing costs which were less than \$300. Dismissed.

S. M. Buck and W. C. Belcher, for appellants. W. L. Duff, H. S. Foote, and L. D. McKissick, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal in this case is granted, and the appeal dismissed, on the ground that the court has no jurisdiction thereof, on the authority of *Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101.

(107 Cal. 243)

BUENA VISTA FRUIT & VINEYARD CO.
v. TUOHY et al. (No. 18,350.)
(Supreme Court of California. May 13, 1895.)

EQUITY—RESCISSION OF CONTRACT—FRAUD.

The complaint alleged that defendants, by fraudulent practices, induced plaintiff to purchase property from them for twice what it was worth; that part payment thereof had been made, and notes and mortgages given for the residue. Held insufficient to maintain an action for the cancellation of the notes and mortgages, where the property received was worth more than the part payment made, without offering to put the vendors in statu quo.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by the Buena Vista Fruit & Vineyard Company against John Tuohy and others to set aside a judgment, and to cancel certain notes and mortgages. From a judgment for defendants, plaintiff appeals. Affirmed.

Morehouse & Tuttle and J. A. Percy, Jr., for appellant. Daggett & Adams and C. L. Russell, for respondents.

SEARLS, C. This action is brought by the corporation plaintiff to have a judgment of foreclosure against its property and a deficiency judgment entered after a sale in foreclosure set aside, and to have the mortgages and notes upon which the foreclosure proceedings were had set aside, annulled, and canceled, and that the defendants, and each of them, be enjoined and restrained from conveying, disposing of, or incumbering the land and premises mortgaged. Defendants demurred to the complaint by two separate demurrers, one on behalf of Tuohy, and the other by all the other defendants. These demurrers were sustained by the court, and, plaintiff declining or failing to amend after notice and leave so to do, final judgment was entered in favor of defendants. Plaintiff appeals from the judgment.

The complaint, with the exhibits thereto attached and made a part thereof, covers over 50 pages of the printed transcript. To epitomize it within brief limits, and at the same time illustrate it fairly, is quite difficult. The following synopsis will illustrate its more salient features: On the 13th day of May, 1891, John Tuohy, one of the defendants, was the owner of 720 acres of land situate in the county of Tulare, state of California; also of certain water rights, stock in water companies, etc., and certain personal property, consisting of six mules, etc., their harness, five wagons, and a quantity of farming tools. On said last-mentioned day

said Tuohy entered into an agreement in writing with E. J. Cox, E. De Witt, and P. F. Wood, the other defendants herein, as parties of the second part, by the terms of which he agreed to sell to them and they agreed to buy all of the property aforesaid on September 1, 1890, with interest at the rate of 8 per cent. per annum, payable semi-annually in advance, from and after September 1, 1891. The parties of the second part were to take possession of the property at once, to prepare the land for planting trees and vines, to plant 200 acres to trees and vines during the season of 1892, to care therefor, and to plant the residue to other crops. They further agreed to incorporate a stock company to plant the land to fruit and vines, to advertise the same, and use due diligence to sell the same; and, if they carried out the agreement, Tuohy was to convey all of the property by good and sufficient deed, etc., on the 1st of September, 1891; and, if the second parties failed to perform, they were to return the property to Tuohy on September 1, 1891, until which time they were to have the option to buy, but, if they failed, they were to pay all expenses up to said last-mentioned date. On the same day, Cox, De Witt, and Wood, the parties of the second part in the foregoing agreement, entered into another agreement, as parties of the first part, with the persons whose names are thereto subscribed, each separately, and not one for the other, which recited that whereas it is proposed to form a corporation, etc., to be entitled the Buena Vista Fruit & Vineyard Company, with a capital stock of \$144,000, divided into 720 shares of \$200 each, for the purpose of purchasing 720 acres of land (then follows a description of the land and property as in the first agreement), at the price of \$100 per acre, and to plant and set out thereon fruit trees and vines of first-class marketable varieties. The agreement then proceeds as follows: "Now, therefore, this agreement witnesses that the said parties of the first part hereby agree to sell to the said parties of the second part, and the said parties of the second part hereby agree to purchase from the said parties of the first part, the above-mentioned lands, water rights, and personal property, and all improvements that shall be made thereto up to the 1st of September next, at the price of \$100 per acre; the title to said lands to be shown to be good and valid at law, by an abstract to be furnished to said parties of the second part, to be paid as follows: \$10,000 cash out of the first payment upon subscription to the stock as hereinafter mentioned, and the balance on the 1st of September, 1896, with interest thereon in the meantime from said 1st of September next, until paid, at the rate of 8 per cent. per annum; said interest to be paid by even and equal half-yearly payments in advance. And it is agreed that on the 1st day of September next, upon said payment

of \$10,000 and interest, a deed shall be made to said corporation of said lands and premises, and a mortgage thereof by said corporation for the balance of the purchase money and interest. The said parties of the second part do hereby severally covenant and agree, each for himself, to and with the parties of the first part, that they will each severally take the number of shares of the capital stock of said corporation set opposite their respective signatures hereto, and pay at the time of their signature hereto, to E. J. Cox, cashier of the Tulare County Bank, as treasurer and trustee, \$20 per share upon the actual number of shares so respectively subscribed for by each of them, the said parties of the second part; and on the 1st of December next, and quarterly thereafter for the term of three years next ensuing, the sum of \$5 per share for said shares, making in all \$30 per share; such payments to be made quarterly as aforesaid. Said E. J. Cox, as such treasurer and trustee, shall and he is hereby authorized and directed to apply said money so to be received by him as follows: First in payment of said cash payment on said lands and interest, and the balance as the board of directors of said corporation shall direct in the improvement of said lands, as follows, viz.: The planting, in the season of 1891-92, in a good and workmanlike manner, of about 200 acres of said lands to grapes, and including the Chinese contract of about 100 acres of fruit trees, and the balance to grain, etc.; and thereafter, unless the directors appoint another treasurer, said money shall be paid by said treasurer, for the planting in the season of 1892-93 of so much of said land as the directors shall determine, and thereafter as said directors shall direct. The parties of the first part to pay all the taxes against said land for the term of five years. This agreement is made conditional and dependent upon the subscription, on or before the 1st of September next, of at least 600 shares of said capital stock; and, should that number not be subscribed by that date, then the said treasurer shall repay to said subscribers all such deposits or cash payments he may have received to the respective persons who shall have paid the same." The agreement was signed by defendants Cox, De Witt, and Wood, and by some 47 persons as parties of the second part, with the number of shares taken by each set opposite his name, aggregating 674 shares. Each of the defendants herein, including Tuohy, subscribed for 25 shares. To this agreement is appended (1) a list of eight names of those who subscribed for an aggregate of 85 shares, with a statement, signed by Cox, De Witt, and Wood, to the effect that said eight parties have been relieved from taking their stock, and are "relieved from payment, their stock never having issued"; (2) an assignment of the agreement with the claims accruing therefrom to the Buena Vista Fruit & Vine-

yard Company, which it is recited has been organized by the undersigned. This assignment is signed by said Cox, De Witt, and Wood, and is acknowledged before a notary public January 14, 1892. Neither of the above documents mentioned in 1 and 2 is dated.

The corporation was organized according to the complaint on or about the 6th day of June, 1891, for the purposes, with the capital stock and number of shares, etc., as specified in the agreement set out and quoted herein, but with other and further objects than those specified in said agreement. John Tuohy, D. W. Madden, E. De Witt, P. F. Wood, N. A. Hummel, J. F. Boller, and R. B. Bohannon were named as the directors of said corporation; and John Tuohy was elected president; D. W. Madden, vice president; and R. B. Bohannon, secretary. On the 16th day of September, 1891, the corporation plaintiff, pursuant to resolution of its board of directors, and for the purpose of completing the purchase of the property hereinbefore mentioned, and paying the purchase price thereof over and above the cash payment of \$10,000, made its two several promissory notes, payable to defendant Tuohy,—one for \$36,000, and the other for \$26,000,—payable September 1, 1896, with interest at 8 per cent. per annum, payable semi-annually in advance, etc., and, to secure the payment of said notes, executed to said Tuohy two several mortgages upon the real estate hereinbefore mentioned. The mortgages provided that, if default should be made in the payment of interest when due, the whole sum, principal and interest, should become due at the option of the mortgagee. The \$26,000 mortgage was subject and the lien thereof subordinate to that of the \$36,000 mortgage. Default having been made in the payment of interest on the \$36,000 note, an action was brought to foreclose the mortgage on or about June 13, 1892. An answer was filed admitting the making of the note and mortgage by the corporation; and thereafter, and, on the 8th day of February, 1893, a decree of foreclosure was entered, under which, on or about April 1, 1893, the land was sold, John Tuohy becoming the purchaser, for \$32,300, leaving a deficiency of \$8,539.80, for which judgment was entered in favor of Tuohy, and against the corporation plaintiff herein. Tuohy, as president, and Bohannon, as secretary, executed, for and in the name of the corporation, the foregoing notes and mortgages. In January, 1893, a set of directors was elected, not including the defendants herein or any of them; and thereafter, and on the 20th day of September, 1893, this action was instituted. The property referred to was conveyed to the corporation plaintiff by Tuohy on the 16th day of September, 1891, the date of the execution of the mortgages, which conveyance, together with the mortgages, was duly recorded. The foregoing contains a chronological state-

ment of the more important transactions involved in the case, irrespective of the fraud charged.

The more important allegations of frauds are: (1) The defendants herein, on or about June 6, 1891, agreed among themselves that with Bohannon, Boller, Madden, and Hummel they would organize a corporation to which the property should be sold; that Cox, Wood, and De Witt should act as promoters of said proposed corporation, represent to the public that they were the owners of the property to be sold, that the value thereof was \$72,000, for which sum they would convey it to the corporation about to be formed; that defendant Tuohy should receive \$36,000 thereof from the corporation, and that the residue of the purchase money should be received by the other defendants as a commission for acting as promoters; that this agreement was kept secret among the defendants, who held out to the world that Cox, Wood, and De Witt were owners of the property, and, to cheat and defraud the subscribers to said corporation, prepared and circulated the agreement (Exhibit B) which represented them as the owners, and that the value of the property was \$72,000, and could not be bought for a less sum; that they well knew they were not the owners, and that their representations were false, and that the property was only worth \$36,000; that the subscribers and stockholders knew nothing of their agreement to purchase at \$36,000 from Tuohy until about November, 1892; that said defendants Wood and De Witt circulated the agreement for signatures, and that subscribers to the extent of 85 shares were fraudulent and false, and were obtained only for the purpose of causing the bona fide subscribers to believe they were genuine, and to induce others to subscribe, and, believing them to be genuine, others were induced to sign; that in fact 600 shares had not been subscribed for in good faith on the 1st of September, 1891, all of which defendants well knew, but, with intent to cheat and defraud the subscribers out of the sum of \$10,000 paid in upon subscriptions, they represented that 674 shares had been subscribed, when in fact only 589 had been subscribed; that defendants paid nothing on the 25 shares subscribed by each of them, and that only \$9,780 was paid in, which defendants appropriated to their own use; that they withheld all knowledge that Cox, Wood, and De Witt were to receive a commission of \$36,000 from the subscribers, etc. (2) That, with a design to cheat and defraud the bona fide subscribers out of the sum of \$36,000, defendants and a few others, on or about June 6, 1891, without the knowledge of the bona fide subscribers, met and organized the corporation, although it was understood and agreed by and between the parties to agreement B that the corporation should not be formed until September 1, 1891; that the object of sooner forming the

corporation was to defraud the subscribers out of \$36,000, and to enable themselves to be elected directors, that they might control and manage the corporation for their own purposes. The complaint then proceeds to charge that, with a view to defraud the subscribers out of the \$36,000 aforesaid, the directors called a special meeting of the board, at which none of the subscribers were present, resolved to consummate the purchase of the lands and water rights, accept the deed thereof, and to execute the notes and mortgages for the purchase price, less \$10,000, paid in cash, etc.; that most of the subscribers were nonresidents of Tulare county, and were not at Tulare city, the principal place of business of the corporation, and, believing the conduct of the corporation to be fair and honest, took stock in the corporation, and paid therefor as provided in agreement B. There are various other allegations of fraud going to support the main charge, to the effect that the value of the property was but \$36,000, \$10,000 of which has been paid, and that the defendants are seeking to defraud the bona fide stockholders out of the residue of the purchase money, and that the second note and mortgage are in fact held for the benefit of defendants Cox, Wood, and De Witt.

The first suggestion which presents itself to the mind upon a perusal of the complaint is that the plaintiff is seeking equity without doing equity. In other words, it has received a conveyance of property admitted to be of the value of \$36,000, upon account of which it has paid \$10,000, and given its notes and mortgages as security for the payment thereof, for the residue of the purchase price. It now seeks by this action to have these notes and mortgages set aside and annulled, without canceling the conveyance to it of the property, and without paying or offering to pay the value of the property which it has received. Manifestly, this cannot be permitted in a court of equity. Practically, it is an attempt to rescind so much of the contract as militates against the interest of the plaintiff, while claiming the benefit of that portion of it in its favor. As a precedent for such claim, we are referred to the case of *Water Co. v. Flash*, 97 Cal. 610, 32 Pac. 600. An examination of that case will show that it does not support the contention here. The germ of that case was that the defendants, promoters of a corporation, had by their agents falsely and fraudulently represented that 4,500 acres of land had been contracted for at \$25 per acre, whereas in fact it had been contracted for at \$5.05 per acre. The land was conveyed to the corporation at \$25 per acre. The corporation or its stockholders had already paid a sum to the defendants in excess of the purchase price of \$5.05 per acre, and had given its notes, secured by a mortgage, for the residue of the purchase price at \$25 per acre, amounting to \$75,000. The

action was brought to cancel and annul a decree of foreclosure of the mortgage and the notes and mortgages, etc. Under these circumstances, the defendants having been paid more than was justly due them, it was held that a rescission of the sale by plaintiff was not necessary; and, as no injustice had been done to defendants, the decree, in accordance with the prayer of plaintiff's complaint, was upheld. Every complaint in an action should be founded upon a theory under which the plaintiff is entitled to recover, and should state all the facts essential to support such theory. Failing in these respects, it is radically defective, and does not state facts sufficient to constitute a cause of action. A party defrauded may rescind and restore within a reasonable time all of value which he has received under the contract, or he may affirm it and sue for damages. *Gifford v. Carvill*, 29 Cal. 590; *Herrin v. Libbey*, 36 Me. 357; *Burton v. Stewart*, 3 Wend. 239; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444. In the case last cited, this court held, in substance, that, where a promoter of a corporation has been guilty of fraud, the company may elect to set aside the contract or to recover the promoter's secret profits. This is not an action to recover the secret profits made by the defendants as promoters of the corporation. No accounting of such profits is sought. No rescission of the conveyance is averred or asked for. The theory of the complaint is: (1) That defendants were promoters of the corporation plaintiff. (2) As such promoters, they were guilty of fraudulent practices, whereby plaintiff was induced to purchase property for \$72,000, which was only worth \$36,000, and to pay therefor \$10,000 in cash, and to give their notes secured by mortgages for the residue of \$62,000. (3) That, these notes and mortgages being fraudulent, plaintiff may retain the property conveyed to it so worth \$36,000, and maintain an equitable action for the cancellation of the notes and mortgages without further compensation for the property purchased. Conceding the facts in support of this theory to be well stated, they do not entitle plaintiff to recover. He who would rescind a contract must put the other party in as good a situation as he was before, otherwise he cannot do it. *Chit. Cont.* 276. And his complaint, framed with this object, must state facts showing that he has performed or offered to perform on his part every act necessary to thus place the defendant.

2. If he would confirm the fraudulent contract, and recover in damages for the fraud, he must so state the facts that the court can see that he is entitled to the relief demanded or to some specific and certain relief, or his complaint will be held bad on demurrer. In cases where an answer is filed, the court may, under section 580, Code Civ. Proc., grant "any relief consistent with the case made by the complaint and em-

braced within the issue." But we are not now dealing with such a case. Non constat that any answer will ever be interposed here, and the question arises as to the sufficiency of the complaint standing alone, and confronted by a demurrer—a case in which the demand of the complaint limits the relief; a case in which, if the complaint is adjudged sufficient, the sequence must follow that, in a court of equity a plaintiff who has been defrauded may take property worth \$36,000 for \$10,000, and leave the defendants to pay all taxes upon such property for five years, under their covenant so to do. In other words, that a plaintiff who has obtained property under a contract tainted with fraud on the part of the vendor may confirm such contract as to the benefit and repudiate its burdens. If to do so works injustice to the defendant, it cannot be done.

There are other objections to the complaint of equal importance, but the objection noticed is deemed fatal to the pleading, and the judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(107 Cal. 258)

HOLT v. HOLT. (No. 15,676.)
(Supreme Court of California. May 23, 1895.)

FAILURE TO ENTER JUDGMENT.

In an action for divorce, where the jury returned a special verdict that the parties were not married, and the court thereupon ordered judgment for defendant, the failure of the clerk to enter it in the minute book of the court, and the fact that the trial judge was re-elected before it was so entered, do not affect the validity of the judgment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action for divorce by Hallie Holt against Fred S. Holt, on the ground of cruelty. From a judgment entered for defendant on a special verdict, and from an order overruling a motion to vacate the same, plaintiff appeals. Affirmed.

Wal. J. Tuska and Beverly R. Hodghead, for appellant. W. W. Allen, for respondent.

BELCHER, C. This is an action for divorce, upon the ground of extreme cruelty. The answer denies, among other things, that the parties to the action ever intermarried, or that they ever were, or are, husband and wife. The cause came on regularly for trial on November 11, 1891, and a jury was impaneled to try the same. Witnesses were examined on both sides, and after argument by counsel the case was submitted to the jury on November 12th, upon the following special issues: "(1) Were the parties to this action

married to each other? (2) If you say that the parties were married, has the defendant treated the plaintiff with extreme cruelty?" The jury rendered the following verdict: "Were the parties to this action married to each other? Answer. No." "Thereupon, on the said 12th day of November, 1891, in open court, the court orally gave and pronounced judgment in favor of the said defendant, that this action be dismissed." This order was entered by the clerk in the rough minutes of the court's proceedings on November 12th, but was not transcribed by him into the engrossed minute book of that day. No written findings were filed, and no judgment was entered in pursuance of this order. In October, 1893, the plaintiff moved the court that the cause be set down for trial. The motion came on regularly to be heard, and in support thereof the plaintiff read the pleadings in the action, and the minutes of the court as to the trial. The court thereupon denied the motion, and directed the clerk of the court to enter judgment in favor of the defendant nunc pro tunc as of November 12, 1891. A paper was then, on October 30, 1893, signed by the judge, and filed, setting out the facts, and that "the court approves and adopts the said verdict, and, as a conclusion of law, the said defendant is entitled to judgment for his costs, and the court hereby orders judgment to be entered accordingly as of the 12th day of November, 1891." Judgment was accordingly so entered, and from it the plaintiff appeals. In November, 1893, the plaintiff moved the court to vacate and set aside the judgment, findings, and decision filed October 30, 1893, upon the grounds (1) that the trial of the cause had not been completed at the time said judgment was entered; (2) that at the time the said judgment was entered, and the said findings made and filed, the term of office of the judge who tried the cause had expired, and his judicial powers relative to the trial thereof during his preceding term had ceased. After a hearing the court denied the motion, and from that order the plaintiff also appeals.

It appears that the judge before whom the case was tried, and before whom all of the proceedings under review were had, Hon. W. T. Wallace, was re-elected to the office of superior judge in 1892, and his new term of office commenced on the first Monday of January, 1893. And it is contended that the case had not been fully tried when the new term commenced, since no written findings approving and adopting the verdict of the jury had then been filed, and that thereafter the judge had no power to make findings or take any steps to complete the trial. In support of this position, counsel cite Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60, and Broder v. Conklin, 98 Cal. 360, 33 Pac. 211. The verdict of the jury to the effect that the parties to the action were not husband and wife, if approved and adopted by the court, was decisive of the action, and necessitated a judgment in favor of the defendant. No fur-

ther findings were required. It is true, the action was an equitable one, and the verdict was only advisory; but it appears to have been regularly returned and entered in the minutes of the court, and thereupon the court orally ordered judgment to be entered thereon. This order necessarily included an approval and adoption of the verdict, and constituted a rendition of judgment in favor of the defendant. And when the order was made it became the duty of the clerk to transcribe it into the minute book of the court, and to enter the judgment as ordered. The failure of the clerk to do so was a failure to perform a ministerial duty which could afterwards be performed at his own instance, or by direction of the court, at any time. *Estate of Cook*, 77 Cal. 220, 17 Pac. 923, and 19 Pac. 431; *Baker v. Brickell*, 102 Cal. 620, 36 Pac. 950. It follows that, notwithstanding the judge of the court below was re-elected between the time of the trial and the completion of the record thereof, the proceedings complained of were authorized and proper.

The *Connolly* and *Broder* Cases, cited by appellant, are not in point. In each of those cases it was held that findings prepared and signed by the judge, but not filed until after his term of office had expired, could not be the basis of a valid judgment, because the "trial of a cause by the court is not concluded until the decision is filed with the clerk; and, when the term of office of the judge who tried the case expires before such decision is filed, the fact that it was signed by him, and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment entered thereon." This is undoubtedly sound law, but it is not applicable to the facts of this case. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(107 Cal. 256)

PEOPLE v. MT. SHASTA MANUF'G CO.
(No. 15,774.)

(Supreme Court of California. May 22, 1895.)
VALIDITY OF INCORPORATION — MANUFACTURING
COMPANY—POWER TO BUY RAILROADS.

The incorporation of a company to manufacture lumber and run a sawmill is not void because the articles state that it is formed in order to, among other things, buy, lease, sell, and otherwise deal in, railroads, tramways, and rights of way, on the ground that this involves an attempt to form a railroad corporation otherwise than as required by law; the provision in the articles merely referring to such railroads, tramways, and rights of way as might be required as parts of the manufacturing plant.

Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Quo warranto by the people of the state of California against the Mt. Shasta Manufacturing Company. From an order sustaining a demurrer to the complaint, and a refusal to allow plaintiff to amend, plaintiff appeals. Affirmed.

P. O. Chilstrom, Thos. V. Cator, and Atty. Gen. Fitzgerald, for appellant. James Alva Watt, for respondent.

TEMPLE, J. This is an information in the nature of a quo warranto, to have it adjudged that the defendant is exercising corporate functions without right, and to enjoin it from doing so. The complaint states that the defendant is doing business as a corporation; that it has a board of directors, a president, and a corporate seal; that it has capital stock, upon which it has levied an assessment, is transacting business in corporate form, and claims, in good faith, to be a corporation; that the incorporators have executed, acknowledged, and filed articles of incorporation, which are not set out at large in the complaint. The articles of incorporation are executed in the manner, and are in substance and form, as required by the general provisions of the Code for the creation of private corporations, but it is contended that the articles are defective because one of the purposes for which it was formed is expressed as being "to buy, lease, sell, mortgage, and otherwise deal in * * * railroads, tramways, and rights of way; to buy, lease, sell, mortgage, operate, construct, and maintain railroads, tramways," etc., and the incorporation was not constituted as the Code requires railroad corporations to be. The general purpose for which the company was formed was to manufacture lumber and all articles made of wood; in other words, to own and run a saw mill. In such business it is frequently necessary to have tramways and railroads, as parts of the manufacturing plant. The articles in question would not authorize the corporation to buy, lease, or operate a railway for traffic. Perhaps it was not necessary to make special mention of this part of the manufacturing appliances, but such mention cannot vitiate the incorporation. Such an incorporation could not use the right of eminent domain to acquire rights of way. We think the court properly sustained the demurrer.

The court refused to allow the plaintiff to amend the complaint. This is generally a matter of absolute right, and, when it is refused, the court must be able to see that the complaint cannot be so amended as to state a good cause of action. This the court will not often be able to do, but I think it was properly so determined here. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

(107 Cal. 262)

TAYLOR v. HEARST. (No. 15,877.)¹
 (Supreme Court of California. May 23, 1895.)
ACTION FOR LIBEL — MITIGATION OF DAMAGES —
MISTAKE—RETRACTION—NOMINAL DAM-
AGES—INSTRUCTIONS.

1. It is no defense that defendant did not mean to make the libelous charge against plaintiff, but intended to accuse somebody else.

2. A retraction made in the newspaper which published the libel may be given in evidence in mitigation of damages.

3. Where it was clearly established that a libelous publication was not made with ill will, it was not error to instruct the jury that punitive damages could not be awarded.

4. In an action for libel, damages may be recovered for injuries to the feelings, though they are not specially alleged or proved.

5. In an action for libel, the court cannot assume as matter of law that plaintiff is entitled to only nominal damages.

Commissioner's decision. Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Joseph W. Taylor against W. R. Hearst for libel. From a judgment for defendant, plaintiff appeals. Reversed.

J. C. Bates, for appellant. W. W. Foote, for respondent.

BELCHER, C. The defendant, W. R. Hearst, was sole proprietor of the daily newspaper published in San Francisco and known as "The Examiner." On January 10, 1892, there appeared in that paper an article charging, in substance, that J. W. Taylor had a contract with the city of San Francisco to supply basalt blocks for paving streets, at the rate of \$45 per 1,000, and that he and one Henry Barron, who had been appointed keeper of the corporation yard near the foot of Sixth street, and whose duties required him to keep track of material belonging to the street department, had conspired together to cheat and defraud the city by getting fraudulent receipts for blocks never delivered; that 34 fraudulent receipts were obtained for 34 loads of blocks not delivered, and that afterwards Taylor swore to and filed a demand for payment on his contract, including the 34 bogus loads; that steps were then taken to prosecute him for perjury, but it was found that the demand had been sworn to before a clerk of the board of supervisors not authorized to administer an oath, and so the only thing for the city to do was to keep Mr. Taylor's demand until the bogus 34 loads were eliminated from it. The defendant had no knowledge of this article before or at the time of its publication, but his attention was called to it, and four days later a correction thereof was published in the paper in the following words:

"A Correction.

"In an article which appeared in these columns on Sunday last referring to frauds on the public in connection with the furnishing basalt blocks to the city, the initials of

J. N. Taylor were erroneously printed 'J. W.' J. W. Taylor, the contractor, had nothing to do with the transaction, and was in no way associated with Henry Barron, who was arrested at the same time as J. N. Taylor for conspiracy."

In April, 1892, plaintiff commenced this action, alleging in his complaint that he was then and had been for more than ten years engaged in the business of manufacturing and supplying basalt blocks to the city and county of San Francisco, and to various persons and corporations in the city; that the defendant was the sole proprietor and publisher of the newspaper named "The Examiner," which had a large and extensive circulation in the city and county of San Francisco and throughout the entire state of California; that on January 10, 1892, the defendant did falsely and maliciously publish in said newspaper of and concerning the plaintiff the article before referred to, a copy of which was annexed to the complaint as an exhibit, and "that by means of said false, malicious, and defamatory publication said defendant intended it to be believed and understood, and that it was generally understood by those who read said article in said newspaper, that this plaintiff had been and was guilty of the crime of stealing and thieving by the use of fraudulent receipts and swearing to false demands against the city and county, and it also was intended by said defendant that said article was to be understood and believed, and it was generally understood, that said plaintiff was dishonest in his business and occupation of contracting with the said city and county in furnishing basalt blocks, and that he merely escaped prosecution for the crime of perjury because the deputy clerk of the board of supervisors was not authorized to administer the oaths to the fraudulent demands"; and that by reason of said publication plaintiff had been greatly injured in his good name and reputation, to his damage in the sum of \$10,000, for which he asked judgment.

The answer admits that defendant was the proprietor and publisher of "The Examiner," and that the said article was published therein on the 10th of January, 1892, but denies that he falsely or maliciously published the same of or concerning the plaintiff, and specifically denies all the other material averments of the complaint. It then alleges that the said charges were not made against the plaintiff, and were not intended to be considered or understood as charges against the plaintiff, but were made, and were intended to be so considered, against one J. N. Taylor, and that in the printing of said article the initials of said J. N. Taylor were printed J. W., and that as soon as said mistake was discovered a correction thereof was duly published in the news columns of the said paper in the words above set out.

The case was tried before a jury, and the

¹ Rehearing denied.

verdict was in favor of the defendant. Judgment was thereupon entered that the plaintiff take nothing by the action, and that defendant recover his costs, amounting to the sum of \$165.50. The plaintiff moved for a new trial, which was denied, and has appealed from the judgment and order.

It was proved at the trial in defense of the action that there was a John N. Taylor who had had a contract with the city to furnish basalt blocks, and had presented a bill against the city for 207,004 basalt blocks, at \$53 a thousand, which was sworn to by him; that the superintendent of streets deducted from the bill \$349.80 on the ground that 6,600 of the blocks had not been furnished, and that there was a prosecution against Taylor for perjury, but the prosecution was dismissed because the oath was taken before the deputy clerk of the board of supervisors. It was also proved that the person who wrote the article complained of was directed by the managing editor of "The Examiner" to see the superintendent of streets, and get the actual facts as to the frauds that were being perpetrated upon the city in furnishing basalt blocks, and that he did so; and that by mistake, and without any malice towards the plaintiff, the middle initial of Taylor's name was printed "W" when it should have been "N." The only evidence introduced showing that any other persons who read the said article understood it as applying to the plaintiff, and the only evidence as to damage resulting from the publication, was that of the plaintiff himself, who testified: "I have suffered this much actual damage, that lots of my friends all over the county say: 'You are a pretty fellow; what are you going to do now? Are you going to San Quentin next?' I don't know that I have lost any money by it. I have lost a lot of credit by it."

The court refused to give to the jury any of the instructions asked by the plaintiff, but gave, among others, the following: (5) "The court further instructs you, as a matter of law, that the publication in question, being as to the plaintiff untrue and unprivileged, is libelous, and that the plaintiff is entitled to such compensatory damages as shall afford a reparation for all the injury which has naturally and proximately resulted from the publication; provided you find that the defendant meant to charge J. W. Taylor, the plaintiff, with the commission of the offenses contained in the publication, and that third persons understood that the person meant was J. W. Taylor, the plaintiff. The amount of these damages, if you find for the plaintiff, is to be determined by you in accordance with this rule, and it is within your power, under the circumstances of the case, to award the plaintiff nominal damages only." (6) "Under certain circumstances, the recovery may go beyond mere reparation or compensation, and

the jury may award that which the law terms 'punitive' or 'exemplary' damages. To authorize such damages, however, it must appear from the circumstances of the case that the wrongdoer acted with a malicious purpose towards the person aggrieved, with a wicked and malignant intention to injure, and that the wrong was not the result of a mistake of fact, or the honest misapprehension as to either right or duty. From this statement you will see that 'punitive' or 'exemplary' damages cannot, as a matter of law, be awarded by you under the facts of this case." (7) "You are restricted to compensatory damages in the event that you find for the plaintiff, which I have already told you may be nominal." The plaintiff excepted to each of these instructions, and now assigns the giving of them as errors.

Libel is a false and unprivileged publication, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business; and the proprietor of a newspaper in which a libel is published, though he had no knowledge of the publication at the time, is as responsible for it as he would have been if it had been done by him personally or under his direct supervision. To constitute libel there must be malice, actual or implied, on the part of the publisher. Actual malice exists when the publication is made through motives of ill will and with intent to injure or defame, and the law presumes malice when the article published is libelous per se. Such malice is called "malice in law," and it signifies a wrongful act intentionally done. Under our statute, in an action for libel, where the defendant has been guilty of malice, actual or presumed, "the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." Civ. Code, § 3294. The defendant may, however, prove any mitigating circumstances to reduce the amount of the damages (section 461, Code Civ. Proc.); and, among other things, he may prove that there was no malice in fact. But such proof is not sufficient to defeat the action or to prevent the plaintiff from recovering such damages as he has actually sustained by reason of the publication. *Wilson v. Fitch*, 41 Cal. 363; *Lick v. Owen*, 47 Cal. 252; *Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157; *Childers v. Publishing Co.* (Cal.) 38 Pac. 903. In the case last cited it is said: "Two classes of damages may be recovered in actions for libel, to wit, actual or compensatory damages and exemplary damages. Special damages, as a branch of actual damages, may be recovered when actual pecuniary loss has been sustained, and is specially pleaded. The remaining branch of actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc.; and,

while special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence of actual proof, and to the amount that the jury estimates will fairly compensate plaintiff for the injury done. *Wilson v. Fitch*, 41 Cal. 386. Exemplary damages may be recovered when malice on the part of the defendant is established as a fact." The article here complained of was libelous per se. It charged J. W. Taylor with dishonesty and criminal conduct, and, according to plaintiff's undisputed testimony, must have been understood by his friends as applying to him. It is true it was made to apply to him by mistake, but that did not justify or excuse the publication. As said in the note to *McAlister v. Press Co.* (Mich.) 15 Am. St. Rep. 339, 43 N. W. 431, where the authorities on the subject of libel are very fully reviewed: "One who has published a libel on another cannot successfully resist the latter's action for redress by showing he did not intend to publish it, and that its publication was due to carelessness, inadvertence, or mistake. Hence it is not a sufficient defense that the publication of a libel resulted from an error in setting type." The "correction" or retraction published was properly pleaded and given in evidence, but it could operate only in mitigation of damages, and not as a full defense to the action. By instruction No. 5 the court told the jury that, the publication being untrue and libelous as to the plaintiff, he was entitled to such compensatory damages as would afford a reparation for all the injury which had naturally and proximately resulted from the publication; "provided you find that the defendant meant to charge J. W. Taylor, the plaintiff, with the offenses contained in the publication, and that third persons understood that the person meant was J. W. Taylor, the plaintiff." This was, in effect, telling the jury, and it must have been so understood, that unless the defendant meant to charge the plaintiff with the offenses contained in the publication, and third persons so understood it, the plaintiff was not entitled to recover compensatory damages for the injury he had sustained. The proviso attached to the instruction was erroneous. The publication did charge the plaintiff with offenses, and whether it did so by design, or was the result of carelessness in setting type, was a matter of no consequence, so far as the question of actual damages was involved.

It is claimed for appellant that instruction No. 6 was also erroneous, but we see in it no prejudicial error. It is true that in an action for libel the question whether there was such malice on the part of the defendant as would entitle the plaintiff to recover exemplary or punitive damages is ordinarily

one of fact for the jury. But in this case it was clearly established that the publication was not made by reason of any ill will against the plaintiff or with any intention to injure or defame him. That being so, the plaintiff was not entitled to exemplary or punitive damages, and the court did not err in so telling the jury. One of the instructions asked by the plaintiff and refused was in these words: "In considering the amount of damages to be awarded, you may consider the injury to the plaintiff's feelings." This instruction should have been given. It was not necessary that damages resulting from injury to feelings be specially alleged, or that proof of such injury be specially given. It is claimed for respondent that the plaintiff was entitled at most to only nominal damages, and that in such case the verdict should not be disturbed, citing the maxim, "*de minimis non curat lex*." The same point was made in *Lick v. Owen*, supra, and the court said: "The rule may possibly be as stated in actions *ex contractu*, when, for the technical breach of a contract, the court can see that, as matter of law, the plaintiff would be entitled to only nominal damages. But in an action for libel the question of damages is for the jury, and the court cannot assume, as matter of law, that the plaintiff is entitled to only nominal damages." The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

(107 Cal. 272)

CLANCY v. PLOVER. (No. 15,832.)

(Supreme Court of California. May 23, 1895.)

MECHANIC'S LIEN—SUIT TO FORECLOSE—ATTORNEY'S FEES—PLEADING AND PROOF.

1. In an action to foreclose a mechanic's lien, attorney's fees will be fixed by the court, irrespective of any averment in the complaint, and hence a failure to determine an issue raised on such an averment is not error.

2. An allegation in the complaint as to what are reasonable attorney's fees being unnecessary, the failure of plaintiff to produce evidence thereon will not affect the validity of the judgment awarding such fees.

3. In an action to foreclose a mechanic's lien, it appeared that plaintiff sublet a portion of the work he had contracted to do upon a structure located on defendant's land to one S., and, when the work was completed, gave S. an order on defendant, which the latter refused to pay, whereupon S. filed a lien, and obtained judgment against defendant for the amount due him, together with attorney's fees and costs. *Held*, that under Code Civ. Proc. § 1193, making it the duty of a contractor to protect the owner's property from any liens of subcontractors or material men, defendant was entitled to a credit for the full amount which he had paid S. under such judgment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by John C. Clancy against Patrick Plover to foreclose a mechanic's lien. From a judgment for plaintiff, defendant appeals. Modified.

Lloyd & Wood, for appellant. A. Morgenthal, for respondent.

BRITT, C. Under a contract with appellant, the respondent did, and caused to be done, the work of painting a building and other structures situated on a parcel of land, the property of appellant, in the city and county of San Francisco. The work was completed March 9, 1891. For this appellant owed respondent \$703, of which sum \$345 was paid, and respondent brought this action to enforce a lien asserted by him against the premises where the work was done for the unpaid balance of \$358. His complaint contains an allegation that an amount specified is a reasonable allowance for attorney's fees in the action, which averment defendant denied. The court made no finding on this issue. Respondent subtlet a portion of the work to one Stapleton, agreeing to pay him therefor the sum of \$100. After the entire job was completed, respondent gave to Stapleton a written order on appellant, requesting the latter to pay Stapleton such sum of \$100 out of the contract price then due respondent, but appellant refused to pay such order on presentation thereof. Stapleton filed in the recorder's office a claim of lien against the property for the amount due him from respondent, and, after appellant's refusal to pay said order, commenced an action to foreclose the lien, in which suit Clancy and Plover, the parties here, were made defendants. Plover, the owner, contested the case, but Clancy made default. Stapleton recovered judgment in that action for said sum of \$100, together with \$3.25, cost of recording his claim of lien, \$50, attorney's fees, and \$75.50, costs of suit,—in all \$228.75,—to satisfy which Plover's premises were ordered to be sold. Plover then paid the amount of that judgment, and claimed credit in the present action for the whole of the sum so paid. But the court below allowed him credit for only \$100, the amount of Stapleton's original demand, and rendered judgment in respondent's favor for \$258, together with costs, and \$40 for attorney's fees. Plover appeals from the judgment and an order denying a motion for new trial.

1. It has been established by the decisions of this court that no allegation need be inserted in a complaint for the foreclosure of a mechanic's lien relative to the claim of the plaintiff for attorney's fees; that an allegation on that subject, if made, does not bind even the party making it. *Mulcahy v. Buckley*, 100 Cal. 490, 35 Pac. 144; *Insur-*

ance Co. v. Fisher (Cal.) 39 Pac. 760. Therefore, the issue made by the pleadings here on that question was immaterial, and the failure of the court to find upon the same was not error. It is said that there was no evidence before the court as to the value of respondent's counsel fee. Since the above-cited cases determine that the attorney's fee is to be fixed by the court irrespective of any averment in the complaint, and that such averment is immaterial, it is not perceived why the plaintiff must necessarily prove what he need not allege. The court is not bound by testimony touching the value of attorney's fees in suits of this nature, the limitation on its action being that it shall not abuse the discretion committed to it by the statute (section 1195, Code Civ. Proc.). We think, therefore, that the failure of the plaintiff to produce evidence on that question does not affect the validity of the judgment awarding such fees. See the opinion of *Harrison, J.*, in *Watson v. Sutro*, 103 Cal. 172, 37 Pac. 201; *Rapp v. Gold Co.*, 74 Cal. 532, 16 Pac. 325. No doubt, such evidence is admissible, and may properly be considered by the court; but its absence in the record on appeal is not a circumstance requiring a reversal, unless it should appear from an inspection of the record, and without evidence to sustain it, that the fee fixed by the court is unreasonable, which is not claimed in this instance.

2. It was the duty of the respondent to protect the appellant's property against any lien preferred by subcontractors, laborers, or material men employed by him. Code Civ. Proc. § 1193. Under the same section the owner was entitled to deduct from any amount due to respondent the amount of the Stapleton judgment and costs; and this, of course, includes the attorney's fees recovered by Stapleton. Respondent could have prevented the accumulation of such expenses by the simple expedient of paying the sum due to Stapleton. It was his debt, and not appellant's. *Covell v. Washburn*, 91 Cal. 560, 27 Pac. 859. It does not affect the case that an order was given upon appellant for the amount of Stapleton's claim before that action was begun, and that he refused payment of the order. The respondent could not split his demand, and, by assignment of a portion thereof, impose upon appellant. Without his consent, the legal obligation of paying the assignee. *Thomas v. Mining Co.*, 54 Cal. 578; *Grain v. Aldrich*, 38 Cal. 514. Respondent refers us to *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640. But that case differed from this in the important feature that there the owner had promised to pay the contractor's orders, and wrongfully violated his agreement, while here there was no such promise. It results that the judgment must be modified, as of the date of its entry, by striking therefrom the sum of \$128.75, the excess of Stapleton's judgment paid by appellant above the sum allowed

as a credit to appellant in this action, and, as so modified, the judgment and the order denying a new trial should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by striking therefrom the sum of \$128.75, as of the date of entry thereof, and, as so modified, the judgment and the order denying a new trial are affirmed.

(21 Colo. 211)

BRANHAM et al. v. STALLINGS.

(Supreme Court of Colorado. May 6, 1895.)

ILLEGAL CONTRACT—RECOVERY OF MONEY PAID—IN PARI DELICTO.

Plaintiff and defendants, with others, organized an association, and entered into an agreement by which each member was to pay two dollars a week, and at drawings, held each week, one of the members was to receive a lot. Plaintiff participated in the drawings, and repeatedly acted as one of the judges therein. *Held*, that such contract was illegal, under Mills' Ann. St. § 2928, prohibiting lotteries, and no action could be maintained to recover money paid thereunder.

Error to Arapahoe county court.

Action by Stephen A. D. Stallings against Charles A. Branham and others for the recovery of money paid for the purchase of lots. From a judgment for plaintiff, defendants bring error. Reversed.

This action was brought by Stephen A. D. Stallings, as plaintiff, suing for himself and as assignee for others, for the purpose of recovering back certain moneys paid for the purchase of lots in the Denver University addition to the city of Denver, plaintiff alleging that he was induced to part with his money by reason of the fraudulent conduct of the defendants. The defendants, answering, denied each and every allegation of the complaint, and for further answer alleged: "That on or about the 1st day of June, A. D. 1890, said plaintiff and said other parties mentioned in said complaint, together with other persons, amounting to one hundred members, associated themselves together and organized and formed what was called 'The Denver Lot Club.' That, under the agreement by which said parties associated themselves together, it was agreed that each member was to pay, as dues to said club, the sum of \$2 per week. That drawings were to be had every Monday evening, commencing with the first week when said club was organized, at which drawing one of the said members was to receive a certain lot in the Denver University addition. That, by the terms of said agreement, one of said members would draw a lot at the first drawing, which would only cost the said member \$2. That one of said members would draw a lot at the second meeting, which lot would cost the successful party the sum of \$4. That said drawings were to

be continued for a period of sixty weeks. That the members of said club, including the plaintiff and the other parties mentioned in said complaint, adopted certain rules governing said club, among which were the following: 'Any person may become a member of the club upon the payment of \$2 to any authorized collector, or at the office of the club, room 20, 910 Sixteenth street, or McGuire & Hyde, room 5, 1790 Curtis street. All dues shall be payable in advance, and become due on the day of each meeting. All dues, if not paid three days before meetings, shall be declared delinquent and forfeited. Members shall be notified of the time and place of the first meeting, after which the meetings shall be continued regularly on each week for the period of sixty weeks. All lots shall be deeded according to the numbered plat on exhibition in the club room, beginning at number one to sixty, consecutively. After the sixtieth meeting, the forty remaining choicest lots will be deeded to the remaining forty members. Each member participating in the fifty first meetings shall be entitled to a warranty deed and abstract for one lot, which is guaranteed to be free and clear from all incumbrances of any nature. The members getting the first fifty lots shall be given a warranty deed of one lot each at the time of the meeting, the said lot to be free and clear from all incumbrance, and can obtain a full and complete abstract of the same upon the payment of \$1. These lots are located in blocks numbered one, two, fifteen, and sixteen, Denver University addition.' These defendants further allege that the plaintiff, and the other parties mentioned in said complaint, became members of said club, and participated in the meetings and drawings had at said meetings; that the plaintiff herein repeatedly acted as one of the judges, and presided over said drawings; that the said lots mentioned in said complaint as having been deeded to the said Sam C. Stallings, J. N. Sherrod and O. H. Van Horn were drawn by said parties, respectively, at a regular meeting of said club. The defendants further allege that the plaintiff, and said parties mentioned in said complaint, except the said Sam C. Stallings and said Sherrod and Van Horn, became delinquent, and their membership forfeited, by reason of their failure to pay their dues in accordance with the agreement made by the members of said club. Further answering, these defendants allege that they were only interested in said club as members thereof, and that the said defendant C. A. Branham was selected by the members of said club to be manager thereof. These defendants further allege that, at the office of said club, a large map was exhibited and hung upon the wall, showing the location of said property, in lots and blocks, and its relation to the adjoining additions, all of which were correctly shown

and located upon said map. That said plaintiff, and the other parties mentioned in said complaint, knew, or had every facility of learning, the exact location, surroundings, and value of said property. Further answering, these defendants deny each and every allegation in said complaint contained, not herein expressly admitted. Wherefore these defendants ask to be hence dismissed, with their costs in this behalf incurred." No replication was filed to this answer. The cause was tried to the court without the intervention of a jury upon these pleadings. Two judgments were entered in the cause. The first, a money judgment, simply bears date of the 18th day of January, 1892. Two days thereafter a second judgment was entered in the absence of defendants' attorneys, and without notice to them, as is shown by an affidavit filed in the trial court to set it aside. The second judgment provided that the plaintiff should have execution upon the bodies of said defendants. To reverse these judgments the cause is brought here upon error.

Norris & Howard, for plaintiffs in error.
Browne, Putnam & Preston, for defendant in error.

HAYT, C. J. (after stating the facts). By the answer of the defendants it appears that the parties plaintiff and defendants, with others, associated themselves together, organized, and formed a lottery association known as the "Denver Lot Club"; that they entered into an agreement by the terms of which they were each to pay two dollars per week, and that drawings were to be had every Monday, at which drawings one of the members was to receive a lot. It further appears that the plaintiff and his assignors became members of said club, and participated in the meetings and the drawings, and that the plaintiff repeatedly acted as one of the judges, and presided over said meetings. It also appears that a number of lots were drawn by the assignors of plaintiff in pursuance of such illegal contract, and that deeds were duly made to said parties for such lots. These uncontradicted allegations show conclusively the illegality of the contract entered into between the plaintiff and his assignors and the defendants. It was a lottery scheme, pure and simple, and as such prohibited by the constitution of this state and also by statute. It is shown that these parties voluntarily associated themselves together for the purpose of carrying out this illegal scheme. "In pari delicto, portior est conditio defendantis."—"In equal guilt, the stronger is the situation of the defendant,"—is a maxim of the law. or, as it is sometimes expressed, "Where misconduct is mutual, the law will not lend its aid to either party." This rule was not adopted for the benefit of defendants, but simply upon the grounds of public policy.

Subject to a few well-known exceptions, the law is well established that, where such a contract is executory, the law will not aid either party to enforce its execution; and where it has been executed, or money paid in pursuance thereof, the law will not aid the party to recover back the amounts paid. The exceptions cover cases of usurious contracts, marriage brokerage contracts, and the like, where the transactions are prohibited for the sake of protecting one set of men from another, the one from their condition or situation being liable to be imposed upon by the other, as in such cases the parties are not in *pari delicto*, and it is assumed that public policy will best be advanced by granting relief. 2 Pom. Eq. Jur. § 941, and cases cited in note. In this case, however, plaintiff and his assignors admittedly joined with a lottery association in direct violation of the statutes of this state, and do not come under the principle governing the excepted cases. The statute reads as follows: "No person or persons, corporation or association, shall within this state, open, set on foot, carry on, promote, or draw, publicly, or privately, any lottery, game or device of chance of any nature or kind whatsoever, or by whatever name it may be called, for the purpose of exposing, setting to sale, or disposing of any houses, lands, tenements, mines, or real estate, or any money, goods, or things in action. Whoever (whoever) violates this provision, shall, for each offense, upon conviction, upon indictment, be fined not less than one hundred dollars, or imprisoned in the county jail not less than sixty days, or both, in the discretion of the court." Mills' Ann. St. § 2928. It is alleged in the answer, and not denied, that these parties associated themselves together under circumstances showing that they were particeps criminis in an illegal scheme to dispose of lots by chance. They are in *pari delicto*, and neither courts of equity nor courts of law will aid either; and, where money has been paid by either party upon such a contract, it cannot be recovered back, for the reason that courts will not assist such a transaction in any way. Broom, Leg. Max. pp. 720-728 et seq.; Norris v. Norris, 9 Dana, 317; Nellis v. Clark, 20 Wend. 24; Sollinger v. Earle, 82 N. Y. 393; Setter v. Alvey, 15 Kan. 157. In the case of Norris v. Norris, supra, it is said: "When the parties to an illegal or fraudulent contract are in *pari delicto*, neither a court of equity nor a court of law will aid either of them in enforcing the execution of that which may be executory, or in revoking or rescinding that which may have been executed. In such a case, the law will not be the instrument of its own subversion, and to every invocation of its assistance replies, 'In *pari delicto*, portior est conditio defendantis.'" The judgment of the county court must be reversed, and the cause remanded. Reversed.

(5 Wyo. 237)

In re MURPHY.

(Supreme Court of Wyoming. May 29, 1895.)

BIGAMY—CONSTITUTIONAL LAW—CRIMINAL LAW—
UNITED STATES AND TERRITORY PUNISH-
ING SAME OFFENSE.

1. Section 74 of chapter 73 of the Session Laws of Wyoming Territory of 1890, being a part of the act of the legislature of the territory of Wyoming approved March 14, 1890, was a valid law of the territory, when enacted, and, by virtue of the enabling act and the constitution of the state, became, and still is, the law of the state; and under the provision of said section which defines and punishes the crime of bigamy the act of bigamy committed March 28, 1891, within the state of Wyoming, is an offense now punishable under the laws of said state.

2. The fact that the congress of the United States had enacted a law defining and punishing the crime of bigamy in the territories and other places over which the United States have exclusive jurisdiction did not restrict or impair the right of the legislature of the territory of Wyoming to define and provide a punishment for bigamy, as an offense against the territorial sovereignty and its laws.

3. The contention that the law of the territory was not valid, because the same act was punishable as a crime under the laws of the United States, and therefore, if both were in force, the person committing the crime would be subject to punishment twice for the same offense, is not sound, as the federal government could punish it as a crime against it, while at the same time it might be a crime punishable under the laws of the territory. In this respect there is no distinction between a state and a territory, in their respective relations to the general government.

4. The act of congress defining and punishing bigamy in the territories constituted the act a crime against the United States, and not an offense against the territory or its laws, and did not so cover the entire subject of legislation for the territories as to supersede the territorial law upon the same subject, or restrict the right of the legislature of a territory to legislate upon it, so long as the territorial legislation did not conflict with the punishment of said crime by the United States, and did not purport to offer immunity to persons committing such crime.

(Syllabus by the Judge.)

Reserved case from district court, Albany county.

Application by James E. Murphy for a writ of habeas corpus. Case reserved to this court by the district court on certain important and difficult questions stated in the opinion. Denied.

N. E. Corthell, for petitioner. C. W. Bramel, Pros. Atty., for respondent Albany county. W. H. Bramel, for respondent sheriff of Albany county.

POTTER, J. On the 20th day of February, 1895, James E. Murphy filed in the district court of Albany county his petition for the writ of habeas corpus, questioning the legality of his restraint in the jail of that county by the sheriff thereof. The cause of the restraint, as alleged, is a commitment issued by a justice of the peace; and it is alleged that the justice had no jurisdiction of the offense charged against the petitioner, and that no offense against the laws of this state has been charged against him. A reference to

the commitment, a copy of which is attached to the petition, discloses the fact that the petitioner was, after examination upon complaint filed before the justice, held to answer to the district court for the crime of bigamy, committed on the 28th day of March, 1891. The writ was issued upon order of the district judge, and the sheriff returned that he had the petitioner in his custody at the jail of said county by virtue of the said commitment. A copy of the complaint or information filed with the justice of the peace is also attached to the return, by which it was charged that the petitioner on January 22, 1881, in Albany county, Wyo., did marry one Lillie C. Rauch, a woman, and on March 28, 1891, at said county and state, did marry one Alice Warren; the said Lillie C. to whom he was married in 1881 being alive, the bond of matrimony between them being still existing and undissolved, and no legal presumption of her death having arisen. A demurrer was filed to the return of the sheriff, and upon this pleading the issues raised were submitted to the court. Thereupon the district court made and entered an order reserving and sending said cause to this court for its decision upon certain questions certified therein to be difficult and important, viz.: (1) Is the act of bigamy, as defined in section 74 of chapter 73 of the Session Laws of Wyoming of 1890,—being a part of the act of the legislature of the territory of Wyoming approved March 14, 1890,—committed March 28, 1891, within the state of Wyoming, an offense now punishable under the laws of said state? (2) Did the legislature of the territory of Wyoming, at the time of the passage of the act of March 14, 1890, above referred to, have power to enact section 74 of chapter 73 of the Laws of 1890, mentioned in the last preceding question? (3) If the enactment of said section 74 of chapter 73 of the Laws of 1890 was not within the power of the legislature of the territory of Wyoming, did said section at any time thereafter come into force or become operative in the territory of Wyoming or in the state of Wyoming, and, if so, when? (4) Is said section 74 of chapter 73 of the Laws of Wyoming of 1890 now in force as a part of the laws of the state of Wyoming?

It is apparent that the same ultimate question is the result of each of the four propounded by the court, viz.: Is section 74 of chapter 73 of the Laws of the Territory of Wyoming defining the crime of bigamy, and providing a punishment therefor, now in force in this state?—that being the only statutory provision we have touching that offense. It is conceded, as it must be, that if that section was valid when enacted, and was a valid law of the territory, it became and was in force, as a law of the state, by virtue of the provisions of the enabling act and the state constitution, each of which expressly continued, as the laws of the state, all the laws of the territory in force at the time of the admission of the

state; and said section had not been repealed by any law of the territory, nor has it been by any statute of the state. Our inquiry is therefore directed to an examination of the question whether, in the first place, the law was a valid enactment by the territorial legislature; and, if not, in the second place, is it the law of the state? It must be confessed, at the outset, that this presents an inquiry of no little difficulty, and the field to be covered in a proper and comprehensive consideration thereof is an amazingly large one.

The section of the statute to which our attention has been invited reads as follows: "Whoever being married, marries again, the former husband or wife being alive, and the bond of matrimony being still undissolved and no legal presumption of death having arisen, is guilty of bigamy, and shall be imprisoned in the penitentiary not exceeding five years." At the time this statute was enacted there existed a law of congress punishing bigamy in all the territories, in the following language: "Every person, who has a husband or wife living who, in a territory or other place over which the United States have exclusive jurisdiction hereafter marries another, whether married or single, and any man, who, hereafter simultaneously, or on the same day, marries more than one woman in a territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract." 22 Stat. 30. The act of congress enacting this section was approved March 22, 1882, and was amendatory of section 5352 of the Revised Statutes of the United States, which defined and provided a punishment for bigamy in the territories and other places over which the United States have exclusive jurisdiction; the change by the amendment being that part covering the case of marriages by a man to more than one woman simultaneously, or on the same day, and the addition of the requirement that, in the case of the absence of the former husband or wife for five successive years, the person marrying again shall believe the other to be dead.

The contention on behalf of the petitioner is that the act of congress covered the same ground as the territorial statute, and de-

prived the territory of the power to legislate on the subject,—at least, to the extent covered by the federal statute,—and that, so far as the territorial statute relates to the offense of bigamy, it never went into effect; and it is affirmed this results—First, from the constitutional provision of the United States that no person shall be subject, for the same offense, to be twice put in jeopardy; second, from the law of congress giving the United States courts exclusive jurisdiction in all cases of offenses cognizable under the laws of the United States; and, third, because, in the territories, congress has plenary legislative power, exercising both the federal and state powers of government for the people of such territories. These reasons are urged with much force, and it would seem that if, by holding the territorial statute to have been valid, it would necessarily result in subjecting the same person, for one offense, to be twice put in jeopardy, or if congress had fully covered the entire subject for the United States and the territory as well, in its dual capacity, as possessing not only federal authority, but as doing for the territories what the people of the states may do for themselves, the argument would assume great strength, if it would not conclusively establish the correctness of the position taken by counsel and so ably presented. Upon a very thorough research, we are unable to discover that the precise question involved in this issue has been decided by any court, although one case hereinafter cited approaches it quite closely, and in one other, at least, in the United States supreme court, some light is shed upon it.

The proposition that the law of congress confers upon the United States courts exclusive jurisdiction, in all cases, of offenses cognizable under the laws of the United States, is not entitled to much weight. Those provisions are not applicable to the territories. In the section referred to (section 711, Rev. St.), the jurisdiction vested in the courts of the United States is made exclusive of the courts of the several states, as to all crimes and offenses cognizable under the authority of the United States; and, by another section (section 629, subd. 20), circuit courts are given "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein." The provisions of section 711 surely have no reference to the territories,—the latter are not states; and, with respect to subdivision 20 of section 629, jurisdiction of crimes and offenses under the laws of the United States, committed in a territory, is otherwise provided by law, such jurisdiction being expressly vested in the territorial courts. It is now well settled that such courts are not United States courts. *Clinton v. Englebrecht*, 13 Wall. 434. "They are courts of the

territories, invested for some purposes with the powers of the courts of the United States." *Reynolds v. U. S.*, 98 U. S. 145. The territorial courts, therefore, did not possess any jurisdiction of crimes against the federal government because they were United States courts, nor because of the provisions of sections 629 or 711, Rev. St. U. S. No United States court, properly so called, had any jurisdiction in the territory. The provisions referred to and thus relied on are not controlling in the question before us, or, indeed, at all persuasive. If there is any controlling force in the contention of counsel, which will compel a court to declare that no law punishing bigamy exists in this state, by reason of the invalidity of the territorial act, it resides either in the argument that the person offending might be twice put in jeopardy for the same offense, if both the law of congress and of the territory were in force, or that congress, being supreme, has fully covered the subject, and thus deprived the legislature of the territory of all power to legislate upon it. The constitutional provision against a second jeopardy, invoked here, and the general principle which refuses the right to place one twice in jeopardy, does not inhibit the twice putting in jeopardy for the same act, but for the same offense. That by one and the same act a person may offend and violate the laws of more than one sovereignty to whom he owes allegiance, and may be punishable under the laws of each such sovereignty, is well settled; and upon reasoning which appears to us entirely sound, not only, but merits our approval as emanating from many courts of high distinction and acknowledged ability. *Fox v. Ohio*, 5 How. 410; *Moore v. Illinois*, 14 How. 13; 1 Bish. Cr. Law (5th Ed.) 178, 179, 988; *Chess v. State*, 1 Blackf. 198; *State v. Antonio*, 3 Brev. 562; *Harlan v. People*, 1 Doug. (Mich.) 207; *Com. v. Fuller*, 8 Metc. (Mass.) 313; *Sutton v. State*, 9 Ohio, 133; *Sizemore v. State*, 3 Head, 26; *Jett v. Commonwealth*, 18 Grat. 933; *State v. McPherson*, 9 Iowa, 53. Case of Slave Amy (opinion of Chief Justice Taney) reported in 14 Md. 149. In *Moore v. People of Illinois*, *supra*, Justice Grier used the following language: "Every citizen of the United States is also a citizen of a state or territory. He may be said to own allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state,—a riot, assault, or a murder,—and subject the same person to a punishment under the state laws for a misdemeanor or felony. That either or both may, if they see fit, punish

such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses, for each of which he is justly punishable." This is a clear and unmistakable expression of the law that one act may constitute at the same time an offense under the laws of two jurisdictions, and that, although both may punish, the culprit has not been twice punished for the same offense. In this connection we do not perceive any distinction, upon principle, whether the designation of the offense is the same in both cases. That there is no such distinction deserving of recognition is shown by those decisions respecting the right of the several states to punish the crime of counterfeiting the coin of the United States, although the same crime, by the same name, is defined and punishable under the laws of the United States. *Fox v. State*, 5 How. 410, and other cases above cited. This has repeatedly been the holding of the courts, and to demonstrate the difference existing between this class of offenses and some others in which such right or power of the state has been denied, and that the denial of such power is not generally based upon the proposition of second jeopardy, it may be instructive to advert to another offense which has attracted the attention of the courts. Since the passage of the national banking act by congress, which, among other provisions, contained one punishing embezzlement by an officer of such a bank, it has been held in several states that, under the embezzlement statutes thereof, such officer could not be punished for that crime in cases where the same crime was included in the offense punishable under the act of congress. In every case which we have been able to examine, the lack of power in the state, in the respect indicated, was placed squarely upon the provisions of sections 629 and 711 of the Revised Statutes of the United States, above referred to, and the fact that, as to jurisdiction over such crime, no other provision had been made by congressional law. Now, as to counterfeiting, the definition thereof and punishment therefor is found in title 70 of the Revised Statutes, which, in section 5328, under chapter 1 of said title, provides, "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." And, as no such provision appears in reference to the crime of embezzlement by a national bank officer, it has been held that the jurisdiction of the United States courts as to such crime is exclusive of the courts of the several states, by virtue of sections 629 and 711; and it is clearly to be observed that, had congress provided as to such crime as it had in relation to others in title 70, the same courts would not have relinquished their right to punish the same offenses, any more than in the case of counterfeiting.

The purpose in thus calling attention to these cases is simply to illustrate that it is only when congress has expressly made the jurisdiction of their own courts exclusive that the state courts refuse to themselves the power to punish offenses also cognizable under the authority of the United States. *People v. Fonda*, 62 Mich. 401, 29 N. W. 26; *Commonwealth v. Luberg*, 94 Pa. St. 85; *Com. v. Felton*, 101 Mass. 204. In *Com. v. Fuller*, 8 Metc. (Mass.) 313, the learned justice delivering the opinion said: "In regard to crimes which existed prior to the constitution, and were the subject of state legislation, or were punishable as offenses at common law, and the prevention of which is essential to the peace and good order of the community, though such crimes are also forbidden by the constitution of the United States, and the authority to punish the commission of them is conferred by congress upon the federal courts, still, unless such grant of power is exclusive by the terms of the constitution, or is made exclusive by acts of congress, the concurrent right of the state courts to try persons accused of such crimes is not necessarily taken away."

It should perhaps be here observed, in connection with what has already been stated as to embezzlement, that another element entered into the consideration of such cases, viz. that such crime was not a common-law offense. In the case last cited, also, the court pays its respects to the proposition that the state law was unconstitutional because it subjected the same person to the operation of two distinct laws upon the same subject, and inflicting different pains and penalties, and it holds that, although a delinquent cannot be punished twice for the same offense, the supposed repugnancy between the several laws does not in fact injuriously affect any individual, but that the offender runs the hazard under which jurisdiction he may be subjected to punishment, and that while the proviso in the act of congress which we have mentioned remains unrepealed the criminal cannot be thus exposed, as the court which first exercises jurisdiction has the right to enforce it by trial and judgment, by the well-established principles of law relating to the jurisdiction of courts. Bishop, in his work on Criminal Law, in discussing this question, after announcing the doctrine of the validity of the laws of the state in such cases, refers to the result thereof, and states that, although the rule best sustained is that the jeopardy under one government is not a good plea in defense to an indictment under the other, the courts of either government will give a sort of practical effect to a judgment of acquittal or conviction in those of the other government, as far as their forms of procedure will permit, though the constitutional provision does not bind them to do so, and that the better opinion seems to be that after the tribunals of the one government dealt with an offender those of the other will decline prosecution, or

in some way suffer the defendant to avail himself of this matter. He adds, however: "At the same time there is much just weight in the consideration that if a man, though by one act, has violated the laws of two governmental powers, it is proper both should punish him." A terse but instructive disquisition in this regard is found in the opinion of Chief Justice Taney in *Case of the Slave Amy*, charged with robbing the United States mail, reported in full as a note to the case of *Negro Ann Hammond v. State*, 14 Md. 149. He says: "In maintaining the power of the United States to pass this law, it is, moreover, proper to say that as these letters, with the money within them, were stolen in Virginia, the party might undoubtedly have been punished in the state tribunals, according to the laws of the state, without any reference to the post office or the act of congress, because, from the nature of our government, the same act may be an offense against the laws of the United States, and also of a state, and be punishable in both, * * * and the punishment in one sovereignty is no bar to his punishment in the other." "Yet, in all civilized countries, it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offense. And, if this party had been punished for the larceny by a state tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the president, to give him an opportunity of ordering a *nolle prosequi*, or granting a pardon."

If, then, we were to attempt to formulate a rule which seems to be the result of the weight of authority upon the power of a state to punish the same offense under its laws which is also punishable under the laws of the United States, it would be that as to any crime which was punishable at common law, or by the states, before the adoption of the constitution, the courts of the states have concurrent jurisdiction with the courts of the United States, in the absence of an express destruction of the jurisdiction of the state courts by act of congress; and that any statute of the state, in such case, assuming to punish such a crime, is not invalid because it may seem to subject a criminal to a prosecution and sentence under both the law of the state and United States; and, further, that in the interest of justice, after a man has been tried for the offense in the court of the one government, the courts of the other, for the same act, would, within the scope of their authority, in some way, suffer the accused to obtain the benefit of the former trial, whether thereon he has been convicted or acquitted, although such courts would not be absolutely bound to extend such advantage to the offender.

Having determined the relation existing in this respect between a state and the federal government, we are confronted with the necessity of determining whether the same relation exists between a territory such as Wy

oming was, and the general government, or whether the situation is so much different with a territory as to exclude from our consideration the results arrived at when a state law punishes the same offense as the United States law. As already indicated, the provisions of the judiciary act giving exclusive jurisdiction to the United States courts in all offenses cognizable under the authority of the United States are not applicable to such offenses committed within the territories. Neither do the provisions of section 5328, Rev. St., which declare that nothing in that title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof affect the territories. We must look to the laws governing these latter governments for legislation, if any, which shall have bearing upon their right to prosecute the same offenses cognizable under the laws of the United States. The character and powers of a territorial government and its courts have been fruitful of much judicial investigation. We have already adverted to the subject of its courts, and shown that it is now too well settled to admit of argument that they are purely legislative or territorial courts, in some of which have been vested jurisdiction to inquire into and try offenses against the United States. The territories, as organized by congress, are given a local government, with powers almost as extensive as those possessed by the states. They have a legislative department to enact laws, a judicial department to construe and enforce them, and an executive to execute them. Subject to the constitution and laws of congress, which stand as the fundamental law for the territories when and in so far as applicable, they have a government in all respects full, adequate, and complete. True, congress may legislate directly for them, although this power has seldom been exercised; it may annul or abrogate their laws; but the laws of the local legislature, if not in contravention of the fundamental law, are as valid and binding upon the people of the territory, unless annulled or abrogated by congressional enactment, as the laws of the state upon the people thereof. The grant of legislative power to the territories, and so to Wyoming, is found in section 1851 of the Revised Statutes of the United States, in these words: "The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents." With this power of legislation so general, with undoubted authority thereunder to define and provide for the punishment of crimes and offenses, is there any distinction between such a government and a state, in its relation to

the United States concerning crimes, with respect to the objection that, if the act is punishable by both, one is liable to be twice put in jeopardy. We are unable to perceive any. If such an objection is unavailing when assailing a law of a state which assumes to punish a crime for which the perpetrator is also amenable to a law of congress, it cannot commend itself as effectual in attacking a similar or kindred territorial law. The territorial legislature has as complete authority, fundamentally, to enact the law and punish the crime, especially if it be an offense punishable as at common law, as the legislature of a state. The territory not only possesses as much power to protect its people in their peaceful avocations, and guard them against the commission of those crimes which offend the moral sense and render property and life insecure, but it is as fully their duty to do so as it is of a state government. For that purpose they have been organized, and invested with such enlarged powers and responsibilities. We are therefore of the opinion that the fact that the law of Wyoming punishing bigamy might possibly have subjected an offender to a prosecution under the laws of the territory, as well as the United States, is not a valid objection to the statute. Every reason which disposes of that proposition or argument when used to attack the validity of a law of a state is equally applicable to a territorial statute.

Some stress has been placed upon what may be called the "Alaska Cases" (*U. S. v. Clark*, 46 Fed. 633, and cases therein cited). Those cases arose upon prosecutions for murder committed in Alaska, and the inquiry was presented whether the law of the United States, or that of Oregon, prevailed, as to that offense. Congress, in legislating for Alaska, had provided that the laws of Oregon in force on a certain date, so far as applicable, and not in conflict with the provisions of that particular act of congress or the laws of the United States, should be in force in Alaska. The statutes of the United States provided for the punishment of murder in places under the exclusive jurisdiction of the United States. Those cases are not controlling. Alaska possessed no legislative power. Oregon was not given authority to legislate for that territory. The sole legislative authority over it resided in congress. All offenses punishable when committed there were offenses against, and prosecuted in the name of, the United States. Alaska was a place over which the United States had "exclusive jurisdiction," in the meaning of that phrase when used in the acts of congress, whereas it has been frequently, and we think universally, whenever that point has arisen, been held that such phrase, used alone, has no application to, and does not include, the territories. *Franklin v. U. S.*, 1 Colo. 35.

But it is urged with considerable force that congress has, by its legislation already alluded to, covered the entire subject, and as a

consequence thereof the territory was deprived of the authority to legislate thereon at all, or to define or provide for the punishment of bigamy. Some of the foregoing observations are of interest in an investigation of the question thus presented. We must recognize that the United States was the supreme power; that congress could legislate directly for the territory; that its enactments were the superior laws, if applicable here. Did congress, by its bigamy legislation cover the entire subject, so as to take away or impair the right or power of the territory to legislate thereon? If so, then our law was invalid. We have noticed the effect in a state where there is no exclusive jurisdiction given to the United States courts, and that although the law of congress actually covers and provides for the same subject, and rightfully so, and such federal power is superior, so far as that goes, to the state authority, nevertheless the state law is valid, and its courts may enforce it. With the territories the authority and lawmaking power in congress is, of course, much more comprehensive. But, however this may be, we apprehend that there exists a marked division between the methods employed by congress, and, after the grant of authority to the territory, even between its own powers of legislation. It may, it is true, legislate directly for the territories. When it does so, it not only says so, but makes such legislation the law of the territory, *per se*. Now, there are two classes of crimes which may be committed in a territory,—those in violation of the laws of the United States, and those offending against the laws of the territory. These two classes are recognized by congress. By section 1894, Rev. St., provision is made for the payment of the expenses of prosecutions for offenses against the laws of the United States, and the employment and subsistence of offenders against such laws. Section 1895 authorizes the imprisonment in a United States penitentiary of persons convicted of offenses against territorial laws, at the cost of the territory; and chapter 235, 1 Supp. Rev. St. p. 299, authorizes the legislative assemblies of the territories to provide for the care and custody of persons convicted of crime under the laws of the territory, as they shall deem proper, and in so doing to contract for their care in some other state or territory, but the expense thereof to be borne by the territory. No doubt, congress can pass a law expressly making a certain act a crime against the territory, and, as such, punishable in the courts of the territory as a crime against the laws thereof, and thus clearly constitute it a crime against the laws of the territory. It has practically done so in the case of certain felonies committed by one Indian against the person or property of another Indian. Such offenses are expressly made subject to the laws of the territory, and are to be tried therefor in the same courts, and in the same manner and subject to the same penalties, as

are all other persons charged with the commission of such crimes. 23 Stat. c. 341, p. 362; Id. § 9, p. 385; U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109. That statute has undoubtedly defined a crime against the territory which the courts of the territory must punish. In U. S. v. Kagama, Justice Miller, in the opinion, says, "In this class of cases where the Indian charged with the crime shall be judged by the laws of the territory on that subject, and tried by its courts." In that case, it is true, it was held that when such crimes were committed by an Indian against another Indian, within the limits of an Indian reservation within the boundaries of a state, the United States courts had jurisdiction to punish them, although there was no express limitation upon the jurisdiction of the state courts; but that view was expressed, as we understand it, because of the peculiar relations sustained by the federal government towards the Indians. That case, however, presented solely the power of the United States to enact the statute authorizing the courts of the United States to take jurisdiction of such offenses when committed upon a reservation within a state. Whether or not the state courts had concurrent jurisdiction was not decided, unless inferentially. Congress, indeed, by the act referred to, did not define the felonies for the commission of which, in a territory, an Indian was punishable, but placed such offenses, when perpetrated by one Indian against the person or property of another Indian, under the laws and jurisdiction of the territory and its courts.

The authority of the United States over crimes is well understood, and requires no elucidation here. It may not be improper, however, in this connection, to briefly refer to certain classes of such crimes, that our position may not be mistaken. There are some acts which congress may by law designate as a crime against the general government, which affect every citizen, whether in a state or territory, such as offenses against the postal service, the administration of justice in the federal courts; against the operations of the government, such as counterfeiting, false personation in procuring naturalization, presenting false claims against the government, etc. These and kindred offenses operate upon all citizens of the United States, and that they reside in a state constitutes no exemption therefrom. Again, congress defines offenses committed in such places over which the United States have exclusive jurisdiction, or upon the high seas, and in this class are found such common-law offenses as murder and robbery. This class has been held not operative in the territories. And then, occasionally, an act is made a crime against the United States when committed within a territory, as well as any other place over which the United States have exclusive jurisdiction. Under the latter head, or included in that class, is the crime of bigamy or polygamy,

and some kindred offenses. In every class, however, the crime is against the United States, and a violation of its laws. A convict thereunder is imprisoned, if at all, at the expense of the general government. The executive clemency, if exercised, must emanate from the president. If indictment is found for such crimes in a territory, the proper United States officials would prosecute. The courts of the territory would, in enforcing such law, exercise the jurisdiction of United States courts by legislative requirement. In other words, such crimes,—to be more particular, the crime of bigamy, as defined and punishable by act of congress, is a crime against the sovereignty of the United States. The act of congress embraces no express limitation upon the right of the territory to also punish the same act as an offense against it and its local laws, nor upon the local legislature to enact a law defining and providing a punishment therefor as an offense against the territorial sovereignty. As there are, in practical and legal effect, two governments, although the one emanates from the other, we are unable to perceive why the legislature of the territory, under the general grant of power with which it was invested, may not have enacted a valid law assuming to punish as a territorial offense the crime of bigamy. It does not conflict with the United States statute. It could not and did not assume to destroy the force or effect of the congressional provision. It could not have assumed to offer immunity to those desiring to contract polygamous marriages. By silence, it could only have refused to punish it as a territorial crime. To avoid this possibility, congress undertook to punish it as a crime against the federal government. As the same courts in the territory ultimately tried offenders against both the general government and the territory, they could, and undoubtedly would, have so tempered their proceedings with that principle of justice in view, which has been adverted to, that no person would have unduly suffered more than once for the two offenses flowing from one and the same act. That a possibility, remote or near, might exist of such double punishment, is, in our judgment, no reason for holding the law of the territory invalid.

In the case of *Davis v. Beason*, 133 U. S. 323, 10 Sup. Ct. 299, appears a statement, in the opinion of Justice Field, which has frequently been quoted; the same being to the effect that the cases in which the legislation of congress will supersede the legislation of a state or territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. We do not understand that Justice Field intended to express a doctrine which would abrogate a law of the territory such as is assailed in this proceeding. His opinion in that case, taken altogether, sustains the views enunciated by us. That case

brought before the court an act of the legislature of the territory of Idaho providing that no person who is a bigamist or polygamist should be permitted to vote at any election in the territory, and applying the prohibition also to all who teach, advise, counsel, or encourage others to become bigamists or polygamists, or who are members of any organization which teaches, counsels, or encourages the same. Appellant Davis, with others, was indicted for a conspiracy to pervert and obstruct the due administration of the laws of the territory by procuring themselves to be admitted to registration as electors by taking the oath required, falsely. Congress had also passed an act prohibiting bigamists and polygamists from voting in any territory. Justice Field, in the opinion, referring to the crime of bigamy, said: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho." Again, after quoting the Idaho statute above referred to, he held that the same was not open to any constitutional or legal objection, although the same point—that, congress having legislated thereon, the territory could not—was made before that court. After quoting the United States statute prohibiting bigamists from voting in any territory, he used the following language: "This is a general law applicable to all territories and other places under the exclusive jurisdiction of the United States. It does not purport to restrict the legislation of the territories over kindred offenses, or over the means for their ascertainment and prevention." The supreme court of the territory of Montana had occasion to determine a very similar question. One Guyott was convicted of selling whisky to an Indian contrary to the statute of the territory constituting such act a crime. It was argued there that the act was invalid, and that congress had provided a punishment for the offense, and that the power of congress was exclusive over the subject. The latter point was the one which seems to have been more particularly urged. However, the court upheld the conviction, after showing that the facts upon which he was convicted brought the case within the purview of the statutes both of the United States and the territory. It was conceded in the opinion in that case that congress had authority to enact laws punishing the same crime, but the court say: "These doctrines are not questioned by this court, and do not decide that a state or territory has no right to pass laws making definite acts of its citizens in selling intoxicating liquors to Indians crimes, and prescribing penalties for their infraction." And again, after quoting from the opinion of the supreme court of the United States in *Hornbuckle v. Toombs*, 18 Wall. 655, with reference to the power of legislation existing in the territories, wherein it is said, "The powers

of legislation thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature," say, "The act under consideration is clearly within the police power of the territorial government, as defined by the courts, and is not inconsistent with the constitution and laws of the United States." *Territory v. Guyott*, 9 Mont. 46, 22 Pac. 134. It will be observed that the Montana case is squarely in point.

We are clearly of the opinion that the act defining and punishing bigamy passed by the legislature of the territory of Wyoming was within the power of that body, and that the same was not inconsistent with the constitution or laws of the United States; that it was a valid enactment, and, not having been repealed, is, by virtue of the provisions of the enabling act and state constitution, in force as a law of the state.

Answering the questions upon which this case was reserved, and which are quoted at length herein, we say—

To question 1: Yes; the act of bigamy, as defined in section 74 of chapter 73 of the Session Laws of Wyoming of 1890, committed March 28, 1891, within the state of Wyoming, is an offense punishable under the laws of said state.

To question 2: Yes; the legislature of the territory of Wyoming had power to enact said section at the time of the passage of said act of March 14, 1890.

To question 3: It is unnecessary to answer this, as we hold the law was in force as a law of the territory.

To question 4: Yes; said section 74 of chapter 73 of the Laws of Wyoming of 1890 is now in force as a part of the laws of the state of Wyoming.

GROESBECK, C. J., and CONAWAY, J., concur.

(27 Or. 278)

SHEAHAN v. DAVIS.

(Supreme Court of Oregon. June 3, 1895.)

ACCOMMODATION INDORSER—RIGHTS AS BONA FIDE HOLDER.

Where, after the execution of a note, a person indorses the same for the accommodation of the payee, without notice of any infirmities, and is required to pay the same to a bona fide purchaser on default by the payee, his payment relates back to the date of his indorsement, thereby rendering him a bona fide holder, and so enables him to recover against the maker, irrespective of equitable defenses.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by E. J. Sheahan against A. F. Davis. There was a judgment for defendant, and plaintiff appeals. Reversed.

Ralph R. Duniway, for appellant. A. C. Emmons, for respondent.

MOORE, J. This is an action by an accommodation indorser against the maker of

two negotiable notes to recover the amount he was compelled to pay to the holders thereof upon the default of the maker. The facts are: That on November 7, 1892, the defendant executed his promissory notes, payable to the order of one J. C. McCaffrey, for \$100 and \$300, due in 30 and 90 days, respectively, in consideration of McCaffrey's agreement to procure for him a conveyance of 160 acres of school land in Lane county. Or., and the further agreement that, if said land should, upon examination, prove unsatisfactory to the defendant, he would, within three months, repurchase it, and repay the purchase price, and the expense of the examination. That McCaffrey, for value, immediately transferred the smaller note to one J. P. Smith, and the larger one to the Portland National Bank, by the following indorsement on each: "For value received, we hereby waive protest, demand, and notice of nonpayment. [Signed] J. C. McCaffrey. E. J. Sheahan. G. Kutzschan." That on the 17th of said month, the defendant, not having received said conveyance, and having examined the land, and being dissatisfied therewith, notified McCaffrey, who agreed to return said notes, but, failing to do so, and the defendant having made default in their payment, the plaintiff paid the amount of each to the holders thereof, and to recover the sums so paid brings this action against the maker, in which he alleges, *inter alia*, that he indorsed said notes for the accommodation of the defendant, at his instance and request, and without any consideration therefor. This allegation was denied by the defendant, and upon the issue thus formed a trial was had, at which the court, in substance, instructed the jury that if the plaintiff indorsed said notes for McCaffrey at his request, and for his accommodation, and not at the request or for the accommodation of the defendant, he could not recover in the action; to the giving of which the plaintiff, by his counsel, excepted, and the exception was allowed by the court. The verdict being for the defendant, the court rendered a judgment thereon, from which the plaintiff appeals.

The question here presented is whether the maker of a negotiable promissory note will be come liable to one who, without his request, indorses it for the accommodation of another, in case such indorser is compelled to pay it upon default of the maker. The rule is well settled that one who voluntarily and officiously pays the debt of another, without any request or authority to do so from the debtor, cannot recover from him the sum so paid. 2 Edw. Bills & N. § 728; Byles, Bills, 273. The reason for this rule doubtless is that by the voluntary payment of the debt no privity of contract is created between the debtor and the person paying the debt; but when a creditor assigns the debt, though without the request of the debtor, a privity of contract between the as-

signee and the debtor is established. The maker of a negotiable note promises to pay at maturity to the person lawfully holding it the amount of money named therein, and an indorser of such note, who, upon the default of the maker, satisfies the demands of the indorsee, and takes up the note, becomes the lawful holder, and may enforce the terms of the contract against all prior indorsers who have been notified of the dishonor as well as against the maker, who, by putting such a note in circulation, invites indorsements thereof, which, when accepted, creates a privity of contract between the maker and indorser. *Barker v. Parker*, 10 Gray, 339. If the plaintiff indorsed these notes to accommodate McCaffrey, his liability was equally as great as though he had at one time been the lawful holder for value, and transferred them in the ordinary course of business. 2 Rand. Com. Paper, § 692. The plaintiff having incurred this liability upon the faith of the maker's promise and the obligation of the payee's indorsement, shall the defendant be allowed to escape his liability as maker because he did not request the plaintiff to indorse these notes? It is true, the plaintiff alleged he was an accommodation indorser for the defendant; but, having taken up the note upon the maker's default, his right of action depends upon the fact of his indorsement, and not upon the manner of it. Id. § 743. If the plaintiff, to accommodate McCaffrey, indorsed the notes in good faith, believing them to have been executed for a valuable consideration, and the indorsees discounted them before maturity in good faith, without knowledge or notice of any infirmities therein, the plaintiff incurred a conditional liability; and, when the maker made default in their payment, his liability to the indorsees became fixed, and it was his duty to satisfy their demands, and take up the notes (Id. § 747), upon the payment of which the law subrogated him to all the rights the indorsees had against the payee and maker; and he, being a bona fide holder, became entitled at once to proceed against the maker, and it could make no difference with his legal or equitable rights what he may have heard or ascertained in regard to fraud in the original consideration after his liability had been incurred (*Beckwith v. Webber*, 78 Mich. 390, 44 N. W. 830), for when an indorsement has been made in good faith, and the indorser has been compelled to pay and take up a negotiable promissory note after its maturity, his title relates back to the date of his indorsement, and he thus becomes the lawful holder for value, and without notice, although, after his indorsement, he may learn of the want or failure of the original consideration. The indorsees having acquired these notes before maturity, for value, and without knowledge or notice of their want or failure of consideration, they had such a title as rendered the defendant liable to them for the amount

thereof; and if the plaintiff indorsed them in good faith, believing that they had been executed for a valuable consideration, then, upon acquiring the title from the indorsees, the defendant became liable to the plaintiff for their payment; and it can make no difference whether the indorsement was made for the accommodation of another or for value, since an accommodation indorser cannot recover from the maker until he has paid and satisfied the demands of the indorsees. The defendant, by executing his negotiable promissory notes, impliedly requested the plaintiff to indorse them, and, having done so, a privity of contract between them was established, and it was error to instruct the jury that the defendant would not be liable thereon if the plaintiff, without his request, had indorsed them for McCaffrey's accommodation alone; for which reason the judgment is reversed, and a new trial ordered.

(28 Or. 9)

SCHMIDT v. OREGON GOLD-MINING CO.¹

(Supreme Court of Oregon. June 8, 1895.)

APPEAL—CONSENT JUDGMENT—FORECLOSURE.

1. A party at whose request a judgment is rendered, the other party consenting thereto, cannot appeal therefrom.

2. Where the complaint in a suit by a trustee to foreclose the mortgage prays judgment for reasonable attorney fees and for professional services rendered therein, and the parties consent that judgment be rendered in accordance therewith, provisions in the decree that the trustee recover the attorney fees and fees for other professional services in trust for the parties rendering the services are not so entirely without the scope of the pleadings, and the authority of the parties to agree thereto, that the appellate court will declare them void at the instance of the party requesting that such judgment be rendered.

Appeal from circuit court, Union county; M. D. Clifford, Judge.

Suit to foreclose a mortgage by A. L. Schmidt, trustee, against the Oregon Gold-Mining Company. There was a decree for plaintiff, from which he appeals. Dismissed.

This suit was instituted to foreclose three several mortgages executed by the Oregon Gold-Mining Company to A. L. Schmidt, as trustee, to secure the payment of certain bonds of the company bearing dates, respectively, May 1 and October 1, 1888, and September 1, 1889. Each of said mortgages, in effect, provides that in case of default of the conditions imposed the trustee might foreclose and sell the property described therein, and that out of the proceeds he should be allowed, for attorney's fees, such sum as the court might adjudge reasonable, together with all necessary costs and expenses incurred, including a reasonable compensation to himself for the execution of the trust. The complaint sets forth, by appropriate allegations, the legal purport of these promises; and the prayer, among other things, is "for judgment and decree fixing and determining the amount to which plaintiff is entitled in this suit for reasonable at-

¹ For opinion on rehearing, see 40 Pac. 1014

torney's fees for foreclosing the said mortgage, and for professional services herein, and declaring the same a lien upon the said mortgaged property, rights, privileges, and franchises, and directing payment therefor out of the proceeds of said mines, and the proceeds arising from the sale of said mortgaged property." The decree, among other things, contains the following findings and provisions, viz.: "Now, at this day, this cause came on to be heard upon the motion of plaintiff for judgment and decree as prayed for in the complaint herein; the plaintiff appearing by T. Calvin Hyde and T. H. Crawford, of counsel, and the defendant by C. A. Johns and W. F. Butcher, of counsel. And it appearing to the court that the referee heretofore appointed herein by the court to take the testimony in the case, and to report the same to the court, together with his findings of fact and conclusions of law thereon, namely, Chas. F. Hyde, an attorney of this court, did, with the assistance of John Wheeler, Esq., the official stenographer of this court, proceed to hear and take the testimony in full of the plaintiff in this cause regularly, as in his appointment ordered and directed, at which time the said defendant notified the plaintiff, by and through its said attorneys, that defendant would offer no testimony, but would consent to a judgment and decree as prayed for in plaintiff's complaint, and that for this reason no testimony was offered and taken on behalf of the defendant by said referee in this cause, and it further appearing to the court that the said referee has filed in court the testimony so taken by him on behalf of the plaintiff, and the same fully sustains the allegations of plaintiff's complaint, and that said defendant, by his said attorneys, in open court, here, now consents that a judgment and decree may be here, now, made and entered in this cause in favor of said plaintiff, A. L. Schmidt, trustee, and against the said defendant, the Oregon Gold-Mining Company, as prayed for in plaintiff's complaint, and that in said judgment and decree the court shall fix the referee's fees at the sum of \$200; the stenographer's fees at the sum of \$——, and the plaintiff's attorneys' fees at such sum as the court may find reasonable for the services performed, and that the referee's fees, stenographer's fees, and that the plaintiff's attorneys' fees shall be a preferred lien upon the mortgaged property of the defendant, and the proceeds thereof, in favor of the said referee, stenographer, and the plaintiff's said attorneys, for the respective amounts found due each, as found and settled by the parties and the court, and that they, or either of them, may have execution therefor against the said mortgaged property. * * * (18) The court further finds that the sum of \$5,550 is a reasonable attorney's fee, in this suit, for the foreclosure of the said several mortgages and trust deeds, and that of said sum plaintiff's attorney T. Calvin

Hyde should receive the sum of \$2,750, and the plaintiff's attorney T. H. Crawford should receive the sum of \$2,750, and that said amounts so allowed each of said attorneys should be a preferred lien upon the said mortgaged premises, and upon the funds arising from the sale of the said mortgaged property, for the payment of the same, for the enforcement of which either of said attorneys should have execution. * * * (19) That upon the agreement of the parties herein, made in open court, the court finds and fixes the compensation of Chas. F. Hyde, referee herein, at the sum of \$200, and the compensation of the court stenographer, John Wheeler, at the sum of \$150, and that the compensation and fees of said referee and stenographer should also be preferred liens upon the said mortgaged property, and the proceeds thereof, for the payment of the same. * * * It is therefore ordered, considered, adjudged, and decreed that plaintiff, A. L. Schmidt, as trustee for the holders of said bonds, have and recover of and from the defendant * * * the further sum of \$5,500, reasonable attorneys' fees herein, in trust for T. Calvin Hyde and T. H. Crawford, plaintiff's attorneys herein, and for the further sum of \$200, referee's fees, in trust for Chas. F. Hyde, referee herein, and for the further sum of \$150, stenographer's fees herein, in trust for John Wheeler, court stenographer, and for the costs and disbursements of this suit. * * * And it is further ordered, adjudged, and decreed that the judgment herein made and entered for attorneys' fees, stenographer's fees, and costs and disbursements, be, and the same is hereby, adjudged and decreed to be a first lien upon all the property described in said several mortgage deeds, and the proceeds arising from the sale thereof, * * * and that the proceeds arising from such sale be applied to the payment of the attorneys' fees decreed in this suit, the referee's fees, and the stenographer's fees." The notice of appeal contains nine assignments of error, which may be comprised in two, as follows: First, the court erred in finding, adjudging, and decreeing that plaintiff recover of and from defendant \$5,500 attorneys' fees in trust for T. Calvin Hyde and T. H. Crawford, \$200 in trust for Charles F. Hyde, referee, and the further sum of \$150 in trust for John Wheeler, stenographer, and that these several sums should be a first and superior lien upon the property described in the said several mortgages, and directing the same to be first paid out of the proceeds thereof; and, second, the court erred in not adjudging and decreeing the amount found to be reasonable as attorneys' fees to plaintiff, and in not decreeing to plaintiff a reasonable sum as compensation for services under his trust, as such trustee. The appeal is taken by Messrs. Dolph, Nixon & Dolph, as attorneys for plaintiff. The defendant made no appear-

ance in this court, but T. Calvin Hyde and T. H. Crawford, in their own behalf, and as attorneys for Charles F. Hyde and John Wheeler, attack the appeal by a motion to dismiss it, and filed a brief herein. The ground mainly relied upon for dismissal is that the decree appealed from was given by consent, and is therefore not appealable.

T. H. Crawford, for the motion. J. N. Dolph, opposed.

WOLVERTON, J. (after stating the facts). Section 536, Hill's Ann. Laws Or., provides, "Any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom." The decree appealed from, in a strict sense, is neither a decree given by confession, nor for want of an answer. But it has been held by this court that by consenting to the rendition of a judgment against himself the defendant, in effect, waives his answer, and thereby leaves no issue in the case to be tried, and that from such a judgment no appeal lies. *Rader v. Barr*, 22 Or. 496, 29 Pac. 880. In the present case the decree shows upon its face that the "defendant, by his said attorneys, in open court, here, now consents that a judgment and decree may be here, now, made and entered * * * as prayed for in plaintiff's complaint." What more could plaintiff have obtained in the absence of an answer, or upon defendant's entire default? The recitals in the decree also show that the defendant gave its consent to the fixing of plaintiff's attorneys' fees by the court at such sum as it should find reasonable, and, there being no evidence in the record to guide it in determining what would be reasonable, we conclude that the parties intended that the court should ascertain the amount in its own way, and that they should be bound by the result. And, further, it is apparent that the amount of the attorneys' fee which plaintiff should recover, and have entered in the decree as the findings of the court, was a matter not to be determined by the court in invitum. The simple fact that plaintiff did not complain of the court's judgment in fixing this sum at \$5,500 would indicate that he so understood it, and expected to be fully bound thereby. All other conditions of the decree appear to be either deducible directly from the allegations of the complaint, or were specially consented to by the defendant. As to the matter of the referee's and stenographer's fees, the record shows that they were fixed and entered by the express agreement of both parties. So we have here a decree which the plaintiff, through his attorney, specifically requests the court to make, and the defendant has, upon the record, consented to every feature of it. True, the record does not show upon its face that the plaintiff consented to the decree in the form as entered, but it was entered nevertheless

at his expressed request, so that this decree is essentially a consent decree. The conditions, simply stated, are, the court is requested by one party to make certain findings, and to enter a decree thereon, with certain definite conditions. To all this the other party consents, and the decree is entered. Now the party making the request appeals to this court, and demands that the decree be reversed in part, without even so much as moving the lower court to modify its findings, or the decree entered thereon, or calling its attention to errors and irregularities, so that the court could, upon its own motion, purge the record of its infirmities. To say the least, this is not fair treatment of the court below, and in support of its decree this court will presume the consent of plaintiff to the entry thereof in its present form. *Hayne*, New Trial & App. p. 846, § 285; *Parker v. Altschul*, 60 Cal. 380; *Leese v. Clark*, 28 Cal. 36, 37; *Wilson v. Dougherty*, 45 Cal. 35; *Reynolds v. Hosmer*, 45 Cal. 627. Consent excuses error, and ends all contention between the parties. It leaves nothing for the court to do but to enter what the parties have agreed upon, and, when so entered, the parties themselves are concluded. From such a decree there is no appeal. *Beach*, Mod. Eq. Prac. § 795; *Armstrong v. Cooper*, 11 Ill. 540. Under section 692 of the Revised Statutes of the United States, the practice of the national courts is to entertain an appeal from a consent decree; but they will not decide any matters that appear to have been consented to by the parties, and if the errors complained of come within the waiver the decree of the court below will be affirmed. *Railroad v. Ketchum*, 101 U. S. 295. This court, however, is committed to the doctrine that no appeal lies from such a decree. See *Rader v. Barr*, *supra*. For these reasons the appeal must be dismissed.

It is further claimed that, notwithstanding the parties may have consented to all the terms and conditions of the decree, yet that those portions thereof wherein it is found and decreed that plaintiff have and recover of and from the defendant \$2,750 in trust for T. Calvin Hyde, \$2,750 in trust for T. H. Crawford, \$200 in trust for Charles F. Hyde, and \$150 in trust for John Wheeler are entirely without the scope of the complaint, and for that reason void, and therefore reversible upon appeal. Undoubtedly, under the allegations of the complaint, the plaintiff could recover the fees named. He sues in the capacity of trustee, and whatever he may recover by reason of the decree would be in trust for the bondholders. Now if, at his own request, the court has decreed that he recover these certain fees in trust for the parties named, who, for all that appears of record, have earned them, when, at the same time, he, as trustee for the bondholders, is under personal obligations to these parties for services rendered in the suit instituted by him, we cannot say that these

provisions are so entirely without the scope of the pleadings, and the authority of the parties to agree to under them, as that the court will declare them void at the instance of a party requesting the court to enter just such a decree. We therefore consider the point not well taken.

As to the error assigned because the court did not ascertain and decree to plaintiff a reasonable sum as compensation for services rendered as trustee, if the question was properly here we could not consider it, as no testimony is found in the record upon which to base such a finding and decree.

(22 Nev. 363)

HUTCHENS v. SUTHERLAND. (No. 1,-423.)

(Supreme Court of Nevada. May 31, 1895.)

SEPARABLE CONTRACTS — CONSTRUCTION—ACTION FOR BREACH—COMPLAINT.

1. Whether a contract is entire or separable into several distinct and independent contracts is a question of intention of the parties, to be ascertained from the language employed and the subject-matter of the contract.

2. Where a contract, although contained in the same instrument, is severable into distinct and independent contracts, a breach of one of these contracts does not constitute a breach of others.

3. Where a complaint upon a contract does not show a breach of the contract by the defendant, it fails to state facts sufficient to constitute a cause of action.

4. The defendant purchased mining property from the plaintiff, for which he agreed to pay him a certain proportion of the net proceeds of the mines, and also to employ him as superintendent, at a salary payable monthly. *Held*, that these contracts were separable, and that the discharge of the plaintiff, though wrongful, constituted no breach of the contract concerning the net proceeds.

(Syllabus by Bigelow, C. J.)

Appeal from district court, Humboldt county; A. E. Cheney, Judge.

Action on a contract by H. H. Hutchens against James Sutherland. Plaintiff had judgment for a part of his claim, and from a judgment of nonsuit as to the balance he appeals. *Affirmed*.

Curlier & Curlier and Thomas E. Haydon, for appellant. M. S. Bonfield and S. J. Bonfield, for respondent.

BIGELOW, C. J. On the 13th day of March, 1891, the plaintiff sold the defendant several mining claims, together with other real and personal property, for a consideration of \$10,000 paid, and 50 per cent. of the net proceeds of the mines, until the sum of \$20,000 more should be paid him. An instrument in writing was drawn up to this effect, in which it was stated that it was distinctly understood and agreed that the \$20,000 were not to be paid until there were net proceeds, and then only out of 50 per cent. of such net proceeds. The instrument also contained a provision that the plaintiff should finish a smelting furnace, then partly

erected upon the property, or, if he did not, the defendant might complete it, and retain the expense of so doing out of any moneys thereafter to become due plaintiff. Also that, if defendant should be dispossessed from any of the mining claims, he could retain \$2,000 for each claim so taken from him. On March 20th another writing was entered into, whereby the plaintiff agreed to act as superintendent of the mining operations to be carried on upon the property, "said services to commence April 1, 1891, and to continue for such time as may be required to complete the payment in full of the purchase price for said property, and for such longer time as may be agreed upon if so desired. In consideration of the above, said Sutherland hereby agrees to pay said Hutchens the sum of one hundred dollars per month, payable monthly, for said services." The plaintiff testifies that this was a part of the original agreement made for the sale of the mines, but was left out of the first instrument by a mistake, and we shall consider the case upon the theory that such is the fact. Mining operations were begun and carried on under the superintendency of the plaintiff until December, 1892, when he was virtually superseded as superintendent by an agent of plaintiff, who continued the mining until some time in March, 1893. On March 17, 1893, the plaintiff was discharged, and he commenced this action on April 5, 1893. He sues for \$20,000, balance due on the sale, and for six months' services as superintendent, for which he had not been paid. He obtained judgment for the balance due upon his wages, but was nonsuited on the other claim, and from that nonsuit he appeals.

The complaint does not allege that there have been any net proceeds from the mines, nor that a reasonable effort to obtain net proceeds had not been made, nor that defendant had sold the property, or otherwise disabled himself from obtaining net proceeds; but his right to recover is based up on the theory that the discharge of the plaintiff from his superintendency constituted a breach of the contract, and entitled the plaintiff to immediately recover the balance on the purchase price of the property. The plaintiff's attorneys have correctly recognized that for such discharge to constitute a breach of the contract concerning the sale of the mines it must appear that the contract was entire. If, although contained in the same instrument, there were really two separate and distinct contracts,—one for the sale, and another for the plaintiff's employment,—a breach of one would not constitute a breach of the other. Whether a contract is separable or entire is a question of the intention of the parties, to be determined by considering the language employed and the subject-matter of the contract. If the part to be performed by one party consists of several distinct and separate

items, and the price to be paid by the other is apportioned to each item to be performed, such a contract will generally be held to be separable. 2 Pars. Cont. 517; *State v. Jones*, 21 Nev. 510, 34 Pac. 450, and cases there cited. We think this is such a contract as that above described. It consists of several distinct and separate items, performed and to be performed by the plaintiff, and the price to be paid is apportioned to each of the items. *Prima facie*, this makes it a severable contract, and we find nothing in the instrument that indicates a different intention. On the contrary, the language used in other parts of the agreement strengthens this conclusion. If the plaintiff failed to complete the furnace, this was not to abrogate the contract, but the penalty for the failure was to be what it would cost the defendant to complete it. Even if the title to some of the mines failed, the sale was still to stand. The consideration for the sale—the plaintiff's share of the proceeds—was fixed and determined. A fixed sum, payable every month, was to be paid him for his services. This part of the agreement was an ordinary contract of hiring, to continue until the happening of an uncertain event in the future. Although a part of the agreement as originally made, it could have been as well made at any other time, and could have been contained, as it really was, in a separate instrument. Each agreement was complete in itself. The hiring of the plaintiff did not increase the defendant's liability on the sale, nor did it increase the plaintiff's security, for there was no provision that he was to have any particular control or management of the mining operations; and, in its absence, we must suppose the intention was that he should act under the control and direction of the owner, the same as any other superintendent would. Again, it is unreasonable to suppose that the parties intended the rendition of the services by the plaintiff to constitute a condition precedent to the payment for the mines, so that, no matter what the mines might produce in the way of net proceeds, he would have forfeited all claim upon them had he died, or become sick, or by reason of disagreement with his employer, or for other reason, had ceased to work for him. But if he would not, then the defendant did not incur a like penalty by discharging him. It would be equally absurd to suppose, without clear language to that effect, that the defendant intended to bind himself to keep the plaintiff employed as superintendent, whether satisfied or not with his services, or, if he did not, to pay him immediately his full share of net proceeds that might never be obtained. Particularly is this the case in view of the statement in the agreement that the \$20,000 was to be payable only out of such net proceeds. The equitable and fair construction to be placed upon the instrument is that it was intended to cover two separate and distinct contracts,

for the breach of either of which the party committing it should incur only a liability for the damages sustained by the other through that breach; and we find nothing in the matter to indicate any different intention. Considering it thus, the plaintiff has claimed no damages for a breach of the contract of employment except the balance of wages due him, and for this he has obtained judgment. As to the contract for payment for the property sold, it is not alleged that the defendant has obtained any net proceeds, nor that he has failed in any way to comply with any of either the express or implied conditions of his agreement. Such being the case, we are of the opinion that the complaint fails to show any breach of this contract by the defendant, and consequently that it fails to state facts sufficient to constitute a cause of action. As we understand the evidence, it is no better than the complaint, and equally fails to show a cause of action existing upon this claim at the time of the commencement of the suit, whatever may have been the case since. If so, it was no injury to plaintiff that his complaint was held good upon demurrer. If anything, that was an error in his favor. The judgment is affirmed.

BELKNAP, J., concurs.

BONNIFIELD, J., having been an attorney in the case in the lower court, did not participate in the decision.

(16 Mont. 198)

ZICKLER v. DEEGAN et al.

(Supreme Court of Montana. May 20, 1895.)

MOTION FOR NEW TRIAL—SPECIFICATIONS OF ERROR—SUFFICIENCY—EQUITABLE PROCEEDING—REVIEW ON APPEAL—COMPETENCY OF JUROR.

1. Where the record was voluminous, a specification of error on motion for a new trial, merely stating that "the evidence clearly shows" that a certain condition of the contract had been fulfilled, without pointing out wherein the evidence of a breach of such condition was insufficient, was properly ignored.

2. A specification of error, on motion for a new trial, stating that "the only ores disposed of by the defendants, and the moneys received therefor, have been fully accounted for to the plaintiff," intended to show that a verdict for the plaintiff, under pleadings charging the defendants with having converted ore belonging to plaintiff, was against the evidence, was insufficient.

3. Where the jury had found that defendants, while working plaintiff's mine under a contract of lease, had attempted to relocate it for their own benefit, a specification of error, on motion for a new trial, which did not attempt to point out wherein the evidence was insufficient to sustain the finding, was properly ignored.

4. Where the defendant, in an action against him for failure to account for the profits of a mine which he held as lessee, alleged no facts showing the plaintiff's acquiescence in the method of accounting adopted by him, such acquiescence could not be urged as ground for a new trial.

5. In an action in the nature of an equity proceeding, the findings by the jury being merely advisory, the erroneous overruling of a challenge

to a juror is not ground for reversal, where the findings are not attacked by proper specifications of error.

Appeal from district court, Jefferson county; Frank Showers, Judge.

Action by Louis Zickler against Ross Deegan and Thomas Moran. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Ella L. Knowles, for appellants. T. J. Walsh and C. B. Nolan, for respondent.

DE WITT, J. The defendants appeal from a judgment rendered in favor of plaintiff, and from an order denying defendants' motion for a new trial. The plaintiff and defendants had entered into a contract in reference to certain mining premises, which contract was, in part, in the nature of a lease from plaintiff to defendants. But in other respects the contract was more than a lease, and in some of its provisions borders closely upon a partnership agreement for the working of the mine. The complaint in the action pleads the contract in full. By that pleading it appears that the defendants had done acts which they had agreed not to do, and had left undone many acts which they had agreed to perform. Defendants were in possession of the premises as lessees of plaintiff, so far as the contract was a lease, but it was set up in the complaint that defendants were claiming the title to the premises by virtue of a relocation of the same in their own names. The plaintiff brought this action to quiet his title in and to the mining premises, against all claim of defendants, and for an injunction restraining the defendants from in any manner interfering with the plaintiff's possession of the premises, and from mining or working the same, or extracting ores therefrom, or from removing or disposing of any ore extracted, and for such other and further relief as to the court may seem just. He also asks that possession be delivered to him. Plaintiff alleges breaches of the conditions of the contract in many respects; one of which was that defendant Deegan, who was manager and superintendent, had failed to account to the plaintiff and Thomas Moran, the other defendant, each month, in accordance with the terms of the contract. The contract particularly set forth the time when and the manner in which the accountings should be made. On motion for new trial the defendants made the following specification of error: "The evidence clearly shows that the defendant Ross Deegan accounted to the plaintiff and defendant Thomas Moran each month, in accordance with the terms of said lease." This court has not, of late, often criticised specifications, and has been decidedly lenient in entertaining appeals where the specifications were perhaps not wholly what they should be. But this specification above quoted is inexcusably insufficient. *Thorpe v. Freed*, 1 Mont. 651; *Bank v. Rob-*

erts, 9 Mont. 823, 23 Pac. 718. There are over 300 pages of record in this case, and this specification makes no pretense of pointing out, in any way, wherein the evidence is insufficient. The specification is little more than a repetition of the statement of a ground for a motion for a new trial, as required to be set out in the notice of the motion. The district court was justified in ignoring this specification.

Another matter set up in the complaint was that the defendants took and carried away and secreted about \$5,000 worth of ore, when the contract provided that all ore should be accounted for. As to this matter defendants specify insufficiency of the evidence, as follows: "The evidence clearly shows that the identical ores claimed by plaintiff to be of the value of about \$5,000, and to have been taken by defendants with the intent to fraudulently defraud plaintiff of his interest therein, were replevied by plaintiff in a suit in the district court of the First judicial district, and have by him been converted to his own use, and kept from the possession of the defendants herein." This specification is remarkable. The defendants being charged with misappropriating \$5,000 worth of ore, they say that the evidence did not sustain the charge of the plaintiff in this respect, for the reason that the \$5,000 worth of ore claimed to be appropriated by defendants was not appropriated, because the plaintiff, in order to prevent a final conversion by defendants, took and obtained the ore by the legal adjudication of a court. It is a matter of course that the district court was justified in ignoring such a specification.

It was also charged by plaintiff that ores had been disposed of by defendants. In order to show that the verdict of the jury in this respect was against the evidence, the defendants specify as follows: "That the only ores disposed of by the defendants, and the moneys received therefor, have been fully accounted for to plaintiff." This is the same sort of an insufficient specification as the first.

One provision of the contract was that, if defendants made any discoveries of ore, they should not locate said discoveries for themselves, but that, if they were located, it should be in the name and for the benefit of the plaintiff. One of the charges made by the complaint was that the defendants had located, or attempted to locate, the premises in their own name, in order to deprive plaintiff of his title therein. It was claimed by plaintiff that the defendants, in the language of miners, jumped the plaintiff's claim while they (defendants) were in possession for the plaintiff. What the result of such an attempt would or could be we need not determine, but need notice only the findings of the jury, and the specification of insufficiency of the evidence in this respect. Upon this question the jury made the following findings: "(1) Did the defendants,

at the time they posted the notice of location, and marked the boundaries of the Frelburg Mine, intend to secure title to said ground for themselves? Answer. Yes. (2) Did the defendants, at the time they posted the notice of location, and marked the boundaries of the Frelburg Mine, intend to convey to plaintiff such rights as might arise from such posting of notice and marking of boundaries? Answer, No." The defendants' specification of error upon this point is as follows: "That defendants' partial acts of location, complained of by plaintiff, were performed for his benefit, and for the purpose of protecting their leasehold rights, and were not performed for the purpose of setting up in themselves a title adverse to plaintiff's title, if any title he had." This specification is simply a very brief syllabus of that issue, as set up in the pleadings. One question for decision was whether the defendants attempted to relocate the mine for their own benefit, or for that of the plaintiff. The jury found against the defendants in this question. Their specification makes no pretense of pointing out wherein the evidence was insufficient to sustain this finding. The two findings which we have recited above are the only special findings. There is also a general verdict in favor of the plaintiff, and that he is entitled to the possession of the premises.

It is also specified that the verdict is against the law, because the plaintiff acquiesced in Deegan's method of accounting, as defendants call it, or failure to account, as plaintiff claims it was. But there was no pleading of any such acquiescence, so as to constitute a waiver, as the defendants claim.

There is a long list of assignments of alleged errors of law, many of which were as to matters of discretion in the district court, most of which are frivolous, and most of which are not discussed by appellants' counsel at all, and none of which are of such a substantial character as to reverse the judgment and order. There is one matter, however, to which we must give attention. This is the alleged waiver of one of defendants' peremptory challenges. It is argued by respondent that the question is not properly raised by the record. We will pass that question of practice, however, and notice the alleged error. The record shows the following: "During the selection of the jury, counsel for defendants states: 'We waive our second challenge.' Whereupon counsel for plaintiff peremptorily challenges one of the jurors then in the box. The court then gives counsel for defendants the privilege of exercising his third challenge against the last juror that entered the box. Counsel for defendants peremptorily challenges Lees Taylor, a juror in the box at the time defendants waived their second challenge, which challenge is overruled by the court, and to which ruling of the court counsel for defendants hereupon duly except." This seems to be an equity

action, or an action for the equitable relief for quieting the title of plaintiff, and enjoining the defendants in the respects as set forth in the opening portion of this opinion, and for such other and further relief as to the court may seem just. The plaintiff was in the possession of the premises by his tenants, the defendants (section 366, Code Civ. Proc.), so far as the defendants may be considered tenants; or, so far as the contract was in the nature of a partnership, plaintiff and defendants were each in possession. If one were required to strictly classify this action under the old forms, possibly some difficulties might be encountered. Indeed, there are some peculiar features in the case. But they are not raised by the record. In any event, it is true that the case has been treated by counsel and the district court as one for equitable relief. Certainly equitable relief was demanded, and was granted, and was the main, if not the only, object of the action. As the equitable character of the action has never been questioned, and seems at all times to be conceded, we feel justified in adopting that view. The question, then, is presented whether, in an action for equitable relief, the findings of the jury being advisory, there was prejudicial error in refusing to allow the defendants to peremptorily challenge juror Taylor, as set forth in the extract from the record above quoted. In the case of *Leggatt v. Leggatt*, 13 Mont. 100, 33 Pac. 5, we said: "The appellant contends that his challenge for cause to juror Heilig should have been sustained. But, if this were error, it is not now material, because the findings were advisory, and were adopted by the court, and are not now attacked." The case at bar, in this respect, is precisely like the *Leggatt Case*, with the slight difference that in the *Leggatt Case* the findings were not attempted to be attacked. Here, as in the *Leggatt Case*, the findings were adopted, and judgment entered thereupon. Also in this case the findings are not attacked,—that is, not attacked in any manner by which this court can notice the objections thereto,—for the reason that error is not specified so that it can be considered. Therefore the findings are the facts of the case. Therefore, if the findings are the facts, not impeached in the method provided by law, there can be no prejudicial error in the refusal of a challenge to a juror who participates in the findings which are now the unquestioned facts of the case; for, suppose it were held that the refusal of the challenge to juror Taylor was error, still, how can the appellants be injured, when it is conceded that the findings of the jury, adopted by the court, are, in the absence of assignment of error, the facts of the case? We find no reason for disturbing the judgment or the order appealed from, and the same are affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(12 Wash. 35)

WATSON v. SAWYER et al.

(Supreme Court of Washington. May 27, 1895.)

DISMISSAL OF APPEAL—FINDINGS OF FACT—PARTIES—CONSTRUCTION OF MORTGAGE—EXTENT OF LIEN—COMMISSIONS AND ATTORNEY'S FEES.

1. Defendants to a mortgage foreclosure suit, whose interests have attached subsequent to that of plaintiff, and who appear only to disclaim title, and as to whom the suits are dismissed, are not necessary parties to an appeal.

2. A statement of facts is not necessary on an appeal taken to determine whether the conclusions of law and the decree were warranted by the findings of fact.

3. An appeal will not be dismissed because the findings of fact are insufficient to determine the rights of the parties.

4. Where a borrower agrees to pay an agent a commission for procuring a loan, and the agent makes the loan himself, and, after the execution of the note and the mortgage securing it, the parties specifically agree that the agent shall retain out of the amount of the loan, the commission agreed upon, the mortgage creates a lien for the amount of the commission.

5. A provision, in a mortgage securing a note and attorney's fees, that, if the note is collected by suit, the attorney's fees may be retained out of the moneys realized upon foreclosure sale, will not prevent the mortgage from being a lien for the attorney's fees, when the same provision states that the principal and interest may be retained out of the amount so realized, and the mortgage further provides that the fees may be retained, though the foreclosure suit is compromised before judgment is recorded.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Frederick Watson against Ernest L. Sawyer and others to foreclose a mortgage. From a judgment foreclosing the mortgage, but refusing to include in the amount secured by the mortgage the attorney's fee stipulated for in it, and a commission to the mortgagee for obtaining the money advanced to the mortgagors, plaintiff appeals. Reversed.

George H. Walker and Walker & Fitch, for appellant. Walter Christian and Murray & Christian, for respondents.

HOYT, C. J. Respondents move to dismiss the appeal on several grounds: (1) That two of the defendants who had appeared in the action were not served with notice thereof; (2) because no statement of facts had been settled and filed; and (3) because the findings of fact and conclusions of law were insufficient to determine the rights of the parties.

The defendants, who, it was alleged, were not served with notice of appeal, were made parties to the action, which was for the foreclosure of a mortgage, only by a general allegation to the effect that they had, or claimed to have, some interest in the property which was subsequent to the claim of plaintiff, and their appearance was only for the purpose of disclaiming any title whatever, and of asking a dismissal of the action as to them, and the action was so dismissed. Under these circumstances, they were not necessary parties to the appeal, and

the failure to serve them with notice furnishes no reason for its dismissal.

As to the second ground: It is not necessary that there should be any statement of facts in order that an appeal should be entertained by this court for the purpose of determining whether or not the conclusions of law and the decree were warranted by the findings of fact.

The third proposition is also untenable, for the reason that, if the findings of fact were not as complete as they should have been, it was the fault of respondents, and cannot deprive the appellant of the right to have the question of the sufficiency of such findings as were excepted to tested in this court. The motion to dismiss will be denied.

The court found as a fact that the respondents Ernest L. Sawyer and wife employed the appellant to procure a loan for them upon certain real estate in the sum of \$3,000, and agreed to pay him for his services in so doing the sum of \$236.88; that thereafter the appellant, instead of procuring the loan from some other person, made it himself, and took a note of said respondents for the amount of the loan, and to secure its payment was by them given a mortgage upon the property in question; that, after the note and mortgage had been executed, the appellant and said respondents entered into an agreement to the effect that the mortgagors should at once be paid the sum of \$1,000 out of the money so loaned; that the remainder thereof should be retained by the appellant, and be paid out in pursuance of an arrangement between the parties as to the making of certain improvements upon the property named in the mortgage. This agreement contained a specific direction to the appellant to pay himself out of said money the sum of \$236.88, which it was agreed was due him for obtaining it. It was further found that before the agreement for the making of the improvements had been fully consummated, and the entire sum of \$3,000 paid out by appellant, the said respondents became so embarrassed that the further prosecution of the enterprise was abandoned; that before such abandonment, and in pursuance of the agreement between the appellant and said respondents, the appellant had disbursed the sum of \$2,809.71 of the \$3,000, which sum included the \$236.88, which he was authorized to pay himself. Upon this state of facts, the superior court was of the opinion that, as a matter of law and as against one who had obtained a lien upon the property subsequent to the lien of appellant's mortgage, the payment of the said sum of \$236.88 could not be enforced as a part of the money secured by said mortgage; and one of the grounds of reversal relied upon by the appellant is that in so holding the superior court committed error. And we feel compelled to hold that this claim of appellant must be sustained; for, while it is true that this sum was to be earned by the appellant

by procuring the money from another, yet, in view of the fact that he himself advanced the money, and thus accomplished the purposes of his employment, to the same extent as though he had literally complied with the contract, and of the further fact that all the parties at that time interested in the transaction recognized the fact that the money had been earned to the same extent as though the loan had been obtained from a third person, and that said respondents for that reason directed its payment, we think that such direction should have been given the same force as though the money had been actually paid to said respondents.

The superior court also held that the attorney's fee provided for in the note and mortgage was not a lien upon the property until after its sale under the decree of foreclosure, and could only be paid out of the money made upon such sale, and in thus holding we think it also committed error. The note provided in absolute terms for the payment of an attorney's fee if suit was brought to collect the same, and the mortgage contained substantially the same condition; and the fact that it was therein provided that the sum due as such attorney's fee might be retained out of the moneys made upon the foreclosure sale should not be construed to have so changed the stipulation for its payment as to deprive the mortgagee of the benefit of a lien therefor upon the property, for the reason that the provision as to its being retained was a part of a clause in the mortgage which provided also that the amount due upon the note and mortgage for principal and interest might also be retained. As well might it be claimed that the lien for principal and interest could only be sustained upon a sale of the property.

The respondents cite the case of *Lammon v. Austin*, 6 Wash. 199, 33 Pac. 355, to sustain this ruling of the superior court; but the mortgage under construction in that case did not contain the following language, which was a part of the mortgage in the case at bar: "And in case such foreclosure suit is settled before judgment is recorded therein said counsel fee may nevertheless be retained," or, if it did, the attention of the court was not directed thereto. The judgment and decree will be reversed, and the cause remanded, with instructions to include therein the said amount of \$236.88, with interest thereon, and to make the attorney's fee provided for in the decree a lien upon the property.

ANDERS, SCOTT, and GORDON, JJ., concur. DUNBAR, J., concurs in the result.

(12 Wash. 658)

HILL v. SAWYER et al.

(Supreme Court of Washington. May 27, 1895.)

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by J. E. R. Hill against Ernest L. Sawyer and others. From a judgment denying part of plaintiff's claim, he appeals. Reversed.

George H. Walker and Walker & Fitch, for appellant. Walter Christian and Murray & Christian, for respondents.

HOYT, C. J. This case, both as to the motion to dismiss and upon the merits, presents the same questions just decided in the case of *Watson v. Sawyer*, 40 Pac. 413, and for the reasons therein stated the judgment and decree will be reversed, and the cause remanded, with instructions to include the \$275 agreed in that case to be paid for negotiating the loan, in the decree, and to make the attorney's fee provided for in the mortgage a lien upon the property.

ANDERS, SCOTT, and GORDON, JJ., concur. DUNBAR, J., concurs in the result.

(12 Wash. 3)

BERRY v. CITY OF TACOMA et al.

(Supreme Court of Washington. May 14, 1895.)

CITY CONTRACTS—PUBLIC PRINTING.

Under the charter of the city of Tacoma, the city council cannot arbitrarily refuse to entertain the bid of a person for the city printing, because at the time the bidder is not the owner of a newspaper.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Suit by Walter A. Berry against the city of Tacoma and others for an injunction to restrain defendants from awarding the contract for city printing. From judgment for defendants, plaintiff appeals. Reversed.

Doolittle & Fogg, for appellant. James Wickersham and Stacy W. Gibbs, for respondents.

DUNBAR, J. This is a suit for injunction brought by plaintiff and appellant to restrain the city of Tacoma and its officers from awarding the contract for the city printing from October 5, 1894, to October 5, 1895, to the Union Publishing Company, or from designating the Morning Union, published by the Union Publishing Company, as the official paper of the city, and declaring invalid and void the bid of the said company, and the designation, or attempted designation, of the Morning Union as the official paper, and any and all contracts or bonds made or attempted to be made with the said company. The complaint alleges the qualifications of the appellant under the provisions of the law and the city charter of Tacoma; sets forth the provision of the charter in relation to the letting of the public printing, and alleges that it bid in accordance with the law; that its bid was lower than that of the Morning Union, to which the contract was let; alleges that lower bidders than the Union Publishing Company were responsible and able to make good their bids, and that the said city council refused to exercise its discretion in awarding said contract; and all the other allegations

necessary, if found true, to warrant the relief asked for. An investigation of the testimony which the appellant has brought up in this case convinces us that the contention of the appellant must be sustained. This court decided in *State v. Milligan*, 3 Wash. St. 144, 28 Pac. 369, that "it does not follow that the best bidder is the person who has a newspaper with the largest circulation, nor does it follow that, because the council is required after having let the contract to designate the newspaper published by the party securing said contract as the official newspaper of the city, the newspaper so designated shall then be in existence"; and it was stated in the opinion rendered in that case that, "had the freeholders intended to confine the bidding to owners of newspapers, they would probably have expressed such limitation in unmistakable terms," but that, in the absence of such expressed limitation, or of language plainly inferring it, courts would not be justified in presuming such restrictive intention." Of course, we do not question the proposition urged by the respondents that, where matters are left to the discretion of bodies of this kind, the exercise of that discretion in good faith will not, in the absence of fraud, be disturbed. This proposition is too elementary to be discussed, and it is frankly admitted by the appellant in this case. But the testimony shows that the council refused to exercise its discretion in relation to the qualifications of these bidders. The president of the council and many of the members stated that they would not take into consideration any bidder excepting one who was the owner of a newspaper, thereby deciding that it does necessarily follow that the best bidder is a person who has a newspaper, in opposition to the doctrine expressed by this court in *State v. Milligan*, supra. The testimony shows that it was the determination of the council not to take into consideration or to investigate the qualifications of any of the bidders other than the owners of newspapers; and if, as we think, the law is that the council should exercise its discretion in investigating the qualifications of bidders, and they arbitrarily dismissed from such investigation or consideration a certain class of bidders, then, certainly, as to that class, the council has refused to exercise its discretion. It is hardly worth while to review the testimony at length in this case, for there is but one conclusion that can be intelligently reached from its perusal, and that is that the council refused to entertain under any circumstances the bid of this appellant and others who were not owners of newspapers. This, we think, was error, and without discussing any of the others alleged by the appellant, for this error the judgment will be reversed, and the cause remanded, with instructions to grant the relief prayed for.

SCOTT, ANDERS, and GORDON, JJ., concur. HOYT, C. J., not sitting.

(12 Wash. 7)

KRUTZ v. ROBBINS et al.

(Supreme Court of Washington. May 15, 1895.)

MORTGAGE—PENAL PROVISION—INCREASE OF INTEREST ON DEFAULT.

A note payable in five years, bearing interest at 7 per cent. per annum, was secured by a mortgage which provided that, in case default was made in the payment of the principal or interest, or in the payment of taxes or insurance, the debtor should pay interest at the rate of 12 per cent. per annum, computed on the principal sum from the date of the note till payment thereof. *Held*, that the provision for 5 per cent. extra interest in case of default was in the nature of a penalty, and could not be enforced in equity.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Thomas S. Krutz against Eliza J. Robbins and others to foreclose a mortgage. From a judgment in his favor, plaintiff appeals. Affirmed.

George Fowler, for appellant. Greene & Turner, for John and Jane Campbell, respondents.

ANDERS, J. On March 1, 1889, the defendants Robbins borrowed from the plaintiff, Thomas S. Krutz, the sum of \$2,500, for which they gave him their promissory note, payable five years after that date, at the Chemical National Bank in the city of New York, with interest at the rate of 7 per cent. per annum, payable semiannually. Coupons for the several semiannual installments of interest were attached to the note, in each of which it was provided that the sum therein named (\$87.50) should draw interest at the rate of 12 per cent. per annum after maturity. The note further provided that it should bear interest after maturity at 12 per cent. per annum, and that on failure to pay the interest when due the principal should become due and payable, and might be at once collected. To secure the payment of this note the makers, on said day, executed to the plaintiff a mortgage on certain real estate in A. A. Denny's addition to the city of Seattle; which mortgage contained, among others, the following covenants and agreements: "And the said first parties do hereby covenant and agree that at the delivery hereof they are the lawful owners of the premises above granted, and seised of a good and indefeasible estate of inheritance therein, free from all incumbrances, and that they will warrant and defend the same against the lawful claims of all persons whomsoever. * * * Now, if said first parties shall pay, or cause to be paid, the said sum of money, with interest thereon, according to terms of said note, then these presents shall be void; but if said sum of money, or any interest thereon, is not paid when due and payable, or if any taxes or assessments now or hereafter levied or imposed in said county or territory against said real estate, or upon this mortgage, or the notes secured thereby, are not paid when the same are due and payable,

or if default be made in the agreement to keep said property insured as hereinafter set forth, then, in either of these cases, the said principal note, with the interest thereon, shall, and by this indenture does, immediately become due and payable at the option of the second party or assigns, to be at any time thereafter exercised without notice to the first parties. But the legal holder of this mortgage may, at his option, pay said taxes, assessments, or charges for insurance, so due and payable, as the mortgagors or assigns shall neglect or refuse to pay, as herein set forth, and charge them against said first parties; and the amount so charged, together with interest at the rate of twelve per cent. per annum, payable semiannually, shall be an additional lien upon the said mortgaged property; and the said mortgages or assigns may immediately cause this mortgage to be foreclosed, and shall be entitled to the immediate possession of the premises, and the rents, issues, and profits thereof. Said first parties agree to keep the buildings erected or to be erected on said land insured to the amount of \$3,000, to the satisfaction of and for the benefit of the second party or assigns, from this time until said note, and all liens by virtue hereof, are fully paid. It is hereby agreed that, in case of default of payment of any sums herein covenanted to be paid, or in default of performance of any covenant herein contained, the said first parties agree to pay to said second party or assigns interest at the rate of twelve per cent. per annum, computed semiannually, on said principal note, from the date thereof to the time when the money shall be actually paid; and any payments made on account of interest shall be credited in said computation, so that the actual amount of interest received shall be and not exceed twelve per cent., computed semiannually as aforesaid." The first two coupons, due September 1, 1889, and March 1, 1890, respectively, were paid in full at maturity, and thereafter, at irregular intervals, various sums, but in each instance less than the amount due, were paid on account of interest, the last payment having been made on June 28, 1892. The plaintiff paid insurance premiums on two occasions, a part of which was repaid by the mortgagors; and he also paid the taxes on the mortgaged property for the years 1890 and 1891, after the same had become delinquent. The note was not paid at maturity, and in May, 1894, this action was instituted to foreclose the mortgage.

The plaintiff in the action sought to recover interest on the note from its date at the rate of 12 per cent. per annum, compounded semiannually, in accordance with the stipulation in the mortgage above set forth. The court, however, awarded him but 7 per cent. interest on the note, computed semiannually from date to maturity, and thereafter at the rate of 12 per cent. per annum. Interest was also allowed on each coupon at the rate of 12 per cent. per annum

from maturity, as therein specified. The amount recovered is \$866.33 less than plaintiff conceives himself entitled to, and hence this appeal. The trial court, it will be seen, based its decision as to the rate of interest on the stipulation in the note itself in regard thereto; but appellant contends that the ruling was erroneous, for the reason that it gave no effect whatever to the stipulation in the mortgage providing for interest on the principal note, at the rate of 12 per cent. per annum from its date in case of default. He claims that that provision was part of the contract between the parties, and that inasmuch as it is not contrary to law or public policy, and is not immoral, it should be enforced as made. On the other hand, the respondents insist that the provision in the mortgage for a higher rate of interest in default of payment of the principal or interest specified in the note is in the nature of a penalty, and unenforceable in equity. If this provision is a penalty, there can be no doubt that it is unenforceable, for it is a universal rule in equity never to enforce either a penalty or a forfeiture. 2 Story, Eq. Jur. § 1319. But what is a penalty, and what is liquidated damages in a given case, it is not always easy to determine. As the question is one of intention, no single rule can be laid down which will furnish a certain and satisfactory criterion for all cases. In most cases many circumstances must be considered in order to ascertain the real intention of the parties. The courts, however, have deduced from the authorities certain general rules, "each having more or less weight, according to the peculiar circumstances of each case." Among these rules is one which is almost universally recognized and acted on, and which is that, where the payment of a smaller sum is secured by an agreement to pay a larger sum, the larger sum will be held a penalty, and not liquidated damages. *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149, and cases cited; 1 Pom. Eq. Jur. § 441; *Adams*, Eq. p. 108; 2 Pars. Notes & B. pp. 413-414; *Seton v. Slade*, 7 Ves. 265; 3 Bl. Comm. 432; *Holles v. Wyse*, 2 Ver. 289; *Strode v. Parker*, Id. 316; *Orr v. Churchill*, 1 H. Bl. 227; *Bonafous v. Rybot*, 3 Burrows, 1370; *Parker v. Butcher*, L. R. 3 Eq. 762; *Tiernan v. Hinman*, 16 Ill. 400; *Watts v. Watts*, 11 Mo. 547; *Mason v. Callender*, 2 Minn. 350 (Gil. 302); *Richardson v. Campbell*, 34 Neb. 181, 51 N. W. 753; *Waller v. Long*, 6 Munf. 71.

In *Alexander v. Troutman*, 1 Kelly, 469, this is said to be the settled doctrine. If this case, therefore, falls within the rule stated, the provision in the mortgage for an increased rate of interest in case of default in the payment of principal or specified interest is in the nature of a penalty, and the trial court was right in refusing to enforce it. While, in construing contracts, due weight will be given to the language used, still courts of equity will not be absolutely controlled by the words employed,

when the enforcement of such contract will cause an unconscionable hardship or otherwise work an injustice. *Keeble v. Keeble*, supra. A penalty has been defined to be an agreement to pay a greater sum to secure the payment of a less sum (*Henry v. Thompson*, Minor, Ala. 209), and it seems to us that this case clearly falls within that definition and the rule above stated. The additional rate of interest is essentially a penalty, although not designated as such. It could not have been intended as compensation for the use of the principal before maturity, for the reason that 7 per cent. interest was agreed on as the rate of compensation. It could not have been intended as compensation for failure to pay the interest when due, because it is neither proportioned to the amount of interest nor to the length of time the debtor is in default. The provision for 5 per cent. extra interest must therefore be considered as a provision to secure the prompt payment of 7 per cent. interest on the principal debt, and also taxes, insurance, and principal when due. The learned counsel for the appellant cite a large number of cases in support of the proposition that whether a debtor shall pay any interest or a higher or lower rate of interest may be made by agreement of parties to depend upon his prompt payment of the principal at maturity. But most of them are cases where the contract provided for no interest, if the principal should be paid at maturity, but contained a provision for interest, if payment was not so made. Whether such a contract would be enforced was the question to be determined in the following cases cited by appellant: *Rumsey v. Matthews*, 1 Bibb, 242; *Gully v. Remy*, 1 Blackf. 69; *Horner v. Hunt*, Id. 214; *Hackenburg v. Shaw*, 11 Ind. 392; *Satterwhite v. McKie*, Harp. 397; *Wakefield v. Beckley*, 3 McCord, 480; *McNairy v. Bell*, 1 Yerg. 502; *Parvin v. Hoopes*, 1 Morris (Iowa) 294; *Horn v. Nash*, 1 Iowa, 204; *Fisher v. Anderson*, 25 Iowa, 28; *Alexander v. Troutman*, 1 Kelly, 469; *Rogers v. Sample*, 33 Miss. 310; *Reeves v. Stipp*, 91 Ill. 609; *Parker v. Plymell*, 23 Kan. 402; *Main v. Casserly*, 67 Cal. 127, 7 Pac. 426.

For various reasons, some of which are not very satisfactory, these several courts held such a contract valid and enforceable. In some of them the decisions were based on the notion that the contract in controversy was equivalent to an agreement for a specified rate of interest, with a provision that the interest would be remitted if the principal was paid at maturity (see *Reeves v. Stipp*, supra; *Rumsey v. Matthews*, supra; *Satterwhite v. McKie*, supra); and in all of them the conclusion reached was deemed to be in accordance with the real intention of the parties as gathered from the whole agreement. So, in this case, the court ascertained and gave effect to the primary and principal agreement, and refused to enforce the superadded condition, because such condi-

tion was, in effect, a penalty. We think, however, that the above cases are distinguishable from the case at bar in many particulars.

Appellant also cites *Daggett v. Pratt*, 15 Mass. 177, and *Wilkerson v. Daniels*, 1 G. Greene, 180, both of which hold that, where a rate of interest before maturity is specified, and the contract provides for a higher rate if payment be not made at maturity, such higher rate is recoverable as upon the contract. The first of these cases is a law case, and the question of penalty does not seem to have been presented or considered; and in the second the decision appears to have proceeded on the theory that the contract to pay the higher rate of interest depended on a condition permitted by law. That argument would seem to be fallacious, for the reason that it assumes that any contract not prohibited by law is enforceable, whereas the rule is that equity will not enforce a penalty even if it be not prohibited by law. But it would appear that that case, as an authority upon the point decided, is weakened, if not destroyed, by the subsequent case of *Conrad v. Gibbon*, 29 Iowa, 120. But, whether that be true or not, it seems to us that that case is contrary to the rule generally recognized by courts of equity. And, besides, in this case there are several contingencies or conditions which were not in that, and which appear to be penal in their nature. For instance, in the case at bar, the higher rate of interest is provided, not only for default in payment of the principal, but for default in the payment of interest or insurance or taxes. Moreover, the consequence is the same whether the least important or the most important of these stipulations is violated, viz. the payment of a higher rate of interest on the principal from date; and this is a further reason why these provisions for an increased rate of interest should in this case be considered a penalty. 1 Pom. Eq. 441-444; 2 Greenl. Ev. § 258; *Berry v. Wisdom*, 3 Ohio St. 241; *First Orthodox Church v. Walrath*, 27 Mich. 232; *Dally v. Litchfield*, 10 Mich. 29; *Jackson v. Baker*, 2 Edw. Ch. 471; *Lampman v. Cochran*, 18 N. Y. 275; *Alexander v. Troutman*, supra. It may be said to be a general rule that the only cases in which the courts will give effect to a contract to pay a stipulated sum as damages are those where the damages provided against are uncertain, and not ascertainable by any satisfactory and certain rule of law. *Mason v. Callender*, supra; 2 Greenl. Ev. § 259. The case of *Galsworthy v. Strutt*, 1 Exch. 659, cited by appellant, is one of the numerous cases which might be cited illustrative of this principle. For the nonpayment of money the law awards interest as damages, and hence there is no difficulty in ascertaining the damages in this case, and it therefore does not fall within the rule just cited. We think the judgment of the trial court gave appellant all he was entitled to,

and it must therefore be affirmed, and it is so ordered.

HOYT, C. J., and DUNBAR, SCOTT, and GORDON, JJ., concur.

(12 Wash. 657)

KLINE et al. v. CITY OF TACOMA et al. (Supreme Court of Washington. May 21, 1895.)

STREET ASSESSMENTS—VALIDITY.

Under charter of Tacoma, requiring, before the making of street improvements, the cost of which is to be assessed on property benefited, a resolution of the council "ordering" the work, a resolution declaring it to be the "intention" of the council to improve the street, will not sustain an assessment. *Kline v. City of Tacoma*, 39 Pac. 453, 10 Wash. —, followed.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Newman Kline, trustee, and others, against the city of Tacoma and others, to set aside an assessment for street improvements. Judgment for plaintiffs. Defendants appeal. Affirmed.

James Wickersham and Stacy W. Gibbs, for appellants. Tillotson & Milligan, for respondents.

DUNBAR, J. This case falls squarely within the rule announced by this court in the case of *Buckley v. City of Tacoma*, reported in 9 Wash. 253, 37 Pac. 441. The same provisions of the charter of the city of Tacoma are to be construed, and the same resolutions and actions of the city council, as were construed in that case. Afterwards, in *Kline v. City of Tacoma*, 10 Wash. —, 39 Pac. 453, the same questions were again reviewed, and the decision in the case of *Buckley v. City of Tacoma*, supra, was affirmed. So that it seems hardly profitable to enter again upon a discussion of the identical questions involved in those cases. The judgment will therefore be affirmed.

GORDON and SCOTT, JJ., concur.

(12 Wash. 657)

GOWER v. CITY OF TACOMA et al.

(Supreme Court of Washington. May 21, 1895.)

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by George Lewis Gower against the city of Tacoma, a municipal corporation, and others, to set aside an assessment for street improvements. Judgment for defendants. Plaintiffs appeal. Reversed.

Tillotson & Milligan, for appellant. James Wickersham and Stacy W. Gibbs, for respondents.

DUNBAR, J. This case presents the same questions involved in *Kline v. City of Tacoma* (No. 1,696, just decided), ubi supra. but, as the cases were tried by different judges, different conclusions were reached, and, for the reasons stated in *Kline v. City of Tacoma*, supra, the judgment in this case will be reversed.

GORDON and SCOTT, JJ., concur.

(12 Wash. 27)

SAUTTER v. McDONALD.

(Supreme Court of Washington. May 25, 1895.)

MECHANIC'S LIEN — SUFFICIENCY OF CLAIM — MATERIALS FURNISHED CONTRACTOR — SUFFICIENCY OF VERIFICATION.

1. A verification of a claim of mechanic's lien, which states that affiant knows the contents thereof, and believes the same to be "true," is not invalidated by the use of the word "true" instead of "just," as provided by statute.

2. A verification of a claim of mechanic's lien is not invalid because it refers to such claim of lien as "the foregoing lien."

3. A lien claim which states that M. is the name of the owner of the premises, and that she caused said building to be erected; that B. is the name of the contractor for the construction of said building; that, as such contractor, he made an oral agreement with claimant, by which the latter was to furnish materials for the construction of said building, and that, in accordance therewith, claimant furnished the material described,—sufficiently states a contractual relation between the owner and the contractor.

4. A lien claim which states that the contractor entered into an oral contract with claimant to furnish materials for the construction of said building, and that, in accordance with said contract, claimant furnished the material described, sufficiently shows to whom the materials were furnished.

Appeal from superior court, Kittitas county; William H. Upton, Judge.

Action by Martin Sautter against Tillie L. McDonald to foreclose a mechanic's lien. From a judgment for plaintiff, defendant appeals. Affirmed.

H. J. Snively and Pruyn & Ready, for appellant. A. Mires, for respondent.

DUNBAR, J. This is an action brought to foreclose a mechanic's lien against property belonging to the appellant. The claim of lien which was sought to be foreclosed in this action was in words and figures as follows, omitting the formal part: "Notice is hereby given that Martin Sautter, of Kittitas county, Washington Territory, lumber dealer, at the times hereinafter mentioned furnished materials which were actually used in the construction of a certain dwelling house [describing the lot on which said building was situated]. That Tillie L. McDonald is the name of the owner and reputed owner of said premises, and caused said building to be erected and constructed. That George Beath and — Brown, partners under the firm name of Beath & Brown, are the names of the contractors for the construction of said building, who, as such contractors, entered into an oral contract with said Sautter on or about the 26th day of July, 1888, under and by which said Sautter was to furnish material for the construction of said building, and the following is a statement of the terms and conditions of said contract: That said Sautter was to furnish lumber to be used in construction of said house in amounts and kinds as the same was ordered by said Beath & Brown from time to time, and to receive pay there-

for on delivery at the prices hereinafter mentioned. That in accordance with said contract the said Sautter, between July 26, 1888, and October 15, 1888, inclusive, furnished the following lumber at the said rates, to wit: [Here follows the amount and price of the lumber furnished.]” The necessary allegations as to time are stated, and also that said owner had due notice of said materials being furnished for said building. The verification is as follows: “Martin Sautter, being first duly sworn, on oath says: ‘I am the person named in the foregoing lien. I have heard the same read, know the contents thereof, and believe the same to be true.’ [Signed and sworn to.]”

The first contention of the appellant is that the claim of lien is not verified as required by law. It is claimed that this verification does not meet the statutory requirement; that the verification should be to the effect that the affiant believes the same to be just, the language in this case being that affiant believes the same to be true. It seems to us that it would be the height of injustice to hold a verification invalid because the word “just” was omitted, and the word “true” used in its place; and this question was squarely passed upon by this court in opposition to appellant’s contention, in the case of *Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729.

It is further contended by the appellant that the verification is insufficient, because it states that the affiant was the person named in the foregoing lien, instead of the foregoing claim of lien. We do not think there is any merit in this objection. The terms “lien” and “claim of lien” are used interchangeably here. It is the claim of lien which is set forth above the verification, and which is referred to by the verification as the “foregoing lien,” and such a technical construction as that contended for by appellant would not be in the interests of justice, and the omission of the words “claim of” could not by any possibility mislead or wrong the appellant.

The second contention is that there is no person named in said claim of lien to whom the materials were furnished; and the third, that there is no contract mentioned or set out in said claim of lien, showing that there was any contractual relation between Tillie L. McDonald and Beath & Brown, or any one else, as to the erection, or furnishing of materials for the construction, of the dwelling house described in plaintiff’s complaint. A lien notice, like a pleading in any case, must be construed as a whole, and all the different allegations must be construed together, when it is plainly the intention to so construe them. This lien notice states, in the first place: That “Tillie L. McDonald is the name of the owner,” and that she “caused said building to be erected and con-

structed.” That “George Beath and — Brown * * * are the names of the contractors for the construction of said building.” (The antecedent of “said building” is evidently the building which Tillie L. McDonald caused to be constructed.) That Beath & Brown, as such contractors, entered into an oral contract with the respondent here, under and by which the respondent was to furnish material for the construction of said building. That in accordance with said contract, viz. the contract entered into between Beath & Brown and this respondent, the respondent furnished this material. It seems to us that, while probably more direct and explicit language might have been employed, no one could read this lien notice without being notified that Tillie L. McDonald caused said building to be erected and constructed by Beath & Brown, and, if she did cause it to be erected and constructed by Beath & Brown, then a contractual relation existed between Beath & Brown and Tillie L. McDonald, and they became her agents, under the lien laws, for the construction of this building, by reason of this contractual relation, and not by reason of any statement to the effect that they were her agents, which would be a mere conclusion of law. And as to the assertion that there is no person named in the said claim of lien to whom the materials were furnished, the lien claim asserts that the contractors entered into an oral contract with the respondent to furnish materials for the construction of said building, which, as we have before said, refers to the building which was caused to be constructed by Tillie L. McDonald; and that, in accordance with said contract, the respondent furnished the material described. This is, in effect, stating that he furnished it to the contractors, Beath & Brown.

This case, so far as the third proposition is concerned, viz. that no contractual relation is shown between the owner and the contractors, falls squarely under the rulings of this court in *Collins v. Snoke*, 9 Wash. 566, 38 Pac. 161, where it was held that “a claim of lien which sets out that ‘S. is the name of the owner and reputed owner of said premises, and caused said building or structure to be built and erected; that R. is the name of the contractor, who, as such contractor, made and entered into a contract with C., under and by which the hardware was to be furnished for said building,’—sufficiently states the relation of principal and agent between owner and contractor.” There is no question raised here as to the description of the property upon which the lien is claimed, and, as the objections raised seem to us to have no substantial merit, the judgment will be affirmed.

HOYT, C. J., and ANDERS, GORDON and SCOTT, JJ., concur.

(12 Wash. 34)

SPURLOCK v. PORT TOWNSEND S. R. CO.

(Supreme Court of Washington. May 27, 1895.)

APPEAL BOND—INSUFFICIENCY—SUBSTITUTION.

Exception was taken to the sufficiency of sureties on an appeal bond, and, instead of such sureties appearing for examination at the time and place specified, appellant filed a new bond within the statutory time, to which no exception was taken. *Held* a sufficient compliance with the statute.

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Action by J. D. Spurlock against Port Townsend Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Motion to dismiss the appeal. Denied.

Andrew F. Burleigh and J. E. Lilly, for appellant; H. L. Forrest, for respondent.

SCOTT, J. The respondent moves to dismiss the appeal herein on the ground of a failure on the part of appellant to comply with the statute in giving an appeal bond. A bond regular in form was filed within the time prescribed by law, but an exception was taken to the sufficiency of the sureties. Instead of the sureties appearing at the time and place specified, for examination as to their sufficiency, the appellant gave a new bond. We think this was a sufficient compliance with the statute, as it was the most that could have been required of appellant in case the sureties upon the former bond had been found insufficient. The filing of the new bond amounted to a confession that the former one was insufficient, and the new one was filed within the time provided. No exception was taken thereto. The motion will be denied.

HOYT, C. J., and ANDERS, J., concur.

(107 Cal. 276)

HECKMAN v. SWETT et al. (No. 15,795.)
(Supreme Court of California. May 24, 1895.)**SALMON FISHERIES—REGULATION.**

1. Act 1859, "to regulate salmon fisheries on Eel river" (section 2), gives owners of land fronting on such river the exclusive right to seine on their own water fronts, and provides that the bed of such river, lying between the lines of the official survey and extreme low-water mark, shall be deemed the water front of the landowner whose lands border on the river or run nearest thereto. *Held*, that one whose lines border on the south side of the river had the exclusive right to fish on the south side of an island opposite his land, where the channel between his land and the island is above low-water mark, and below high-water mark.

2. Pen. Code, §§ 634-636, regulating the times and mode of catching salmon, does not repeal provisions of Act 1859, entitled "An act to regulate salmon fisheries on Eel river" (section 2), giving persons whose lands border on the river the exclusive right to fish off the shore opposite their land.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by J. Heckman against John A. Swett and others, to quiet title to a fishing privilege, and for an injunction. From a judgment for plaintiff, defendants appeal. Modified.

E. W. Willson and P. F. Hart, for appellants. John W. Turner, for respondent.

HARRISON, J. In addition to the facts presented upon the former appeal in this case (99 Cal. 303, 33 Pac. 1099), the court has now found that the change in the channel of Eel river left no portion of the lands included in surveys 36 and 42 on the north side of the river, and that at low tide the bed of the old channel is dry in places between the island and the plaintiff's land. It was held upon the former appeal that the land of the defendants is bounded by the high-water mark on the south side of the river, and that the southerly line of the plaintiff's land is the high-water mark on the north side of the river; that, as the low-water mark is on the south side of the island, and the old channel of the river between the island and the plaintiff's land is above low-water mark, the plaintiff is within the provisions of section 2 of the act of 1859 (St. 1859, p. 208), which gives to the owner of lands fronting on the river "the exclusive right and privilege of casting, hauling, and landing seines and nets on their own water front," and provides that for the purposes of that act "all bars and the bed of said river lying between the lines of the official survey and extreme low-water mark shall be deemed and held to be the water front of the landowner whose lines border on said river, or run nearest thereto." The court below, therefore, could render no other judgment than that the plaintiff was entitled to the exclusive right of casting nets and seines for salmon on the south side of the island in front of his lands, and enjoining the defendants from interfering therewith, or making claim thereto.

Counsel in the briefs filed herein have discussed at considerable length the question of the title to the lands in the bed of Eel river, and also the power of the state to alienate these lands; but, as these questions are not involved in the case, it is unnecessary to express any opinion thereon. The case presents for determination simply the question of the respective rights of the parties under the aforesaid statute of 1859 to exercise a right of casting seines and nets for salmon in the waters of Eel river, fronting upon the lands of the plaintiff. The state, by virtue of its sovereignty, has authority to regulate fisheries within its borders, and may prescribe the places as well as the times in which fish may be taken, and may make exclusive grants of fisheries in designated waters, so far as the same do not impair private rights already vested. Gould, Waters, § 189; Com. v. Vincent, 108 Mass. 447; Wooley v. Campbell, 37 N. J. Law, 163; People v. Doxtater, 75

Hun, 472, 27 N. Y. Supp. 481. By the aforesaid act of 1859 this power was exercised, in reference to the mode and times of catching salmon in Eel river, and the exercise of the right was limited to the owner of lands fronting upon the river. By the same act the owner was given a right of action against any other person who should cast or haul a net or seine in the waters of the river fronting on his land. So long as this law remains in force, the right thus conferred is appurtenant to the land, and its invasion by another is the subject of judicial cognizance. "If the plaintiff has a right to the use and enjoyment of the property, that is sufficient to have his right protected against invasion by another." *Moore v. Waterworks*, 68 Cal. 150, 8 Pac. 816.

These provisions of the act of 1859, which form the basis of the plaintiff's right of action, are not repealed by sections 634-636, Pen. Code. These sections are intended merely to regulate the times and mode of catching salmon. Within the times and mode thus prescribed, the owners of the lands fronting on Eel river may still exercise the right of catching salmon which was conferred upon them by the act of 1859. The judgment gives to the plaintiff the exclusive right of casting nets in Eel river, irrespective of the purposes for which they are cast, and enjoins the defendants from casting any nets in the waters fronting upon the plaintiff's land. The title of the act of 1859 is "to regulate salmon fisheries on Eel river," and the act itself purports to confer a right of action in favor of the owner of lands fronting thereon, only against those who shall "cast, haul, or draw any seine or net on Eel river for the purpose of catching salmon." The judgment is broader than is justified by the statute, and should be modified by limiting it in this respect. The court below is directed to make a modification of its judgment in accordance with this opinion, and as so modified the judgment will stand affirmed. The costs of the appeal are to be borne by the appellant.

We concur: GAROUTTE, J; VAN FLEET, J.

(5 Cal. Unrep. 38)

GRIMES v. LINSKOTT et al. (No. 15,780.)
(Supreme Court of California. May 24, 1895.)

BILL FOR INJUNCTION—AMBIGUITY.

A bill to restrain public officers from filling up a ditch along the side of a road, which fails to show whether the road is public or private, whether the ditch or water course is artificial or natural, or occupied a part of the road or was outside of it, is insufficient.

Commissioners' decision. Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by Michael Grimes against James A. Linscott and others for an injunction. From a judgment for defendants, plaintiff appeals. Affirmed.

Julius Lee, for appellant. Carl E. Lindsey, for respondents.

BEICHER, C. This action was brought to obtain an injunction restraining the defendants, who were the supervisors of Santa Cruz county, from filling up, or causing to be filled up, a ditch or water course along the side of the Carlton road, in that county. It is alleged in the complaint that the plaintiff is the owner of a tract of land bounded on the northeasterly side by the "Carlton Road," so called, and that along the southerly side of a portion of said road, which bounds plaintiff's land, there is, and has been for more than 20 years, a ditch or water course, through which a stream of water has been accustomed to flow in an easterly direction to a natural stream called the "Casserly Creek," and thence down said creek to the Pajaro river; that the defendants, acting as the board of supervisors for said county, at their regular meeting on the 7th day of June, 1893, passed and caused to be entered in their minutes an order that said ditch or water course be filled up to a level with the roadbed of said road, so as to completely stop and prevent the water from flowing therein and passing off as it had been accustomed to do, and that defendants, unless restrained from so doing, will proceed to fill up said ditch or water course, pursuant to said order; that the necessary and inevitable consequence and effect of such filling up will and must be to cause the water which otherwise would flow in said ditch or water course to be diverted to and upon the lands of plaintiff, and to overflow, spread out, and stand upon the same, which, but for such filling up, it would not do; to his great, constant, continuing, increasing, and irreparable damage and injury; and that the sole and only purpose and object of said defendants in so filling up said ditch or water course is, confessedly, to divert the waters therefrom, and to cause them to flow upon plaintiff's land, and not because such filling up is necessary, or deemed to be necessary, for the proper protection or repairing of said road. A general and special demurrer to the complaint was interposed and sustained. Plaintiff declined to amend, and thereupon judgment was entered that he take nothing by his action, from which he appeals.

The only question is as to the sufficiency of the complaint. We think the demurrer was properly sustained upon the ground of ambiguity and uncertainty. Assuming that the complaint was sufficient in other respects, still it cannot be ascertained therefrom whether the Carlton road was a public or private road, nor whether the ditch or water course was an artificial or natural water course, nor whether it occupied a part of the road or was outside of its limits. But pleadings are to be construed most strongly against the pleader, and, so construing the complaint, it must be held that the road was a public highway, and the ditch was an artificial water

course, constructed upon and within the limits of the road. If such were the facts, the plaintiff had acquired and could acquire no right by prescription to have the ditch maintained, and the defendants, as the board of supervisors, had a right to order it filled up, and to cause the work ordered to be done. The reasons which prompted such action cannot be inquired into in this proceeding. The judgment should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(107 Cal. 298)

ADAMS v. HELBING. (No. 15,453.)¹
(Supreme Court of California. May 24, 1895.)
FORCIBLE ENTRY AND DETAINER—SUFFICIENCY OF FINDINGS—REVIEW ON APPEAL.

1. Code Civ. Proc. § 1172, provides that, on a trial for forcible entry and detainer, plaintiff need only show, in addition to the forcible entry or detainer, that he was in actual and peaceable possession at the time of the entry, or was entitled to possession at the time of the detainer. *Held*, that where the complaint charged both forcible entry and detainer, and there was a finding that plaintiff was the owner and in possession of the premises at the time of the entry, since this is sufficient to support a judgment for forcible detainer, a judgment for plaintiff would not be reversed for lack of a finding that plaintiff was in actual and peaceable possession at the time of the entry.

2. The sufficiency of evidence will not be passed upon when the only specifications are brief statements as to what the evidence shows.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action of forcible entry and detainer by Frank P. Adams against Louis Helbing. Judgment for plaintiff. From an order denying his motion for a new trial, defendant appeals. Affirmed.

Thos. E. Curran, for appellant. Stafford & Stafford, for respondent.

BELCHER, C. This is an action of forcible entry and detainer. The plaintiff had judgment, and the defendant appeals from an order denying his motion for a new trial.

It is alleged in the complaint that on the 20th day of August, 1889, the plaintiff was, and had been for five days previous thereto, the owner and in the actual possession of a certain building situated on the south side of McAllister street, in San Francisco, and known as "No. 1911 McAllister Street," and that on the day named, "while the plaintiff was in peaceable and actual possession thereof, the defendant, unlawfully, violently, and without cause, ejected the plaintiff and his tenant of said building then and there being, and took possession of, and has ever since held possession of, said building, forcibly and against the will of plaintiff." The answer "denies that the said plaintiff had been for five days previous to Au-

gust 20, 1889, or is now, or ever has been, in the actual or any other possession of the premises in said second amended complaint described; denies that on the 20th day of August, 1889, or at any time, or at all, upon said building and premises, while plaintiff was in the peaceable or actual possession thereof, or otherwise, or at all, the defendant, unlawfully or violently, or without cause, ejected plaintiff or his tenant of said building, or took possession of, or has ever since held possession of, said building, forcibly or against the will of plaintiff, or otherwise, except as hereinafter set forth." The answer then alleges that, prior to the commencement of the action, plaintiff and defendant entered into a contract for the erection and construction of a building on the land of the plaintiff, on the south side of McAllister street, and known as "No. 1911 McAllister Street," in San Francisco and "that on or about the 20th day of August, 1889, while defendant was engaged in the erection and construction of said building in pursuance of said contract, and before the completion of said building, the said plaintiff unlawfully and illegally entered in and upon the said building, and attempted to eject the defendant and oust him from the possession thereof, and prevent the performance of the said contract by said defendant; that defendant was compelled to and did oust and eject the said plaintiff from the said premises, using no more force than was reasonably necessary." The court found that "on August 15, 1889, the plaintiff was owner and in possession of the real estate and premises designated as 'No. 1911 McAllister Street,' in the city and county of San Francisco, and was such owner and in possession thereof on the 20th day of the same month, on which last-mentioned day the defendant, by force and violence, removed the plaintiff from the possession thereof, and from thence hitherto has, by force and menace, and against the will of the plaintiff, kept the plaintiff out of the possession of said premises, and in like manner still detains the possession of said premises from the plaintiff."

1. The notice of motion for new trial stated that the motion would be made upon the ground of the insufficiency of the evidence to justify the decision, and that it was against law. It is claimed that the decision was against law, because, to maintain the action, it was necessary for the plaintiff to show that he was in the actual and peaceable possession of the house at the time of the alleged entry and ouster, and that the findings are silent as to whether such was the fact or not. It has been several times held that when a court renders judgment, but fails to find upon a material issue, the decision is against law, and may be reviewed on appeal from an order granting or refusing a new trial. *Knight v. Roche*, 56 Cal. 15; *Spotts v. Hanley*, 85 Cal. 168, 24 Pac. 738; *Brisson v.*

¹ Rehearing denied.

Brison, 90 Cal. 328, 27 Pac. 186. The question then is, were the findings in this case so defective as to make the decision one against law? The Code of Civil Procedure contains the following provisions:

"Sec. 1159. Every person is guilty of a forcible entry who * * * by any kind of violence or circumstance of terror, enters upon or into any real property.

"Sec. 1160. Every person is guilty of a forcible detainer who * * * by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired forcibly or otherwise."

Sec. 1172. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer."

The complaint charges both a forcible entry and forcible detainer, and the finding that the plaintiff was the owner and in possession of the property should be construed, we think, to import that he was in the actual and peaceable possession thereof at the time he was forcibly removed therefrom, and certainly that he "was entitled to the possession at the time of the forcible detainer." But, conceding that the finding was insufficient to support a judgment for forcible entry, still, as it was sufficient to support a judgment for forcible detainer, the order appealed from cannot be reversed on this ground; for, as said in *Brison v. Brison*, supra: "If the complaint, as in the present instance, sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient, and a failure to find upon the other does not constitute a mistrial, or render the decision 'against law.'"

2. It is also claimed that the findings were not justified by the evidence, but this point cannot be considered. The only specifications attached to the statement are found under the head of "Specification of Errors," and are brief statements of what "the evidence shows." Such specifications are insufficient. "It is not necessary that the specifications should state what the evidence does show. Such a statement is insufficient if standing alone, and surplusage if joined to a proper specification." *Haynes*, *New Trial & App.* § 150. And see *Spotts v. Hanley*, supra, where the above language is quoted and approved. The order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(107 Cal. 309)

O'HARA v. O'BRIEN et al. (No. 15,821.)
(Supreme Court of California. May 25, 1895.)
LOCATION OF SECTION CORNER — RESURVEY —
BOUNDARY—AGREEMENT BY OWNERS
—EVIDENCE.

1. In locating the northwest corner of a section of which the northeast corner can be located, it is error, instead of merely following the calls of the division survey of the township, to start from a subsection corner in an adjoining township subdivided under a different survey, and thence run a mile and a half, only connecting the subdivision surveys of the two townships by assuming that their section corner stones on the township line coincide.

2. The fact that an agent, authorized to attend to the leasing of his principal's land, for the purpose of showing a tenant the line between the land of his principal and the adjoining owner, the adjoining owner not being with him at the time, located a line, measuring from lines to which other owners had plowed, on which the adjoining owner subsequently built a fence, does not estop the principal from denying that the line so staked is the true line, in that it was a conventional division line, agreed on between them.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by James O'Hara against P. O'Brien and others. From an order denying plaintiff a new trial, he appeals. Reversed.

Rhodes & Barston, for appellant. John B. Mhoon, for respondents.

VANCLIEF, C. Action to recover possession of the N. E. $\frac{1}{4}$ of section No. 1 of township No. 1 N., range 2 E., Mt. Diablo base and meridian, situate in Contra Costa county. The complaint being in the ordinary form and unverified, the answer denies generally each and every allegation thereof, and then specially alleges adverse possession of the demanded premises by the defendants during a period of more than five years before the commencement of the action, and that the action is barred by the statute of limitations. The cause was tried by a jury, which returned a general verdict in favor of defendants, whereupon judgment was rendered accordingly; and plaintiff brings this appeal from an order denying his motion for a new trial, made upon a statement of the case.

Upon the trial it clearly appeared, and was admitted by both parties, that the plaintiff owned and was entitled to the possession of said northeast quarter, and that defendants owned the northwest quarter of said section, according to the survey and subdivision thereof by the government of the United States; and, consequently, that the controversy related solely to the location of the line between the northeast quarter and the northwest quarter of said section, and involved the question of title to only a strip of land running north and south across the north half of the section, containing about $7\frac{1}{2}$ acres, which lies wholly within the northeast quarter, if that quarter, according to government survey, is 40 chains square, or

even if the north and south boundary lines thereof extend 40 chains west from the east boundary of the section; and there is no dispute as to the true location of the east boundary line of the section. The plaintiff employed E. C. Brown, county surveyor of Contra Costa county, to determine the true location, according to government survey, of the dividing line between the northeast and northwest quarters of the section, who testified as a witness for plaintiff that he had procured from the United States land office a copy of the original field notes of United States Deputy Surveyor L. Ransom, who had surveyed township No. 1 north in 1851, and also a copy of the field notes of E. H. Dyer, who, as United States deputy surveyor, had subdivided said township into sections and quarter sections in 1861; that by those field notes he found and identified the northeast and southeast corners of section 1 of said township by means of witness trees, etc., called for in said field notes; but could find none of the monuments, witness trees, or other landmarks referred to in those field notes by which to locate or identify the northwest or southwest corners of that section, or any of the interior corners of the quarter sections thereof. Nor was he able to find any of the monuments, witness trees, or landmarks called for in the field notes of the government surveys of sections 2, 3, or 4 of said township, by which to identify any corner of the last-named sections, or of any quarter section thereof. But it clearly appears that by starting at either the northeast or southeast corner of section 1, both of which were identified and fixed, and following the courses and distances called for in the field notes of either Ransom or Dyer, he could have located both the northwest and southwest corners of section 1, and also all the corners of the quarter sections thereof. He did not think it proper, however, to adopt this method, but, for the purpose of finding the northwest corner of section 1 in township 1, he commenced at the corner common to four quarter sections in township No. 2, which had been subdivided in 1872 by United States Deputy Surveyor Wackenruder, viz. the northeast and southeast quarters of section 34, and the northwest and southwest quarters of section 35, township No. 2. This common corner he identified by a witness tree called for by Wackenruder's field notes. Thence he ran south half a mile to a crossing of fences, which he established as the corner common to sections 34 and 35 of township 2, and which he assumed to be identical with the corner common to sections 2 and 3 of township 1. Thence he ran east 40.04 chains to a fence which the defendant claimed to be his west line; and thence continued east 40 chains, and accepted this point as the northwest corner of section 1, township 1. The result is that, instead of being 80 chains in length, as called for by the field notes of Ransom

and Dyer, the north line of section 1, township 1, is only 78.78 chains in length. To reach this result the county surveyor started at a point in township 2 established by Wackenruder, and thence ran a mile and a half by courses and distances, only connecting the subdivision survey of township 2 by Wackenruder with that of the subdivision of township 1 by Dyer, assuming that the section corners of the two townships on the township line coincided, and that certain fences of the farmers were on the section and quarter section lines; whereas he should have started at the known and established southeast corner of section 1, from which Dyer started; and thence run north 80 chains to the known northeast corner of township 1, which coincides with northeast corner of section 1 of same township. This line is admitted to be the true east boundary of section 1. After reaching the northeast corner of section 1, Dyer's field notes read substantially as follows: "Thence west on true line between sections 1 and 36, forty chains, set post for quarter sec. cor., with mound, pits, and trench, as per instructions, 80 chains, set post for cor. to secs. 1, 2, 35, and 36, with mound, pits and trench. * * * Thence south on true line bet. secs. 1 and 2, forty chains, set post for quarter sec. cor. with mound, pits, and trench, 80 chains to corner of secs. 1 and 2,"—thus showing that section 1 is a full section, each of the four boundary lines thereof being 80 chains in length, and all the angles being right angles. The county surveyor also located the southwest corner of section 1 at a crossing of fences upon the unwarrantable assumption that those fences and other fences in that vicinity had been located on true section and quarter section lines. The inevitable consequence of this was to reduce the length of the south boundary line of section 1 to 78.26 chains.

Assuming that by the aforesaid methods the county surveyor correctly located the northwest and southwest corners of the section, he properly divided it into quarter sections, whereby the disputed strip of land was found to be wholly within the plaintiff's northeast quarter; and, on the other hand, if the methods pursued by the county surveyor were wrong and liable to lead to erroneous conclusions, as I think they were (Chapman v. Polack, 70 Cal. 487, 11 Pac. 764; Gordon v. Booker, 97 Cal. 586, 32 Pac. 593; Blackburn v. Nelson, 100 Cal. 336, 34 Pac. 775), and the north and south boundary lines of the section extended from the fixed east corners west 80 chains, as indicated by Dyer's field notes, the true division line between the northeast and northwest quarters would be considerably west of the location of it by the county surveyor, and consequently considerably west of the west line of the strip of land in question; so that in either case the verdict of the jury to the effect that the strip of land in question is

not in plaintiff's northeast quarter, or that plaintiff was not the owner of it, was not justified by the evidence. The evidence strongly tends to prove that the strip is within the northeast quarter, and there is no substantial conflict of evidence on this point. *Gordon v. Booker*, supra; *Wise v. Burton*, 73 Cal. 166, 14 Pac. 678. Rejecting the methods by which the county surveyor determined the location of the west corners of the section, still his uncontradicted testimony, in connection with the field notes of Ransom and Dyer, as to the monuments he found and as to those he failed to find, is sufficient, *prima facie*, to prove that the strip of land in question lies within the boundaries of the northeast quarter of section 1, according to the government survey thereof, and it is admitted that the plaintiff is the owner of that quarter section as surveyed by the government, unless he has lost a part of it by adverse possession of defendants, or by estoppel. The mode of survey adopted by the county surveyor is considered here, and held to have been incorrect in response to the objections to it by respondents' counsel; so that in case of a resurvey for purposes of a new trial the errors of the county surveyor may be avoided. It is possible that, upon such resurvey, additional monuments called for by the field notes of Ransom or Dyer may be discovered, and, if so, they must control the calls for courses and distances; but, if no additional monuments are discovered, the west corners of the section, and the interior corners and lines of the quarter sections, must be found by means of the courses and distances called for in the field notes of Ransom and Dyer, from the established and known eastern corners, as above indicated; it being well settled that where no monuments, natural or artificial, called for by a description or by the field notes of a survey, can be found, the courses and distances called for must control. *Gordon v. Brooker*, 97 Cal. 586, 32 Pac. 593.

2. Assuming that the strip of land in question lies wholly within the northeast quarter of section 1, I think the evidence insufficient to justify a verdict to the effect that defendants acquired title to any part thereof by adverse possession. A patent for the north half of section 1, township 1, was issued by the United States to the railroad company May 31, 1870, and the railroad company conveyed the northwest quarter of that section to defendant O'Brien on October 18, 1872, described as the northwest quarter "according to the United States survey," and as "containing 160 acres." On February 12, 1874, the railroad company conveyed to Charles McLaughlin all its rights in and to the northeast quarter of said section, and on October 11, 1892, all the rights and title of McLaughlin passed to plaintiff. In the first place, the evidence shows that the controversy has always re-

lated solely to the location of the division line between the northeast and northwest quarters of section 1, and that defendants have never claimed title to any land in the northeast quarter, but have expressly disclaimed title to any part of that quarter as surveyed by the government. The testimony of plaintiff to this effect was not disputed, and was corroborated by the conduct of O'Brien during the survey by Brown. In the second place, the defendants never inclosed the land in question. They built a fence on what they claimed to be the division line running north from the south line of the north half of the section to a point about 20 feet south of the north line of the section. As to when this fence was built the evidence is indefinite and uncertain, but strongly tends to prove that it was built within five years next before the commencement of this action. In the third place, there is no evidence that defendants ever paid any taxes on any part of the land in question. The only answer to this point by counsel for respondents is that adverse possession had continued for a period of five years before the amendment of section 325, Code Civ. Proc., in 1878, requiring payment of taxes as a requisite condition to the acquisition of title by adverse possession. But of this there is no substantial evidence.

3. It is contended for respondents that the line upon which they built the fence was a conventional division line, agreed upon by McLaughlin and the defendants; and the grounds of this contention are that in 1885 or 1886, while Capt. Lamberton was agent for McLaughlin for the purpose of superintending the lands of the latter, and leasing the same, he staked the line upon which the defendants afterwards built their said fence, and caused a furrow to be plowed upon that line by McLaughlin's tenants of the northeast quarter of section 1. But the evidence shows that Lamberton had no authority from his principal to fix or settle boundary lines, and that he never pretended to have such authority; that he staked the line merely for the purpose of showing McLaughlin's tenants how far west they should plow; that he did not consult the defendants in regard to the location of the line, nor represent to them that it was the true division line; that the only means he employed to locate that line was measuring with a tapeline from certain lines to which farmers in that vicinity had plowed; and that he regarded his staking of the line as "guesswork." None of the defendants were present with him while he was staking the line, or ever said anything to him about the matter. Surely, there was no agreement between Lamberton and defendants as to the location of the division line between the northeast and northwest quarters of section 1, even if Lamberton had authority to make such agreement. Nor does the evidence show any acts or representations of

Lamberton by which McLaughlin or his vendee should be estopped from denying that the line staked by Lamberton is the true line. I think the order should be reversed, and a new trial granted.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, and a new trial granted.

(107 Cal. 334)

**CALIFORNIA ACADEMY OF SCIENCES
v. CITY AND COUNTY OF SAN
FRANCISCO et al. (No. 15,593.)¹**

(Supreme Court of California. May 25, 1895.)

DEDICATION—WHAT CONSTITUTES PUBLIC USE.

A dedication of property to a corporation of limited membership, formed purely for scientific purposes, is not for a "public use," and, therefore, a dedication to such a corporation of unoccupied city land by a board of supervisors, authorized to dedicate such land for a "public use" only, under St. 1868, p. 379, is invalid.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Ejectment by the California Academy of Sciences against the city and county of San Francisco and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Holladay & Holladay, for appellants. H. T. Creswell, for respondents.

HARRISON, J. The land claimed by the plaintiff is embraced within the pueblo claim of the city of San Francisco, which was confirmed to the city by the decree of the circuit court, May 18, 1865. It is situate west of the charter line of 1851, and is within that portion of the city and county commonly known as outside lands, and is a portion of the land referred to in the act of congress of March 8, 1860 (14 Stat. 4). After the passage of this act, the supervisors passed an ordinance known as "Order No. 800," which was ratified by the legislature by an act approved March 27, 1868 (St. 1868, p. 379). By the first section of this ordinance the board of supervisors were authorized and directed to devise and adopt a plan for the subdivision of these outside lands into blocks and lots, "and to select and set apart for public uses such lots and portions of said land as said board may deem necessary." The second section provided that, after the adoption of the plan, the board of supervisors should cause a map of the lands to be made according to this plan, "and upon such map shall be designated the lots and portions of land set apart for public uses, and the particular use for which each lot or portion of land shall have been set apart." Provision was also made for hearing applications for changes in the plan, and making alterations therein, and deline-

ating them upon the map, and that, when such alterations should have been delineated, the map should become the official map, and the portions of land thereon designated for public purposes should be deemed to have been dedicated as such. By virtue of the provisions of this ordinance, the committee on outside lands prepared a map, which they presented to the board of supervisors, and accompanied the same with a report showing the various selections of lots and portions of land set apart for public uses, and designating one of these selections to be "for the use of the Academy of Sciences." Before the final adoption of the map, the lot involved in this action was, upon the recommendation of the committee on outside lands, substituted for the one that had been originally reported by them, and was delineated thereon, and the map was by ordinance declared to be the official map, and all the lots and lands designated on said map were declared to be set apart and dedicated to the uses for which they had been designated on the map. Upon this map the words, "Academy of Sciences" were placed within the space corresponding to the description of the lot involved herein. Other acts were performed by the supervisors indicative of an intention to set apart the lot in question for public uses, and upon other official maps, subsequently made, the lot is marked "Academy of Sciences." By virtue of these acts of the city and its officers, the plaintiff claims the right to the possession of the lot. The plaintiff was never in the occupancy of the lot, but in December, 1887, a resolution was passed by its trustees, and entered in its records, "accepting the dedication" of the lot, and a copy of this resolution was presented to the board of supervisors, and filed with its clerk. In February, 1888, the supervisors passed a resolution granting the use of the lot to the board of education, and thereafter this latter body erected a schoolhouse thereon, and is still occupying the lot. The plaintiff was incorporated June 27, 1853, under the laws of this state for the incorporation of scientific associations, by the corporate name of "California Academy of Natural Sciences," and on February 24, 1871, was reincorporated under the same laws by the name of "California Academy of Sciences." There is no corporation, association, or institution in this state by the name of "Academy of Sciences" other than the plaintiff herein. The record does not disclose the method by which membership is had in the plaintiff, but it is stated that it has no capital stock, and that during its whole existence it has derived its support from the monthly dues of its members, and from sums paid for life memberships in the society, and from voluntary contributions. It also appears that it is managed by a board of trustees, and that the services of its officers are rendered without compensation. The court below rendered judgment in favor of the defendants upon the ground that

¹ Rehearing denied.

the plaintiff is a private corporation, and that the board of supervisors had no power to set apart the land in question for any other than public purposes. From this judgment, and an order denying a new trial, the plaintiff has appealed.

At the time of the adoption of the official map under order No. 800, and the placing thereon upon the lot in question the words "Academy of Sciences," the corporate name of the plaintiff was "California Academy of Natural Sciences," and there is nothing in the record to indicate that the board of supervisors intended by this delineation to designate the plaintiff, or whether it was its intention to set apart the lot for an "Academy of Sciences" that might thereafter be created or organized for public purposes. It is unnecessary, however, to determine what was the intention of the board of supervisors, as, unless that body had the power to set apart the land for the plaintiff, none of its acts could effect that purpose. The decree of the circuit court confirming the pueblo claim of the city declared that the confirmation was in trust for the benefit of the lot holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue, "in trust for the use and benefit of the inhabitants of the city." By an act of July 1, 1864 (13 Stat. 333), congress had released to the city all claim to land within its corporate limits, as defined in the charter of 1851, and on March 8, 1860, the United States (14 Stat. 4) confirmed the claim of the city, and granted to it its interest in said lands, upon the trust that it should be disposed of and conveyed by the city to parties in bona fide actual possession thereof on the passage of the act, "except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses." Order No. 800, which was validated by the legislature, conferred upon the supervisors the power to set apart and delineate upon the official map lots or portions of land for public uses only, and only the lots which should be designated on the map for public uses are dedicated as such. It must be observed that, at the time this ordinance was validated by the legislature, the selection and designation of lots upon the map had not been made, and the act of the legislature in validating the ordinance is only a letter of authority to the supervisors to make the selection and designation according to its terms, and is not to be construed as a ratification or adoption of an act already performed by them. As, therefore, there was no authority in the board of supervisors to select or designate upon the map of the lands any lot or portion of land for any other than a public purpose, it follows that the lots or portions of land so selected and designated are limited to a public purpose, and can be claimed or kept only for such public purpose. Any selection or designation upon the map by the super-

visors for any other than a public purpose would be an act without authority, and could confer no right in the land so designated. The plaintiff herein is a private corporation, with limited membership, and can in no respect be regarded as invested with the care of the public, or subject to public control. The laws under which it is incorporated clearly indicate that it is essentially private, and has none of the characteristics of a public corporation. It is undoubtedly the fact that the public derives a benefit from its labors and its contributions to science, but this is merely an incidental result of its organization and existence, and it is not the essential object for which it was incorporated. The public derives similar benefit from the organization and labors of any association for scientific or sociological investigation, whether incorporated or not; but this fact does not render such organization a public body, or its object a public purpose, within the meaning of the ordinance and statutes referred to. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(5 Cal. Unrep. 40)

FIRST NAT. BANK OF SOUTH BEND v. KELSO. (No. 15,816.)

(Supreme Court of California. May 25, 1895.)

APPEAL—ASSIGNMENT OF ERROR.

An assignment of error, on motion for a new trial, that the "evidence is insufficient to justify the third finding of fact, in that there is no evidence to show that there is due and owing plaintiff" a certain sum, is insufficient to question on appeal the sufficiency of the evidence to sustain such finding that no part of the principal has been paid except a certain sum.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the First National Bank of South Bend against John Kelso. There was a judgment for plaintiff, and, on defendant's motion for a new trial being denied, he appeals. Affirmed.

Edward L. Foster, for appellant. Reel B. Perry, for respondent.

PER OURIAM. Action on a promissory note for the sum of \$2,000, besides interest, dated April 1, 1893, payable three months after date, executed by appellant in favor of the respondent. The complaint was filed October 12, 1893, and contained, among other allegations, an averment to the effect that no part of the principal sum or the interest mentioned in the note had been paid. This allegation was denied in the answer, and the defendant also pleaded that the time of payment had been extended by written agreement of the parties. It appears from the bill of exceptions that the controverted fact at the trial was whether the plaintiff had

given to the defendant the extension of time pleaded by him in his answer. The court found in favor of the plaintiff, and rendered judgment in his favor. The defendant moved for a new trial, which was denied, and he has appealed.

One of the grounds urged in the motion for a new trial is the insufficiency of evidence to sustain the decision of the court, and the specification of this insufficiency is as follows: "The evidence is insufficient to justify the third finding of fact, in that there is not sufficient evidence to show that there is due and owing plaintiff from defendant the sum of \$2,000, together with interest thereon from July 1, 1893, at the rate of ten per cent. per annum." The third finding of fact is as follows: "That no part of the principal sum of said note, or of the interest thereon, has ever been paid, save and except the sum of fifty dollars on account of interest; and that there is due and owing plaintiff from defendant the sum of \$2,000, together with interest thereon from July 1, 1893, at the rate of ten per cent. per annum." Upon the appeal herein counsel for the appellant makes no other contention than that there was no evidence in support of the finding of the court that the note had not been paid. The appellant did not, however, in the bill of exceptions, specify this as one of the particulars in which the evidence was insufficient to justify the decision, and for that reason he cannot now be heard in support of his contention. The assignment of error is limited to the latter part of the third finding, and does not question that portion thereof which finds, "that no part of the principal sum of said note, or of the interest thereon, has ever been paid, save and except the sum of fifty dollars on account of interest." The judgment and order are affirmed.

(107 Cal. 291)

WOOD et al. v. BLANEY. (No. 15,737).¹
(Supreme Court of California. May 24, 1895.)

ESTOPPEL—FRAUDULENT REPRESENTATIONS—LIABILITY OF AGENT.

1. Where an agent procures his principal's approval to a contract of sale by telling him that he has received the cash deposit provided for in the contract, he will, under Code Civ. Proc. § 1962, subd. 3, be estopped from showing that he did not receive the deposit in cash, but in a note of the vendee.

2. Where a vendor's agent receives from the vendee a cash deposit, to be held by him till the happening of a certain condition, after the happening of the condition and rescission of the contract he continues to hold the deposit as agent of the vendor, and is liable for its conversion.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by T. Wood and another against Charles D. Blaney. From a judgment for defendant, and an order denying a new trial, plaintiffs appeal. Reversed.

¹ Rehearing denied.

W. C. Kennedy, for appellants. Wilcox & Patton, for respondent.

SEARLS, C. This is an action to recover \$500, alleged to have been received by defendant, as the broker and agent of plaintiffs, in the sale of certain real estate, and converted to his own use. The cause was tried by the court, and written findings filed, upon which judgment was entered in favor of the defendant. Plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The testimony and findings show that plaintiffs were the owners of a 44-acre tract of land lying near San Jose, in the county of Santa Clara, and, being desirous of selling the same, commissioned and employed the defendant, Blaney, who was doing business as a real-estate broker under the name and style of Charles D. Blaney & Co., to make such sale at the price of \$16,000. On the 5th day of February, 1891, Blaney found a purchaser for said premises at the agreed price in one Charles H. Sinclair, of San Francisco, and, as agent of plaintiffs, Blaney entered into a written contract with said Sinclair for the sale to him of said premises for the price of \$16,000, payable as follows: \$500 down, the receipt whereof was acknowledged in the contract; \$1,000 in 20 days; \$4,500 in 60 days; and the balance upon mortgage payable at certain specified dates, with interest, etc. Blaney was to furnish an abstract of title to the property within 10 days, and within 10 days thereafter Sinclair was to accept the title as good, or object to the same as not good. If the title was found good, Sinclair was to complete the deferred payments as per the contract, or forfeit all deposits; but, should the title not be found good, all deposits were to be returned to Sinclair, and the contract avoided. The deposits of \$500 and \$1,000 were to remain in the hands of Blaney & Co. until title was shown to be good, etc. The contract was signed by Charles D. Blaney & Co. (who were described in the instrument as agents of the owners) and by Sinclair. A day or two after making the agreement, Blaney presented it to the plaintiffs for their written approval, who thereupon asked Blaney if he had taken the deposit of \$500 in coin, to which the latter responded that he had, and thereupon plaintiffs indorsed upon such contract their written approval of the same. Blaney did not in fact receive \$500 in coin from Sinclair, as specified in the agreement and as represented by him to the plaintiffs, but took from Sinclair his promissory note for \$500, payable to him, the said Blaney, at 60 days from February 5, 1891. The title was found good. Before the expiration of the 20 days fixed for the payment of the \$1,000, an extension of the time of such payment for 15 days was mutually agreed upon between the plaintiffs and Sinclair. Sinclair made default in all the payments. Subse-

quent to such default he sought to make other and different terms with plaintiffs, but they, having learned that his financial standing was bad, refused to make any other or further terms with him, and in April, 1891, he, the said Sinclair, went into voluntary insolvency, and the \$500 note so given by him to Blaney became worthless. Plaintiffs, soon after the failure of Sinclair to consummate his agreement, sold the property in question to a third party for \$16,000. Neither plaintiffs nor Sinclair made any tender of performance of the contract; that is to say, Sinclair did not tender payment and plaintiffs did not tender a deed or offer to do so, but said contract was abandoned by plaintiffs and Sinclair. The \$500 so acknowledged as having been paid is the identical sum of money averred to have been converted to his own use by defendant, and to recover which this action is brought. Plaintiffs demanded from defendant said sum of \$500 before suit brought, which he refused to pay. The court found also that plaintiffs did not suffer any damage or injury by reason of the failure of Sinclair to complete his contract, or by reason of Blaney's taking said note of Sinclair instead of coin, or by reason of said Blaney's asserting at the time of the approval by plaintiffs of said contract that he had received \$500 in coin. At the trial the court permitted the defendant, against the objection of plaintiffs, to contradict the written contract, and his declaration to plaintiffs that he had received upon the agreement for a sale the sum of \$500 cash, and to testify that he did not in fact receive any money from the purchaser, etc. This ruling is assigned as error. Several errors are also predicated upon the insufficiency of the evidence in support of various findings, as well as error of law in the decision of the court, contained in the conclusion of law that the defendant was entitled to a judgment. These alleged errors all proceed upon the theory that the defendant was estopped by the contract of sale and by his declarations from denying that he had in fact received the sum of \$500 on account of the said sale, and they may be considered together.

Subdivision 3 of section 1962 of the Code of Civil Procedure, among conclusive presumptions, declares that: "Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it." Bigelow, in his work on Estoppel (4th Ed.) at page 552, in discussing the elements essential to an estoppel in pais by conduct, lays down the following rule: "(1) There must have been a false representation or a concealment of material facts. (2) The representation must have been made with knowledge, actual or virtual, of the facts. (3) The party

to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter. (4) It must have been made with the intention, actual or virtual, that the other party should act upon it. (5) The other party must have been induced to act upon it." *Pickard v. Sears*, 6 Adol. & E. 469; *Stephens v. Baird*, 9 Cow. 274; *Canal Co. v. Hathaway*, 8 Wend. 480; *Dezell v. Odell*, 3 Hill, 215; *Dresbach v. Minnis*, 45 Cal. 223; *Bleven v. Freer*, 10 Cal. 172; *Martin v. Zellerbach*, 38 Cal. 300; *Appeal of Wright*, 99 Pa. St. 425. The facts of this case bring it squarely within the rule as above enunciated. Defendant, Blaney, virtually admitted, and the court found, that he falsely represented to plaintiffs that he had received \$500 as a deposit on account of the sale, when he had taken what proved to be a worthless note. He had full knowledge of the falsity of the statement. Plaintiffs were ignorant of the facts, and, relying upon the statement as true, were induced thereby to approve the contract precisely as defendant intended they should do. Under such circumstances defendant was and is in morals, law, and equity bound to make good his statement, and estopped, independent of all considerations of agency, from showing its falsity to the injury of plaintiffs. The late case of *Myers v. Byars* (Ala.) 12 South. 430, is in point. Briefly stated, the facts were: In an action to recover \$1,000 for money had and received, it appeared that one Landrum had sued a lottery company to recover a prize of \$5,000, and plaintiff had intervened in the action, claiming as against Landrum a part of the prize. Defendant, who was the attorney of Landrum, agreed that in case plaintiff would withdraw his intervention he would hold \$1,000 of the prize money to be collected, subject to a contest between plaintiff and Landrum in the courts, and to be paid to plaintiff in the event of his recovery. When plaintiff brought the action it was held that defendant was estopped to deny the fact that he had the money which had been paid over to him. Like considerations apply here, and defendant should not have been permitted to deny his former statement that he had received and held the \$500. Respondent contends, however, that conceding all this, still the plaintiffs were not entitled to recover, for the reason that the contract of sale was rescinded, and defendant, being required by the written contract to hold the money until the title was found good, became and was upon the abandonment of the contract the agent of Sinclair, the vendee, and liable to him therefor. We think this contention cannot be sustained. The evidence and findings alike show that defendant was employed by plaintiffs to sell the land. As their agent, he contracted for the sale, and its terms, as is shown by the written agreement. It was for them, and as their agent, that he professed to have received the \$500, and to have acknowledged its re-

celpt from Sinclair. Concede that by the terms of the agreement he was to hold the deposit until the title was found good, or even until the payment of \$4,500 fell due. All of those things had transpired long before the written demand upon him in evidence made August 10, 1891, or the later demand of the plaintiffs admitted at the trial to have been made upon him November 2, 1891. Defendant owed no duty to Sinclair. If the contract was abandoned, and the latter was entitled to recover back his deposit, less the damage plaintiffs had sustained by reason of its breach, it was against the plaintiffs that he was entitled to recover, and not against their agent, the defendant. Whether or not Sinclair was entitled to recover from the plaintiffs, and, if yea, how much, or whether or not the plaintiffs were gainers or losers by the transaction, were questions that did not concern him. *Bogart v. Crosby*, 80 Cal. 195, 22 Pac. 84, and cases there cited. In *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774, the recovery was had upon the ground that the defendants were in fact the agents of the plaintiff, who was a vendee, and who had made default. The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

(107 Cal. 282)

RAUER v. BRODER et al. (No. 15,855.)¹
(Supreme Court of California. May 24, 1895.)
ACTION ON NOTE—EVIDENCE—PRESENTATION FOR PAYMENT.

1. Proof of the execution and indorsement of a note is not necessary where the allegations to that effect are not denied in the answer.

2. Under Civ. Code, § 10, providing that the time within which any act provided by law is to be done shall be computed by excluding the first and including the last day, a note dated September 1, 1890, payable 60 days after date, is due October 31, 1890, and, in order to bind the indorser, must, in the absence of excuse, be presented on that day, as required by Civ. Code, § 3131, subd. 5.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by J. J. Rauer against Robert Broder, W. H. Sigourney, and others on a note. From a judgment for plaintiff, W. H. Sigourney appeals. Reversed.

Bull & Cleary and A. W. Crandall, for appellant. F. A. Berlin and Edward J. McCutchen, for respondent.

SEARLS, C. This is an action on a promissory note dated September 1, 1890, made by Robert Broder, for \$2,890, payable 60 days after date, without grace, with interest at 6

¹ Rehearing denied.

per cent. per annum, to W. H. Sigourney, or order, "due at the bank of Visalia of Herrell & Son." Robert Broder, the maker of the note, made default. Defendant W. H. Sigourney answered, and a trial was had before the court without the intervention of a jury, and judgment entered in favor of plaintiff and against said defendants, from which judgment, and from an order denying his motion for a new trial, defendant Sigourney appeals.

The first point made by the appellant is that there was no sufficient evidence of the execution of the note by Robert Broder, the alleged maker thereof, or of its indorsement by Sigourney or Charles H. Wood. A copy of the note is set out in the complaint, with the indorsements thereon, and it is specifically averred therein that it was made by Robert Broder, indorsed by Sigourney and Wood before maturity, and by the American Bank & Trust Company. None of these averments are denied in the answer except the indorsement by the American Bank & Trust Company, as to which last-mentioned indorsement there was proof. As to the others, no evidence was necessary. The only important contention in the case relates to the sufficiency of the demand upon the maker, and notice of dishonor to defendant Sigourney as an indorser. As before stated, the note was dated September 1, 1890, and was payable 60 days after date. "The time within which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." Civ. Code, § 10. There are no days of grace allowed in this state. *Id.* § 3131. Defendant Sigourney was an indorser before maturity of the promissory note, and, not having waived demand and notice, it was essential to his liability that such demand should have been made upon the very day upon which the note fell due, which was on Friday, October 31, 1890. The demand not having been made upon the maker of the note until Saturday, November 1, 1890, was one day too late (subdivision 5, § 3131, Civ. Code), and, no excuse therefor having been claimed or proven, the effect was to discharge defendant Sigourney from his liability as an indorser. It follows that defendant's motion for a nonsuit should have been granted, and that the finding of the court below "that at maturity the said note was duly presented to said Robert Broder (the maker), and, payment thereof demanded," etc., is wholly unsupported by the evidence. The judgment and order appealed from should be reversed, and the cause remanded for such action as may be consistent with this opinion.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for such action as may be consistent with this opinion.

(157 Cal. 327)

UNION INS. CO. OF CITY OF SAN FRANCISCO v. AMERICAN FIRE INS. CO. OF CITY OF NEW YORK. (No. 15,755.)

(Supreme Court of California. May 25, 1895.)

CONTRACT OF REINSURANCE—WHEN TAKES EFFECT.

A reinsurer is not liable to the insurer for a loss which, unknown to either party, occurred before the reinsurance was effected, where the parties contracted with reference to a custom that reinsurance took effect from the time when it was granted.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the Union Insurance Company of the city of San Francisco against the American Fire Insurance Company of the city of New York to enforce a contract of reinsurance. From a judgment for defendant, plaintiff appeals. Affirmed.

Carter P. Pomeroy, for appellant. Van Ness & Redman, for respondent.

SEARLS, C. This action was brought to enforce a contract of reinsurance entered into by the parties hereto on the 6th day of June, 1889. The cause was tried by the court without a jury upon the amended complaint and answer thereto, and upon an agreed statement of facts. Written findings were filed, and judgment entered thereon in favor of defendant, from which judgment plaintiff within 60 days next after the rendition thereof appealed. The agreed statement of facts upon which the cause was tried, after stating that the plaintiff, on May 24, 1889, insured certain property of the Seattle Lumber & Commercial Company in the sum of \$4,000 against loss or damage by fire, contains the following: "(3) That subsequent to the said insurance of the said property, and on, to wit, June 6, 1889, and between 3:15 and 4 p. m., the said property so insured as aforesaid was destroyed by fire, by reason of which said destruction of said property the said Seattle Lumber & Commercial Company lost and was damaged in a sum in excess of four thousand dollars. (4) That on said June 6, 1889, but subsequent to the destruction of said property as aforesaid, the plaintiff notified defendant, at the office of defendant in the city and county of San Francisco, California, of its said insurance upon said property, and requested of and from defendant reinsurance thereon in the sum of one thousand dollars; whereupon defendant agreed to and did reinsure plaintiff thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed. That at the time of said application and agreement neither plaintiff nor defendant knew of the prior destruction of said property." The question presented under the pleadings and stipu-

lated facts is simply this: Did the defendant, under its agreement of reinsurance, contract to indemnify plaintiff against loss and liability for and during its original contract of insurance, or was the undertaking of defendant to indemnify plaintiff against such loss as might thereafter occur? "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event." Civ. Code, § 2527. "A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance." Civ. Code, § 2646. "A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage." Civ. Code, § 2648. "When an insurer finds it prudent or convenient to protect himself from loss by reason of any liability he has assumed under a policy, he may contract with another to relieve him from that liability, and take it upon himself. This is to reinsure; and by the contract the reinsurer, except as to the matter of premium, which may be more or less than that paid on the original policy, as the parties may agree, undertakes, with reference to the first insurer, what the first insurer undertakes with reference to the insured, and subject to like rights, duties, and obligations." May, Ins. (3d Ed.) § 9. Section 2531, Civ. Code, provides that "any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against." Section 2587 provides, among other things, that: "A policy of insurance must specify: (1) The parties between whom the contract is made. * * * (5) The risks insured against; and, (6) the period during which the insurance is to continue." In the present case, as will be seen by the agreed statement, no policy in fact issued, and the theory urged by appellant is that the reinsurance was for and during the entire term of the original insurance, and covered any unknown loss which might have occurred within said term, prior to the application for and granting of the reinsurance. Respondent, on the other hand, claims that the undertaking of the defendant was to indemnify plaintiff against such loss and liability as might occur from and after the granting of the reinsurance. The contract, according to the stipulation, was that "defendant agreed to and did reinsure plaintiff in said sum (\$1,000), and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed." The general rule is that a policy, if delivered, takes effect from its date, unless it be otherwise stated, or unless there is evidence of a contrary intent. If the premium be paid, and the policy be not delivered till afterwards, the policy takes effect by rela-

tion as of its date, even though a loss intervenes. May, Ins. § 400; Russ v. Insurance Co., 23 N. Y. 516; Whitaker v. Insurance Co., 29 Barb. 312; Lightbody v. Insurance Co., 23 Wend. 18; City of Davenport v. Peoria M. & F. Ins. Co., 17 Iowa, 276. It is said: "The circumstances and intent of the parties are to control." May, Ins. § 240. The same author, continuing, adds: "And where the policy was in fact a reinsurance, and was for a year, but specifying no time when the year was to begin, it was held that it began from the date of the prior policy, though that was some months prior to the issue of the latter policy," citing as authority the case of Philadelphia Life Ins. Co. v. American L. & H. Ins. Co., 23 Pa. St. 65. Referring to the case cited, it appears that on the 24th of February, 1851, the American L. & H. Ins. Co. insured the life of one Maxwell Nusbaum for \$2,500 for one year, with the privilege of another year. On the 31st day of May, 1851, the insurers obtained an insurance of \$1,000 of their risk from the Philadelphia Life Insurance Company for the term of one year, but the time when the year was to begin or end was not stated. It appeared that Nusbaum had gone to California, and had lost his life at a fire in San Francisco, May 4, 1851, which fact was unknown to the parties in Philadelphia, where the insurance was had, when the second policy issued. The court, in holding the reinsurer liable, placed its decision upon the circumstance that, while the policy of reinsurance was for one year, and did not state the date at which the risk was to commence, yet, as the reinsurers charged one whole year's premium, while the original policy had then only say nine months remaining, it indicated an intention to reinsure from the date of the original policy. Lawrie, J., said: "The contract and the circumstances express themselves in seeming contradiction of each other, and our duty is to make them harmonize by construction. We cannot alter the facts to suit an inference drawn from the mere words of the policy, but we must suit the inference to the facts. Without the circumstances, we would draw one inference as to the intention of the parties; with them, we must draw a different one. The fact that the reinsurance was for one year, on a risk running for one year from the 24th February, and in consideration of a proportional share of the premium as from that date, settles the question, and starts the year of the reinsurance from that date." In the present case we find no circumstance indicating the mutual intention of the parties to give to their contract a retrospective effect. The stipulated facts show that at all the times mentioned it was the custom among fire insurance companies doing business upon the Pacific coast granting reinsurance to other fire insurance companies to charge and collect premiums as and from the date of reinsurance, and to write

their policies so as to cover the reinsured company from the date upon which the reinsurance would be granted. Both plaintiff and defendant were fire insurance companies doing business in San Francisco, and may be presumed to be familiar with these customs, and, in the absence of a showing to the contrary, to have contracted with reference to them. Indeed, plaintiff alleges in effect that its contract with defendant was subject to the customs in vogue and understood by insurance men, when it avers that defendant "did agree to and did reinsure plaintiff thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed." Where there is a known usage of trade, persons carrying on that trade are held to have contracted in reference to the usage (unless the contrary appears), and the usage forms a part of the contract. Brown v. Howard, 1 Cal. 423; Taylor v. Castle, 42 Cal. 367; Auzeais v. Naglee, 74 Cal. 60, 15 Pac. 371.

Without pursuing the authorities further, we are of opinion:

1. Where the exact time of the commencement and termination of the risk are specified in the policy, or, if no policy has been written, in the contract, such specification governs.

2. Where no time has been expressly indicated, the circumstances of the case will be considered for the purpose of determining it.

3. If there are no circumstances indicating the intention of the parties, and no time is specified in the contract, the risk will be deemed to have commenced at the date of the contract.

4. In the case last mentioned, if before the contract of insurance is made the property has ceased to exist, although unknown to the parties, the risk never attaches.

In consonance with these views of the law, we are of opinion the judgment appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(107 Cal. 317)

REDINGTON v. PACIFIC POSTAL TELEGRAPH CABLE CO. (No. 15,695.)

(Supreme Court of California. May 25, 1895.)

ACTION AGAINST TELEGRAPH COMPANY—INCORRECT TRANSMISSION OF MESSAGE—NEGLIGENCE—EVIDENCE.

1. In an action against a telegraph company for failure to correctly transmit an unrepeatable message, it appeared that the plaintiff delivered to defendant a message directed to an officer, requiring him to levy on property to the amount of "nineteen hundred and three dollars." In sending the message the company omitted the syllable

"teen" in the first word, making it read "nine" instead of "nineteen." The message blanks of defendant in terms limited its responsibility to the cost of transmission, unless the message was repeated. The plaintiff called but one witness, an expert electrician, who had served 21 years as a telegraph operator, who gave it as his opinion that owing to a rest of one to three seconds which would occur between the first syllable of the word "nineteen" and the balance of the message, if the current had ceased to flow, the omitted syllable could not have been lost without the receiving operator's knowledge, if he was competent. *Held*, that the evidence was sufficient to sustain a finding of gross negligence on defendant's part, making it liable for the damage sustained.

2. In an action against a telegraph company for incorrectly transmitting a message, it is not error to exclude testimony as to the amount of business of the office from which the message was sent, offered to show that an operator of the highest capacity was not called for there, when the evidence offered does not show the amounts collected on the individual messages handled.

3. Where a witness for plaintiff has testified, on cross-examination, to facts not called for by anything in his examination in chief, he cannot be contradicted in regard thereto.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by W. P. Redington against the Pacific Postal Telegraph Cable Company for failure to correctly transmit a message. Judgment for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals. Affirmed.

Lloyd & Wood, for appellant. Chickering, Thomas & Gregory, for respondent.

SEARLS, C. This is an action to recover damages for the failure of the defendant (a telegraph company) to correctly transmit an unrepeatable telegraphic message. Plaintiff had judgment for \$555 and costs, from which judgment, and from an order denying its motion for a new trial, defendant appeals. The case is this: The defendant is a telegraph company, engaged in transmitting and receiving messages for hire by telegraph over its lines, one of which extends from San Francisco to Visalia, in the county of Tulare, state of California. On the 28th day of March, 1890, plaintiff caused a message to be delivered to defendant at San Francisco for transmission to Visalia, directed to D. G. Overall, sheriff of the county of Tulare, directing said sheriff to attach the property of Woodruff and Dobson under a writ of attachment issued out of the superior court of the city and county of San Francisco, in an action in which the plaintiff herein was plaintiff and Woodruff and Dobson were defendants, which said writ was set out in the message, and commanded the sheriff to attach sufficient property of the defendants therein to satisfy plaintiff's demand for "nineteen hundred and three dollars," etc. The writ was in the usual form. The said message was transmitted to Visalia, and delivered to said sheriff, but when delivered the word "nineteen" in said writ was changed and altered so that it read

"nine," thus causing the writ to read \$903 instead of \$1,903. The writ was duly levied for \$903, and before the mistake was discovered other writs of attachment were levied upon the same property. The total receipts upon the sale of the property of the attachment debtors, over and above the sum of \$903 and costs, was the sum of \$555, which plaintiff would have received in addition to \$903 had the message been correctly transmitted. The said message was not repeated. Plaintiff, within 30 days after sending, duly notified defendant of his loss, and demanded satisfaction therefor. The message was upon the usual blank of defendant, and was preceded by the following printed agreement or notice: "All messages taken by this company subject to the following terms: To guard against mistakes, the sender of a message should order it repeated; that is, telegraphed back to the originating office. For repeating one-half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated message beyond 50 times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruptions in the working of their lines, or for errors in cipher or obscure messages. And this company is hereby made the agents of the sender, without liability, to forward any message over the lines of other company, when necessary, to reach its destination. Correctness of the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risks, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of company is authorized to vary the foregoing. The company will not be liable for damages in any case where the claim is not presented in writing within fifty days after sending the message. John W. Mackay, President. W. C. Van Horne, Vice President. Send the following message, subject to the above terms, which are hereby agreed to." Plaintiff prepaid to defendant the sum of \$6.70 for sending said message, for which sum defendant offered in its answer to permit plaintiff to take judgment under and pursuant to section 997 of the Code of Civil Procedure of this state.

The foregoing is a condensed statement of facts stipulated between counsel for the respective parties as existing in the case, and

used as evidence on the part of plaintiff. At the trial plaintiff called a single witness, W. W. Slater, an electrician, who stated that he had had 27 years' experience, 21 years as a telegraph operator, and 6 years as an electrician, who explained the Morse alphabetical system, etc., and who, as the substance of his testimony, gave it as his opinion that the word "teen" lost from the message in the course of transmission could not have been lost without the knowledge of the receiving operator, if competent, and that if it was not known by the sending or receiving operator it would be because they or one of them was not a competent operator. The witness alluded to the causes which might arrest the electric current, and gave as the central reason why a competent receiving operator should know if there was a cessation of its flow that the rest or space of time necessary to receive the syllable "teen" (one to three seconds) would indicate to him something wrong, whereupon it would become his duty to call for a repetition. Upon the close of plaintiff's testimony defendant's counsel moved the court for a judgment of nonsuit, upon the ground substantially that the message in question was transmitted over the wires of the defendant under the agreement contained in the agreed statement, and was not repeated, and that "there has been no evidence showing any gross negligence on the part of defendant corporation or its employes, and that in the absence of proof of a repetition of a message, and in the absence of proof of the gross negligence on the part of the defendant or its employes, the plaintiff has failed to make any case." The court overruled the motion, and such ruling is assigned as error.

The message here was in all material respects identical with the one involved in the case of *Hart v. Telegraph Co.*, 68 Cal. 579, 6 Pac. 637, in which this court held that a similar stipulation, that the liability of the company for any mistake or delay in the transmission or delivery of a message shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause except willful misconduct or gross negligence on the part of the company; and that in an action to recover damages beyond the amount stipulated the burden of proof is on the plaintiff to show such willful misconduct or gross negligence. The onus, then, of proving willful misconduct or gross negligence on the part of the defendant devolved upon the plaintiff, and is not in the face of the stipulation to be presumed from the mere fact of a mistake, but must be proven by independent facts, or by circumstances connect-

ed with the principal fact, and warranting the conclusion or inference of willful misconduct or gross negligence. There is no claim of willful misconduct.

Did the evidence establish a prima facie case of gross negligence on the part of the defendant? The degrees of negligence are correlative to the degrees of care. Law writers have criticised the practice of dividing negligence into degrees, and have declared that the term "ordinary negligence" involves a solecism, "since, if the negligence were ordinary (that is, in accordance with the usual course of practice among all men of average prudence), it would cease to be negligence at all." *Shear. & R. Neg.* § 48. The same authors admit, however, that terms in use to define "negligence" are well understood, and any attempt to dispense with them would promote confusion rather than clearness of conception. The accepted definition of "gross negligence" is "the want of slight care." *Id.* § 49. Gross negligence is the want of slight diligence. *Kranz v. Thieben*, 15 Ill. App. 482; *Bank v. Graham*, 85 Pa. St. 91; *Wright v. Clark*, 50 Vt. 130; *Smith v. Railroad Co.*, 24 N. Y. 222. Gross negligence is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others. *Railroad Co. v. Cocke*, 64 Tex. 151. Gross negligence is that entire want of care which would raise a presumption of a conscious indifference to consequences. *Manufacturing Co. v. Bradley*, 52 Tex. 587.

The question of negligence is a mixed question of law and fact, and is said to involve two questions: (1) Whether a particular act has been performed or omitted; and (2) whether the performance or omission of this act was a breach of legal duty. The first of these is purely a question of fact; the second a pure question of law. *Shear. & R. Neg.* § 52. "The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such a difference as to the inferences which might fairly be drawn from conceded facts. Where this is the case, the issue must go to the jury, no matter what may be the opinion of the court as to the value of the evidence or the credibility of the witnesses." *Id.* § 54. Tested by this rule, the evidence on the part of plaintiff presented such a state of facts that the inference to be drawn therefrom might well lead to a difference of opinion between reasonable men, and hence become a proper question for a jury or for the court sitting in lieu thereof. *Hart v. Bridge Co.*, 30 N. Y. 622; *Dahl v. Railroad Co.*, 62 Wis. 652, 22 N. W. 755; *Railroad Co. v. Hotham*, 22 Kan. 41; *Schierhold v. Railroad Co.*, 40 Cal.

447. It follows that the court below did not err in denying defendant's motion for a nonsuit.

The second error assigned relates to the sufficiency of the evidence to justify the finding of the court that, "in the transmission of said telegraphic message, the defendant was guilty of gross negligence and carelessness, and it was because of such gross negligence and carelessness that the words 'nineteen hundred and three dollars' in the said message contained as written by the sender were changed and altered to the words 'nine hundred and three dollars.'" The defendant introduced evidence tending to show that the day upon which the message was transmitted from San Francisco to Visalia (March 28, 1890) the weather was cloudy, with light rains from San Francisco south to Los Angeles, and that in rainy weather the electric current is liable to be momentarily diverted from the wire by contact of such wire with trees, buildings, or crossing wires, etc., and generally upon all branches of the case the testimony of the defendant was sufficiently convincing that defendant was not guilty of gross negligence to raise a grave doubt as to the propriety of the above-quoted finding. To state the evidence at length or to discuss it at large can be of no avail, for the reason that a doubt, however grave as to the correctness of the finding, where, as here, there is a conflict in the evidence, is not, under the settled rule of this court, sufficient to authorize a reversal. We judge the case upon the facts from the cold record, and it may well be that, had we been in the place of the trial court, heard the witnesses as they detailed the facts, observed their demeanor and mode of testifying, the doubt which now exists as to the conclusion reached by such court would never have arisen. The rule of this court, that the verdict of a jury or a finding of fact by a court will not be reversed where there is a substantial conflict in the evidence upon which such verdict or finding is based, is so firmly established as to amount to a maxim. The order appealed from cannot be reversed because the findings are not supported by the evidence.

It is further urged that the court "erred in refusing to permit defendant to show the receipts and expenses of the Visalia office." The evidence in question consisted of a writing showing the monthly receipts and expenditures of the Visalia office during the year 1890, from which it appeared the receipts were \$1,469.84 and the expenses, \$667.24. The object of the testimony was no doubt to show that the Visalia office was an unimportant one, having but a small volume of business, and hence not calling for the highest capacity in an operator. As the memorandum presented did not show the amounts collected upon the individual messages received or sent, it was too indefinite to be of value in determining the volume of business. The defendant was permitted to show, and did show, that the office at Visalia was classed as a third-

class office, and the number of dispatches sent and received per day was testified to by the operator without objection. There was no error in the ruling under these circumstances.

The only other error assigned is predicated upon a ruling of the court upon a question put to the witness F. P. Medina, as follows: "Do you know what is the custom in the railroad service as regards the repeating of train orders?" When the question was objected to, the court remarked: "I don't know myself that the railroad question is important." Thereupon counsel for defendant stated, in substance, that he wanted to contradict plaintiff's witness (Slater), and show that he knows nothing about it. "I want to discredit him. It would be of no consequence; only to discredit their only witness, and to show that he does not know what he is talking about." The witness Slater had testified that it was not usual in the railroad office to repeat messages directing the movement of trains, but this was upon cross-examination, and not responsive to anything concerning which he had testified in chief, and, being upon a collateral matter, the answer was not open to contradiction. There is another answer to alleged error. The witness afterwards, and without objection, testified to the very matter objected to, his answer being as follows: "I do know of messages being repeated in the railroad business. All train orders, all orders regarding the movement of trains, are repeated," etc. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(107 Cal. 235)

THRUSTON v. CLARK. (No. 18,423.)

(Supreme Court of California. May 24, 1895.)

MISCONDUCT OF OFFICER—REMOVAL—INCRIMINATING EVIDENCE.

1. Under Pen. Code, § 772, providing for the removal of officers for violation of duty, a sheriff cannot be removed from office, while serving his second term, for offenses committed during his first term.

2. A prosecution under Pen. Code, § 772, providing for the removal of public officers for violations of duty, is a criminal case, within Const. art. 1, § 13, declaring that no person shall be compelled to be a witness against himself in any criminal case.

Commissioners' decision. Department 1. Appeal from superior court. Glenn county; Seth Millington, Judge.

Action under Pen. Code, § 772, by Joseph D. Thruston against P. H. Clark, to remove defendant from the office of sheriff. From a judgment for plaintiff, defendant appeals. Reversed.

J. C. Ball and J. H. Ball, for appellant.
Chas. L. Donohoe and George D. Dudley, for respondent.

SEARLS, C. This is a proceeding under section 772 of the Penal Code to remove the appellant, P. H. Clark, from the office of sheriff of the county of Glenn, and to recover a judgment for \$500 against him in favor of Joseph D. Thruston, as an informer under said section. The cause was tried by the court, written findings filed, upon which judgment was entered, depriving the defendant of his office as sheriff of Glenn county, and that Joseph D. Thruston have and recover from said P. H. Clark the sum of \$500 and costs. Defendant appeals from the judgment, and from an order denying his motion for a new trial. The judgment and order appealed from must be reversed, for many reasons, some of which are as follows:

1. It appeared from what may be termed the complaint that the defendant was duly elected sheriff of the county of Glenn, and qualified on the 11th day of May, 1891; that he was re-elected to the same office on the 8th day of November, 1892, and qualified on or about December 9, 1892. In other words, he was his own successor, and under the act organizing the county of Glenn, approved March 11, 1891, may be presumed to have taken office under his second term on the first Monday of January, 1893. There are in the complaint about a dozen separate and distinct specifications of acts averred as violations of law, of which some one-half, as nearly as can be determined, were for alleged misconduct during defendant's first term of office. As to these charges or specifications, the demurrer should have been sustained. Section 772 of the Penal Code, under which this proceeding is prosecuted, is as follows: "When an accusation in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented; and on that day, or some other subsequent day not more than twenty days from that on which the accusation was presented, must proceed to hear, in a summary manner, the accusation and evidence offered in support of the same, and the answer and evidence offered by the party accused; and if, on such hearing, it appears that the charge is sustained, the court must enter a decree that the party accused be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases." It will appear from the foregoing that the specific object of the

legislature is to remove from office a class of officers who have been guilty of malfeasance or misfeasance in such offices. It is not to punish such persons for wrongs perpetrated outside of, but within the scope of, the duties imposed upon them by the precise office in question. In *Smith v. Ling*, 68 Cal. 324, 9 Pac. 171, it was held that a proceeding for the removal of an officer under section 772, supra, could not be maintained after the accused had ceased to hold office. See, also, *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843. By parity of reasoning, an officer cannot, under the same section, be removed from office for a violation of his duties while serving in another office, or in another term of the same office. Each term of an office is an entity separate and distinct from all other terms of the same office. If defendant violated any duty imposed upon him as an incumbent of the office of sheriff during a former term, the law furnishes a mode or modes for his punishment, but to remove him from an office to which he has been subsequently elected is not the punishment for such violation of duty prescribed by any law of this state. There are other objections to the accusation or complaint, and the demurrer should have been sustained.

2. At the trial the prosecution, for the purpose of making out its case, called as a witness the defendant, P. H. Clark; and, against his objection and protest, the court required him to testify, and he gave evidence in the cause tending to sustain the charges against him. This action of the court is assigned as error, and, in view of the fact that in the event of another trial the same question is liable to arise, we will briefly notice it here. Section 13 of article 1 of our constitution, following a like provision in amendment 5 of the constitution of the United States, declares that no person shall "be compelled, in any criminal case, to be a witness against himself." Removal from office under the summary proceeding provided for by section 772, supra, is a punishment for wrongdoing by the class of officers designated in chapter 2 of title 2 of part 2 of such Code. There are two methods of prosecution for willful or corrupt misconduct in office provided by chapter 2. One is by an accusation in writing, presented by the grand jury, stating the offense charged in ordinary and concise language, under which the accused is entitled to and must be tried by a jury, and upon a conviction the judgment is that the defendant be removed from office. Pen. Code, §§ 758-770. The other method is the summary method provided by section 772 of the same chapter, supra. In all its essentials of cause and effect, the latter is a criminal proceeding, equally with the former. The proceeding is a nondescript, but resembling somewhat a *qui tam* action. But whatever its garb, it is in body and spirit, in its aim and object, a process for the punishment of crime. When the constitution declares that

no person shall be compelled in any criminal case to be a witness against himself, it must be construed to apply to all cases in which the action prosecuted is not to establish, recover, or redress private and civil rights, but to try and punish persons charged with the commission of public offenses. A criminal case is an action, suit, or cause instituted to punish an infraction of the criminal laws, and, with this object in view, it matters not in what form a statute may clothe it; it is still a criminal case, and the person charged therein is protected from being an enforced witness against himself by the aegis of the constitutions, national and state. This whole question was considered, and, as we think, set at rest, by the supreme court of the United States in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524. The proceeding was one in rem, to establish the forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon pursuant to an act of congress. The law authorized the court, on motion of the government attorney, to require the defendant to produce in court his invoices, etc., or upon failure so to do, the allegations of the prosecution as to their contents were to be taken as true. The court made an order accordingly, and the defendant produced the invoice, but excepted to the action of the court upon the ground that the act of congress was in violation of the constitution. Bradley, J., in an elaborate opinion reversing the judgment, after stating that under the act the prosecution might have proceeded by indictment against the defendant, proceeds as follows: "If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is, civil in form,—can he by this device take from the proceeding its criminal aspect, and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one." The court adds: "We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the constitution." In the later case of *Lees v. U. S.*, 150 U. S. 476, 14 Sup. Ct. 163, which was a civil action, in form, to recover a penalty for importing an alien under a contract to perform labor, etc., the defendant was called and compelled to give evidence in favor of the government. Mr. Justice Brewer, in disposing of this branch of the case, said: "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the

case of *Boyd v. U. S.*," etc. It follows that the action of the court in requiring the defendant to give testimony against himself was in violation of the right guaranteed to him under the constitution.

The other errors assigned need not be noticed. The judgment and order appealed from should be reversed, and the court below directed to sustain the demurrer to the accusation, with leave to amend.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer to the accusation, with leave to amend.

(107 Cal. 199)

HELM v. McCLURE et al. (No. 15,803.)

(Supreme Court of California. April 30, 1895.)

DEDICATION OF LAND FOR HIGHWAY—EVIDENCE—OBSTRUCTION—REMEDY OF ABUTTING OWNER.

1. D., at one time the owner of a large tract, sold land abutting on each side of a strip known as "D. Avenue," which opened into a town street. Plaintiff's lot had a frontage on the strip, and the strip was used for passage by the persons whose property abutted on it, and by others, for more than 15 years, and was the only means of access from abutting property to the street. D. then conveyed the strip to defendants, who erected improvements which cut off plaintiff's access to the street. D. knew of the travel over the strip, and several witnesses testified as to his declarations that it should remain a street. *Held*, that the evidence was sufficient to sustain a finding that the strip was dedicated to the public as a highway.

2. Whether land has been dedicated for a highway is a question of fact, to be determined from the circumstances of each case, which must show an intention by the owner to dedicate the land, and an acceptance by the public.

3. The evidence of the former owner on the subject of dedication of land for a highway is relevant, but not conclusive that it was not so dedicated.

4. One whose access to a highway is cut off by an obstruction thereof sustains an injury in such a special sense, under Civ. Code, § 3493, that she may maintain an action for the abatement of the nuisance.

5. The fact that plaintiff had constructed an embankment in front of her lot, from which she reached the street by a bridge, did not affect her right of action.

6. An objection that plaintiff's lot did not abut on the alleged highway is untenable where the highway extended to a creek which was entirely on plaintiff's land, and plaintiff's land extended to a line which the court found from the evidence was the boundary of the highway.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by M. J. Helm against Frank McClure and another to abate a nuisance. From a judgment for plaintiff, defendants appeal. Affirmed.

J. A. Cooper, for appellants. Hudson & Sayre and J. H. Seawell, for respondent.

BRITT, C. Action begun May 18, 1893, to abate an alleged public nuisance, plaintiff claiming to have sustained special damage. After trial the court found that for 15 years last past there has been a public road in the county of Lake, about 43 rods in length, which is an extension northeasterly of Main street in the town of Upper Lake; that, for upwards of three years last past, plaintiff has been the owner and in possession of a lot of land on the west side of, and adjacent to, said public road; that the only means of entrance and exit to and from plaintiff's lot is over such highway, and she had been accustomed to travel with vehicles and on foot over the same, to her lot, until about December 1, 1891, when defendants erected a dwelling house and fence in said road, whereby access to and egress from her lot is wholly prevented; that plaintiff has suffered no pecuniary damage by reason of such obstructions, but has been injured in a "manner different in degree and in kind from what the public in general have suffered"; that the defendants, who are husband and wife, are the owners of the land on which the obstructions rest, subject to the right of the public to use the same as a highway. The findings were filed October 14, 1893. The judgment directed the removal of the house and fence. Defendants moved for a new trial, which was denied, and have appealed from the judgment, and the order denying such motion.

The principal matters agitated here are whether the evidence supports the conclusions of the court that the place where defendants erected their structures is a highway, and that plaintiff has sustained detriment different in kind from that suffered by the public at large. The evidence shows that the alleged highway has for many years been known locally as "Dewell Avenue," and for brevity we may refer to it here as the "Avenue." From the evidence in the record, including a map of the way and premises involved, it appears that about the year 1870 one Benjamin Dewell was the owner of the land "all around the premises claimed to be a road," as well as that included in the avenue itself. From time to time he sold the land abutting on both the east and west sides of the avenue, in parcels of varying dimensions,—probably five in all. The parcel including plaintiff's lot was conveyed by Dewell to one Waller as early as 1874. It had a frontage on the west side of the avenue of a little more than 20 rods, and has been subdivided into four lots, owned by as many different persons, but all fronting on such avenue. Dewell yet owns, and, it seems, resides on, the land to the northward of the avenue, into which, at its northern extremity, he has a gateway. For more than 15 years such avenue has been marked and inclosed at its northern end by Dewell's fence and gate, and on its east and west sides by the fences of the persons to whom Dewell sold

the abutting parcels of land, or their successors in interest, and open at its southern extremity into the northern end of Main street, in the town of Upper Lake. The avenue is thus a cul-de-sac. It is about 6 feet wider than said street, which latter is 70 feet in width, the east line of the avenue being continuous with the east line of the street; but the west line of the street, at the point of junction, is about 6 feet further east than the west line of the avenue. A creek (or slough, as it is commonly called in the evidence) 15 or 20 feet wide courses along the westerly side of the avenue the greater part of its length. During the winter season water runs in this slough to the depth of several feet. The plaintiff's lot is about 18 rods in length, east and west, and about 4 rods in width. It includes at its eastern end the greater part of the width of said slough, but appellants deny that it extends to the line of the alleged highway,—a matter to be noticed further on. The south line of plaintiff's lot, assuming that it extends to said avenue, intersects the same at a point about 7 rods north of the junction of the latter with said Main street. Plaintiff constructed an embankment or breakwater $4\frac{1}{2}$ feet high on her lot, along the west side of said slough, to prevent the overflow of water therefrom. This embankment prevented communication between her lot and the avenue, unless by means of a bridge across the slough; and she designed to rest one end of such a bridge on the embankment, and had hauled materials for the bridge, and deposited the same in the avenue, on the east side of the slough, when defendants removed the materials, and then built their fence, and obstructed the roadway so that plaintiff could not reach her lot therefrom, or construct the bridge. Dewell conveyed to defendant Luella McClure a strip of land lying lengthwise of the avenue, and in the same, about 54 feet in width and 300 feet in length, having for its southern boundary the south end of the avenue, where the same unites with said Main street, and for its western boundary the east line of the tract previously sold to Waller. This strip, 54x300 feet, taken out of the western side of the avenue, was fenced and otherwise improved by defendants, leaving a narrow lane, 20 feet or little more in width, in the eastern part of the avenue, yet open for passage. Such fence and improvements are the obstructions which the judgment requires to be abated as a nuisance. It does not appear precisely when the conveyance was made by Dewell to Luella McClure, but it was probably about the year 1890. In November of that year, defendant Frank McClure had begun his house, and was then forbidden by the witness Dunton to obstruct the avenue. There has never been any expenditure of labor or money by the highway authorities of the county or road district on the way in question. Its character as a highway depends upon its dedication for that purpose

by Dewell while he was yet the owner, and its acceptance as such by the public. Concerning this question there was evidence, in addition to the matters above stated, that the avenue has been used for passage by many persons other than those whose lands abut upon it, while as to these latter there appear to be six or eight proprietors, whose principal, if not sole, means of exit from and access to their respective lots are afforded by the disputed roadway. They and their predecessors have customarily used it in reaching the town of Upper Lake. It seems a fair inference from the evidence to say that the so-called avenue has, as regards its use, partaken rather more of the character of a village street than of a strictly rural lane. Mr. Dewell knew of the travel over the avenue, and that somewhat numerous persons were using it as a roadway, for, it seems, at least 15 years, but took no measures to prevent such use. One Cook, the former owner of a parcel of land adjoining plaintiff's lot, testified that at the time he purchased his lot, in 1874, he made inquiry of Dewell about the character of the avenue, and Dewell replied that it was a street "as far south as the property extended that he sold to Waller"; that it was his intention, "for the benefit of settlers, and for his own benefit, to open up this street." One Fritz testified that about the year 1877, under similar circumstances (he intending to buy an abutting lot yet further north than the Waller tract), Dewell told him to complete the purchase; that the avenue always would be a street, to that lot, — never would be stopped.

We understand the law to be well settled that whether a dedication of land for highway purposes has occurred in any instance is a conclusion of fact to be drawn from the circumstances of the particular case; that such circumstances must clearly show an unequivocal intention, manifested by appropriate words or conduct, or both, on the part of the owner, to devote his land to the wayfaring uses of that somewhat vague entity called "the public"; that the public must accept the proffered dedication, but such acceptance may be signified, and the dedication made perfect, by public user in accordance with the apparent offer of the owner. *Harding v. Jasper*, 14 Cal. 647; *San Francisco v. Calderwood*, 81 Cal. 589; *Smith v. City of San Luis Obispo*, 95 Cal. 470, 30 Pac. 591; *People v. Marin Co.*, 103 Cal. 223, 37 Pac. 203; *Hall v. Kauffman* (Cal.) 39 Pac. 756. The evidence in the present case, above outlined, was sufficient to fulfill the requirements of the law as here stated, and as illustrated by the cases cited. It is true that Mr. Dewell testified that he had never dedicated the land for highway purposes, and had no intention to do so, and denied the declarations testified to by Cook and Fritz, and there is evidence of acts and declarations on his part inconsistent with such in-

tent; his testimony was relevant, but not conclusive, evidence upon the subject of his actual purpose. *City of Chicago v. Chicago, R. I. & P. Ry. Co.*, 152 Ill. 561, 38 N. E. 768. There was thus a conflict of evidence, which the trial court resolved in favor of plaintiff. The finding of a highway should stand.

We are of opinion, also, that the plaintiff sustained injury in such a special sense that she was entitled to maintain this action. Civ. Code, § 3493. The obstructions cut off access from her land to the highway. *Hargro v. Hodgdon*, 89 Cal. 628, 26 Pac. 1106. Appellants claim that the embankment constructed by plaintiff on the west side of the slough of itself prevents her access to the roadway, and therefore she cannot be specially damaged by their obstructions. True, the evidence shows that plaintiff must reach the avenue, since the embankment was constructed, by a bridge across the slough, one end of which must or may rest on the embankment; but this does not establish that plaintiff's own structure, and not those of defendants, cause plaintiff's injury. If it did, then a fence or wall would have the same effect, and the result would be that only uninclosed lots would be protected by the rule plaintiff invokes here.

Appellants further contend that the plaintiff has not suffered special damage, because, they say, her lot does not abut upon the alleged highway; that the slough intervenes between the east boundary of her lot and the west line of the avenue. The map accompanying the record shows that at one point the entire width of the slough is on plaintiff's lot; so that, if appellant's assumption that the alleged highway reaches only the east margin of the slough be correct, plaintiff might still construct a bridge entirely on her own land, and reach the roadway, but for the obstructions of the defendants. Besides, it was admitted at the trial that the defendants have fenced the parcel of land conveyed to defendant Luella by the deed of Dewell, and the map shows that this parcel abuts upon the lot of plaintiff throughout the width of the latter lot. The court found that defendants' fence is around land comprised in a highway, and we have seen that the evidence sustains the finding. It necessarily follows that, as shown by the record, the east line of plaintiff's lot is coincident with the west line of the highway.

Appellants question the sufficiency of the complaint. It is certainly not a model of pleading, but we do not think it fatally defective in the particulars urged by them. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(107 Cal. 345)

PEOPLE v. SIMONSEN. (No. 21,183.)

(Supreme Court of California. May 28, 1895.)

CRIMINAL LAW—PROOF OF CORPUS DELICTI—ADMISSIONS.

A conviction cannot be had for obtaining property under false pretenses on the extrajudicial statements and admissions of defendant alone as to the falsity of the statements, such falsity being part of the corpus delicti, which must be proved otherwise.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

H. Simonsen appeals from a conviction for obtaining property by false pretenses. Reversed.

Geo. Hayford, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendant was convicted of the crime of obtaining property under false pretenses, and prosecutes an appeal from a judgment and order denying his motion for a new trial. No briefs have been filed in the case. It is claimed that the evidence is insufficient to support the verdict, and we think the claim has merit. The facts of the case may be stated as follows: Defendant secured several hundred dollars from the prosecuting witness, Wolters, by reason of the following representations and pretenses: Defendant stated to Wolters that he (defendant) was the owner of a certain tract of land in the state of Minnesota, and proposed to secure a loan from said Wolters, giving as security therefor a deed to this tract of land. The money was loaned, and the deed given as contemplated and agreed. It is charged in the information that the representations made by defendant to Wolters as to his ownership of land in Minnesota are false, and that in fact he owned no land as represented. At the trial the only evidence offered by the prosecution to prove that defendant did not own any land as represented were the extrajudicial statements and admissions of the defendant himself to that effect, and we hold them insufficient to prove the fact. It is elementary that the corpus delicti must be established before extrajudicial statements and admissions of a defendant are admissible in evidence and can be considered as tending to establish the fact to which they relate. The falsity of the representations made by defendant as to his ownership of the land is a material and essential element and portion of the corpus delicti, and a defendant's admissions alone can never be relied upon to establish as sufficient any fact which is a necessary ingredient to form the body of the crime. The term "corpus delicti" means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the corpus delicti. It would simply establish the corpus; and proof of the dead body alone, joined with a con-

fession by the defendant of his guilt, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide, before a defendant's confession would be admissible for any purpose. Upon a charge of arson, mere proof that a building was destroyed by fire does not establish the corpus delicti; and the defendant's confession of his guilt, made extrajudicially in connection with such proof, is not sufficient to sustain a judgment of conviction, for there is no evidence of the commission of a crime other than the defendant's statements, and the law, in the exercise of a jealous care over its subjects, demands something more. To be sure, the appearance of the dead body, the nature of the wounds, the evidences of a struggle, the physical circumstances surrounding the affair, may furnish evidence of the corpus delicti; they may indicate that a crime has been committed; but there must be proof of the fact from some source other than the defendant's admissions. A building may be burned under such suspicious circumstances as to indicate the act of an incendiary, and thus a corpus delicti established, and the doors opened for the defendant's admissions and confessions; but there must be some evidence of some kind tending to show the incendiary character of the fire, aside from these admissions and confessions. Laying aside the evidence of defendant's admissions, there is nothing whatever in the record even pointing towards the commission of a crime, and this condition furnishes a sure and conclusive test that the falsity of the representations is a necessary element of the corpus delicti. Indeed, the falsity of these representations as to the ownership of the land form the core of the charge, and make the defendant's conduct and acts a crime, when otherwise they would be entirely innocent and lawful. For these reasons we conclude the evidence offered at the trial failed to establish *prima facie* the corpus delicti, and that defendant's admissions cannot be relied upon to supply the defect in the proof. As supporting the general principles of law here declared, we cite 3 Greenl. Ev. § 30; People v. Jones, 31 Cal. 565; People v. Thrall, 50 Cal. 418; People v. Alviso, 55 Cal. 230. In the Jones Case a quotation is made from Sam v. State, 33 Miss. 352, which indicates inferentially that, joined to defendant's admissions, proof of death is sufficient against a defendant in a case where a homicide is charged, and that upon a charge of arson proof of the burning of the building is sufficient; but the doctrine of the Jones Case itself goes to the full lengths here laid down. There appear to be no other errors in the record. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN FLEET, J.

(6 Wyo. 318)

SNYDER et al. v. STATE, to Use of DONNELLY.

(Supreme Court of Wyoming. May 29, 1895.)

CLERK OF COURT—SURETIES ON BOND—RELEASE
—DEATH OF SURETY—EFFECT—EXECUTOR'S
BOND—CONSTRUCTION.

1. An executrix, who gives a bond to "faithfully discharge all of the just debts and obligations" of testator, will be liable for the misapplication of funds by an official on whose bond testator was a surety, though such misapplication occurred after the executrix had given her bond.

2. An increase of the liability of a clerk of the district court after his election by a change in the law requiring him to account for the fees of his office, which were formerly his compensation, does not discharge the sureties on his bond from liability for his misapplication of money paid into court.

3. The estate of a testator is liable for the misapplication of funds by an official on whose bond testator was a surety, occurring after testator's decease.

Error to district court, Laramie county; Richard H. Scott, Judge.

Action by the state of Wyoming to the use of Catherine Donnelly against Priscilla M. Snyder and others on her bond as executrix and sole legatee, conditioned for the payment of the debts and obligations of her testator. General demurrer of defendants overruled, and they bring error. Affirmed.

R. W. Breckons, for plaintiffs in error.
Baird & Churchill, for defendant in error.

CONAWAY, J. Albert C. Snyder was one of the sureties upon the official bond of Samuel Atkinson as clerk of the district court of the First judicial district of the state of Wyoming for the county of Laramie for the term ending January 2, 1893. On March 17, 1892, the sum of \$357.50 was paid into court, into the hands of said Atkinson as clerk, for the use of Catherine Donnelly. Atkinson never accounted for this money. Albert C. Snyder died on March 23, 1891. He left a will, of which Priscilla M. Snyder, his wife, and one of the plaintiffs in error, is executrix. She is also sole legatee. On June 22, 1891, she gave a bond, pursuant to an order of court, and under a statute authorizing such proceeding, to "faithfully discharge all of the just debts and obligations of the late Albert C. Snyder, according to law." She thereupon took possession of all of the assets of the decedent. Catherine Donnelly, by leave of the court, presented her claim on account of the above facts to Priscilla M. Snyder, as executrix and sole legatee of Albert C. Snyder, on November 11, 1893, and caused a demand and proof of claim to be so presented on November 16, 1893, which claim had been neither approved nor rejected at the commencement of this action on January 31, 1894. To a petition setting up these facts a general demurrer was overruled. Plaintiffs in error declining to plead further, judgment was rendered against them for the amount of the claim, with interest from October 20, 1893, and costs. The overruling of this demurrer and the giv-

ing of this judgment is assigned as error. Plaintiffs in error present three reasons in support of their assignments of error:

"First. Upon the death of Snyder, he, and his heirs at present, were released from the bond for any misapplication of funds occurring after his death." No authority is given in support of this proposition. The authorities are directly opposed to it. 24 Am. & Eng. Enc. Law, p. 767, and authorities there cited.

"Second. After the bond in question was given, the law was changed, providing for a different kind of bond, thus releasing the sureties on the former bond for any misapplication occurring after the change in the law." The argument is that the liability of the clerk was increased by the change in the law which requires him to account for the fees of the office which were formerly his compensation. We cannot agree to the proposition that an increase in the responsibilities of the clerk in matters which properly pertain to his office has the effect to discharge his sureties from all liability upon his bond. The liability of the clerk was not increased as to the subject-matter of this action. The responsibility of the clerk of the court on his official bond for money deposited with him in his official capacity existed at the time of his election and qualification.

"Third. Under the terms of the legatee's bond in question no recovery can be had for a misapplication occurring after the bond is given." The bond was conditioned for the faithful discharge of "all of the just debts and obligations" of the deceased. It is urged that the word "obligations" should be rejected as surplusage, because the statute required only a bond for the faithful discharge of "debts." Plaintiffs in error say in their brief: "It has always been held that one of the distinguishing features of the 'debt' is that it is a fixed and determinate sum and due from one person to another. And it is further claimed that it results from this definition that the sureties on the bond of the executrix became responsible only for all sums 'fixed and certain' which Snyder owed at the time of his death." There is no authority cited in support of this conclusion. We cannot approve of the proposition that under our statute the executor or administrator of a decedent becomes liable with his sureties only for such liabilities as are "fixed and certain" at the time of decedent's death. The following is a better statement of the law: "The term 'debts,' as used in the statutes relating to the estates of deceased persons, is not limited to such as are strictly legal debts, but manifestly includes every claim and demand by a creditor, whether recoverable at law or in equity." 5 Am. & Eng. Enc. Law, p. 143. Whether the word "obligations" be rejected as surplusage or not, the result is the same. The judgment is affirmed.

GROESBECK, O. J., and POTTER, J., concur.

(5 Wyo. 325)

DOBSON v. OWENS, Sheriff.

(Supreme Court of Wyoming. May 29, 1895.)

REPLEVIN—CONSTRUCTION OF ANSWER—SEPARATE DEFENSES—DEMURRER—GENERAL DENIAL.

1. Plaintiff filed a demurrer containing two paragraphs, the first demurring to defendant's answer, and the second to "the further answer of the defendant"; thus using the language of defendant in commencing the statement of the second defense, the ground in each paragraph being stated. *Held*, that the demurrer was not to both defenses jointly, but attacked singly the second defense.

2. An answer containing first a general denial, and, for "further answer," stating other facts, contains two separate defenses.

3. Where the complaint in replevin alleges ownership of the property by plaintiff, an answer alleging that defendant seized the property under an execution against a third person, and that the property was not plaintiff's, though it may not be sufficient as a justification, is sufficient as a denial of plaintiff's ownership.

Error to district court, Weston county; W. S. Metz, Judge.

Action by Ella Dobson against John Owens, sheriff. There was a judgment for defendant, and plaintiff brings error. Affirmed.

B. M. Camplin, for plaintiff in error. E. E. Lonabaugh and Baird & Churchill, for defendant in error.

POTTER, J. The petition in error in this case complains of a judgment rendered by the district court of Weston county on the 6th day of April, A. D. 1894, and several errors are assigned, one only of which is insisted upon. None of the evidence is before us, except an alias writ of attachment, which was admitted in evidence over the objection of the plaintiff; but we cannot consider that objection, in the absence of the other evidence. This, perhaps, conceded, inasmuch as counsel for plaintiff in error, in his brief,—there having been no oral argument,—discusses but the one assignment of error above referred to, viz. the action of the court in overruling the demurrer to the answer.

Plaintiff in error brought her suit in the court below for the recovery of specific personal property. The defendant filed an answer containing two defenses, the first being a general denial, and the second setting up that, as sheriff of Weston county, on a certain date mentioned, he had received an alias writ of attachment, issued out of the district court of Sheridan county, Wyo., directed to him, in a certain action therein pending, wherein Samuel Westheimer et al. were plaintiffs, and J. A. Jones and P. G. Dobson, partners as J. A. Jones & Co., were defendants; that by virtue of said writ said defendant seized and levied upon the goods and chattels described in plaintiff's petition, as the property of said P. G. Dobson; and, further (quoting the language of the answer), "said defendant alleges, on information and belief, that the property described in said plaintiff's petition is the property of the said P. G. Dobson, and not the property of the plaintiff herein." The

petition alleged ownership in the plaintiff, and the right to possession is clearly claimed by virtue of such alleged ownership.

The plaintiff filed a demurrer containing two paragraphs. The first paragraph demurs "to defendant's answer," and in the second the demurrer goes to "the further answer of the defendant"; thus using the language of the defendant in commencing the statement of the second defense, the ground in each instance being that the facts stated are insufficient to constitute a defense. It is contended by the counsel for defendant in error that there was but one defense stated in the answer, or attempted to be so stated, but that, if there were two, the demurrer was to both defenses jointly, and was therefore properly overruled, one of them—the general denial—being good and sufficient. We are of the opinion that the answer contains two defenses, separately stated and numbered, and that the demurrer in the second paragraph sufficiently attacked singly the second defense. It may be that this defense is insufficient as a complete justification, and, so far as the facts alleged with reference to the writ of attachment and levy thereunder are concerned, does not present, in that respect, a complete bar to the action. The allegation, however, that the property in controversy was that of another, and not the property of the plaintiff, cannot be overlooked. It is sufficient in itself to avoid the demurrer. The other allegations set up by way of justification can be treated as mere surplusage, as those facts, and others necessary to establish the right of the sheriff to the possession of the property, are admissible under the general denial. The second defense, conceding that the facts alleged did not constitute a sufficient justification, standing as a defense or allegation of ownership of the property in a third person, which to the petition in this case would amount to a perfect bar, if true, and, in the absence of proof on the trial connecting such ownership in a third person with the plaintiff's alleged right to possession, showing her to have the right of possession notwithstanding such ownership, would, if proven, constitute a defense. We are of the opinion, therefore, that error was not committed in overruling the demurrer to the answer. As no other question is presented, this disposes of the case. The judgment is affirmed.

GROESBECK, C. J., and CONAWAY, J., concur.

(21 Colo. 284)

WATER SUPPLY & STORAGE CO. v.**TENNEY, Water Commissioner, et al.**

(Supreme Court of Colorado. June 3, 1895.)

SETTLEMENT OF BILL OF EXCEPTIONS.

A bill of exceptions may be settled by the judge who tried the case after he has ceased to be a judge.

Appeal from district court, Larimer county.

Action between the Water Supply & Stor-

age Company and Rollin Q. Tenney, water commissioner, and another. There was a judgment for the latter, and the former appeals. On motion to dismiss. Denied.

George W. Bailey, H. I. Garbutt, and H. N. Haynes, for appellant. Charles H. Toll, W. R. Barboyr, and C. M. Garwood, for appellees.

CAMPBELL, J. The term of office of Hon. S. S. Downer, district judge of the Eighth judicial district, expired January 8, 1895. Three days prior thereto, in the district court of Larimer county, Judge Downer presiding, the decree in this case was entered, from which an appeal to this court was granted, and time given within which to tender a bill of exceptions. After the expiration of his term of office, but within the time theretofore fixed, there was presented to the ex-judge a bill of exceptions, which was thereupon approved by him, and signed and sealed as a true and correct bill. It was thereupon lodged in the office of the clerk of the district court, and thereafter filed in this court as a part of the record in the cause. The appellees now move to strike it from the record. The sole question is, may a bill of exceptions be settled, signed, and sealed by the judge who tried the case after he ceases to be judge? There seem to be three lines of decisions upon this question: (1) In England and in some of the states, where there is no statute permitting the succeeding judge to sign the bill, the trial court will award a new trial as a matter of right to the defeated party. *Newton v. Boodle*, 54 E. C. L. *795; *People v. Judge of Superior Ct.*, 40 Mich. 630; *Owens v. Paxton* (N. C.) 11 S. E. 375. (2) In some states the successor in office may settle the bill of exceptions in a case tried before his predecessor, where the statute permits it to be done, and, in Indiana, in the absence of any such authority. *Smith v. Baugh*, 32 Ind. 167, and cases cited. (3) In other states the rule is that the trial judge may sign the bill after he ceases to be judge. *Fellows v. Tait*, 14 Wis. 156; *Stirling v. Wagner* (Wyo.) 31 Pac. 1032, where the authorities are reviewed at length.

It is important that the practice in this state be settled. In the jurisdictions wherein it is held that, when the judge who tries a case ceases to be judge before the bill of exceptions is settled, a new trial will be granted as of right, it is upon the theory that the settling of the bill is not only a judicial act, but one that can, in the nature of things, be performed only by the judge who presided at the trial, because he, and not his successor, knows what took place during its progress. Upon this holding, the only way to preserve the rights of a defeated party is to give him a new trial, provided he is diligent in making his application therefor. In the states where it is held that the successor

in office may perform this function, it is either because of express statutory authority, or upon the theory that the act being judicial, and the office a continuous one, whoever fills the office at the time the act is to be performed is competent to sign the bill, the same as any other judicial act that pertains to a cause in court. In the third class of cases the settling of the bill of exceptions is regarded as a ministerial act, particularly where, as in this state, the statute permits a bill to be attested by affidavits in case the judge who should settle it neglects or refuses to allow the same. Without discussing at length the reasons that are given for these various decisions, we think those authorities which recognize the power of the judge to settle the bill after he ceases to hold the office are grounded upon the better reason, and that the rule is more consonant with the liberal spirit of the Code in observing the substantial rights of the parties to an action and disregarding technicalities. It saves expense to litigants, and avoids waste of time, yet preserves to the parties their substantial rights equally as well as does either of the other methods. Besides, it is in accordance with the practice heretofore prevailing in this state, though no decision to that effect has been reported. We therefore establish it as the practice to be followed in cases like the one at bar. The motion to dismiss is denied. Motion denied.

(21 Colo. 259)

HURD v. ATKINS.

(Supreme Court of Colorado. May 20, 1895.)

JURISDICTION OF SUPREME COURT.

The supreme court has no jurisdiction to entertain a writ of error to a judgment of the district court dismissing a complaint, when the matter in controversy does not relate to a franchise or a freehold, or involve the construction of a constitutional provision.

Error to court of appeals.

Action by Nathan S. Hurd against Horace H. Atkins, clerk of a district court, for damages for fees illegally and corruptly overcharged. From a judgment of the court of appeals affirming a judgment of the district court for defendant, plaintiff brings error. Dismissed.

W. T. Hughes, for plaintiff in error. Teller, Oranhood & Morgan, for defendant in error.

PER CURIAM. Hurd, as plaintiff below, brought suit against Atkins, who was clerk of the district court of Clear Creek county, to recover from him damages for fees excessively, illegally, and corruptly charged and collected. In the district court of Arapahoe county, trial was had to a jury, and a verdict was returned for defendant, upon which was entered a judgment dismissing the complaint. To that judgment the plaintiff prosecuted a writ of error from the court

of appeals, resulting in the affirmance of the judgment of the district court. The plaintiff is now here with a writ of error to the latter judgment.

The judgment in this case is merely one dismissing the complaint. The matter in controversy relates neither to a franchise nor a freehold, nor is a construction of any provision of the constitution of this state or of the United States involved. This court, therefore, has not jurisdiction to entertain this writ of error, and it is accordingly dismissed. Writ dismissed.

(21 Colo. 280)

JUSTICE MIN. CO. et al. v. LEE.

(Supreme Court of Colorado. May 20, 1895.)

**MINING CLAIM—PATENT TO ALIEN—CONCLUSIVE-
NESS—JURISDICTION.**

1. The grant of a patent to a mining claim from the United States to one who procured it for and assigned it to an alien is the judgment of a special tribunal, and cannot be collaterally attacked by a third party. 29 Pac. 1020, 2 Colo. App. 112, reversed.

2. An action to annul a patent to a mining claim on the ground of the alienage of the patentee was prematurely brought while the patent proceedings were still pending in the land office. 29 Pac. 1020, 2 Colo. App. 112, reversed.

Appeal from court of appeals.

Action by Abe Lee against the Justice Mining Company and others to annul a patent. From a judgment of the court of appeals (2 Colo. App. 112, 29 Pac. 1020) reversing a judgment of the district court for defendants, defendants appeal. Reversed.

This case was brought into this court by appeal from a judgment of the court of appeals rendered in the case of Lee v. Mining Co., at the April term, 1892. See opinion, 2 Colo. App. 112, 29 Pac. 1020. The record consists of the complaint and a demurrer thereto, which are fully set out in the statement of the case preceding that opinion. The complaint is, in substance, as follows: That the plaintiff, Lee, on the 20th day of May, 1887, made a valid location of the Aftermath lode mining claim. That on the 8th day of October, 1885, Edwin Doust, being then and ever since an alien, located the Justice mining claim. That this claim covers and conflicts, to the extent of 300 feet in width and 500 feet in length, with the ground included in the Aftermath location. That Doust, on the 13th day of October, 1885, entered into a contract to sell and transfer the Justice mining claim to one Lawson, also an alien, and on that date executed a deed, without any consideration therefor, to John W. Richards, who was a citizen of the United States, and solely for the purpose of having Richards procure a patent from the government. That concurrently with the deed, and in execution of the agreement to transfer the title to Lawson, Richards executed a title bond to said Lawson, whereby he agreed to convey to him the Justice mining claim, with other properties, for certain considerations therein named.

That said Richards made application for patent, and on the 20th day of February, 1886, commenced his advertisement therefor. Said publication was completed on April 23, 1886. On the 30th day of April, 1886, the Justice Mining Company was organized and incorporated, with a nominal capital of \$100,000; and on that day Richards executed a deed for the Justice mining claim, for a nominal consideration, to Joseph Ruse, as trustee for said company, which was recorded June 11, 1887. That the receiver's receipt was issued to Richards on June 14, 1887. Ruse thereafter conveyed the title held by him to the Justice Mining Company, in consideration of 56,000 shares of the capital stock. That by reason of the foregoing facts the title to the ground in controversy, by reason of his location of the Aftermath, became vested in plaintiff prior to the transfer by the trustee to the Justice Mining Company. That said receiver's receipt is a cloud upon his title, and asks that it, together with all the deeds mentioned, be canceled and held for naught. The court below sustained the demurrer to the complaint, and dismissed the action at the cost of plaintiff. The court of appeals, by a majority opinion (Judge Bissell not sitting), reversed this judgment.

A. W. Rucker, for appellants. A. T. Gunnell, for appellee.

GODDARD, J. (after stating the facts). We think the learned judge who delivered the opinion of the court of appeals was in error in assuming that the record in the case presented a question as to the right of an alien to acquire by location a transferable interest in a mining claim. That question, under the facts presented, could not be raised by the plaintiff. While it is true that the mineral lands of the government are open to location and purchase only by a citizen of the United States, or one who has declared his intention to become such, and the fact of alienage, if raised at the proper time by any one adversely interested, will defeat the acquirement of title thereto, yet the qualifications of an applicant for a patent, as well as the fact of discovery, and the compliance on his part with other requirements made essential by the act of congress to entitle him to purchase the mineral land of the government, being cognizable by the officers of the land department when, in the exercise of their jurisdiction, they approve the application, and allow an entry, the fact of citizenship, as well as all other questions of fact, is presumed to have been established, and is not open to review by the courts at the instance of third parties. As was said by Justice Field, speaking for the court, in *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389: "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it

creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States, to portions of the public domain, is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation." It is now too well settled to admit of discussion that after the "grant of title, or the equivalent, is made to an alien, it cannot be attacked by any third party." *Billings v. Smelting Co.*, 52 Fed. 250, 3 C. C. A. 69; *Gouverneur v. Robertson*, 11 Wheat. 332; *Craig v. Leslie*, 3 Wheat. 563. If the right of a third party to attack the validity of a patent, when issued, upon the ground of the alienage of the patentee, was a debatable question, it is clear that the present action was prematurely brought. At the time of its commencement the proceedings in the land office were yet pending, and that department had exclusive jurisdiction of the matter, and any attempt on the part of the courts to control its action would be an unwarranted assumption of jurisdiction, under the circumstances. In either view, this action cannot be maintained, and the demurrer should be sustained. The judgment of the court of appeals must therefore be reversed, and the cause remanded, with directions to affirm the judgment of the district court. Reversed and remanded.

(21 Colo. 197)

McCLELLAN et al. v. HURD et al.¹

(Supreme Court of Colorado. May 6, 1895.)

JURISDICTION OF SUPREME COURT — ISSUE AS TO FREEHOLD—JUDGMENT — ON WHOM BINDING — TRESPASS ON LAND—USE AND OCCUPATION—LIABILITY OF AGENT.

1. When, in an action for the use and occupation of land, defendant claims a fee simple in the premises, the action "relates to a freehold," so as to give the supreme court jurisdiction on appeal.

2. Where a person, holding a deed to land at the time the title is in litigation between her grantor and a third person, suppresses knowledge of her title, and participates in and directs the defense, she is bound by the judgment.

3. The complaint alleged that plaintiffs were the owners of certain land, of which defendants wrongfully detained possession; that the rental value was a certain amount, and asked judgment for such rental value, and also for damages. *Held* that, as it was not alleged that plaintiff was ever in possession of the land, the action was not one for trespass *q. c. f.*, but for use and occupation.

4. In an action for the use and occupation of land, evidence merely showing that one of the defendants, as agent for another, sold tickets for theatrical exhibitions given on the premises, is insufficient to authorize a recovery against him.

Error to court of appeals.

Action by Nathan S. Hurd and others against Catherine McClellan and others. There was a judgment of the court of appeals reversing a judgment for defendant McClellan and affirming one as to defendant Forbes, and the former brings error. Affirmed.

It is alleged in the complaint: "First. That on May 14, 1885, and ever since, plaintiffs have been, and now are, the owners, and were and are entitled to the possession, of the east half of lot one, in block twenty, in Georgetown, in Clear Creek county, Colorado. Second. That afterwards, and from that day to the present time, the defendants took and held possession of said premises, except the first floor upon the north 56½ feet of said half lot, and of about twenty feet off the north of the second floor of said premises, and that all the remainder of said premises the defendants, by their agents, privies, and under-occupants and lessees, have held, used, and occupied said premises willfully, wrongfully, and against plaintiffs' will and consent. Third. That the rental value of the premises possessed and detained by the defendants as aforesaid has been worth at least six hundred dollars per year. Wherefore plaintiffs pray judgment against the defendants for the rental value of said premises, and for damages from May 14, 1885, to the present time, and for costs of suit." The defendants filed separate answers. In the answer of Catherine McClellan she claims a fee-simple title to the property in controversy. The defendant Forbes answered, interposing specific denials to the allegations of the complaint. A replication was filed to the new matter set up in the answer of Catherine McClellan. A more detailed statement of the facts will be found in the opinion of the court of appeals. See *Hurd v. McClellan*, 1 Colo. App. 327, 29 Pac. 181. A trial in the district court resulted in a judgment of nonsuit as to the defendant Forbes. The case proceeded, however, as to Catherine McClellan, and resulted in a judgment in her favor. An appeal having been taken to the court of appeals, the judgment was reversed as to Catherine McClellan, and affirmed as to the defendant Forbes. See *Hurd v. McClellan*, *supra*. Catherine McClellan sued out a writ of error to this judgment, and afterwards, at the instance of plaintiffs, Forbes was made a party in this court.

Wells, McNeal & Taylor, for plaintiffs in error. Ezra Keeler and W. T. Hughes, for defendants in error.

HAYT, C. J. (after stating the facts). The question as to the jurisdiction of this court

¹ Rehearing denied May 20, 1895.

to entertain this cause upon error must be determined in limine. Our jurisdiction is fixed by the act creating the court of appeals. In this case it depends upon the construction of the first and fourth sections of that act. By the first the jurisdiction of this court is retained when "the matter in controversy relates to a franchise or freehold." By the fourth section it is provided that the court of appeals "shall have jurisdiction, not final, in cases where the controversy involves a franchise or freehold." By other provisions this court is given jurisdiction in all cases not within the final jurisdiction of the court of appeals. These provisions have received consideration by this court in a number of cases. In the case of *Wyatt v. Irrigation Co.*, 18 Colo. 208, 33 Pac. 144, it was held that the word "involve" and the word "relate," as used in the act creating the court of appeals, are synonymous. In the case of *Harvey v. Insurance Co.*, 18 Colo. 354, 32 Pac. 935, the following statute was under review: "Appeals to the supreme court from the district, county and superior courts shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold." It was there held that an action does not relate to a freehold, so as to give the right of appeal, unless the right or title to the freehold is the direct subject of the action, nor unless the judgment is conclusive of such right or title, until reversed. In *McCandless v. Green*, 21 Colo. —, 39 Pac. 64, this court refused to take jurisdiction by appeal of an action to foreclose a mechanic's lien upon real property, upon the ground that the freehold was not involved. In the case of *Railroad Co. v. Watson*, 105 Ill. 217, the action was for the purpose of subjecting certain real estate to the payment of judgments held by the plaintiffs, and the supreme court of that state held that the case did not involve a freehold, so as to give that court jurisdiction by appeal. This is because the ultimate object of such suits is to obtain satisfaction of the claim, and the suit may be defeated at any time by the payment of the same; the real estate, at most, being only collaterally or incidentally involved. In all such cases the courts have uniformly held that a freehold is not involved in the sense that the word is used in the statute. *Wyman v. Felker*, 18 Colo. 382, 33 Pac. 157; *Pinneo v. Knox*, 100 Ill. 471; *Clement v. Reltz*, 103 Ill. 315; *Goodkind v. Bartlett*, 136 Ill. 18, 26 N. E. 387. On the contrary, when the title to real property is directly put in issue by the pleadings, and the judgment, until reversed, is conclusive of such title, a freehold is involved, and the right to review given by the statute exists. The case of *Piper v. Connelly*, 108 Ill. 648, is strongly in point. That was an action of trespass. The pleadings were the general issue and the plea of *liberum ten-*

ementum, which latter was put in issue by the replication, and the court held that the action involved a freehold, and sustained its jurisdiction to review the case upon appeal. The same views are announced in the subsequent cases of *Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272, and *Elson v. Comstock*, 150 Ill. 303, 37 N. E. 207.

After the filing of the answer and replication, this suit became more than a money demand. The issues then embraced a complete involvement of the fee, and the judgment of the court of appeals, if unreversed, is conclusive against the right or title set up by Catherine McClellan. Such a judgment is not only conclusive upon the right of possession, but upon the title as well, as this is the precise question upon which the case turned. *Hurd v. McClellan*, supra; *Elson v. Comstock*, supra; *Dunkle v. Wiles*, 5 Denio, 296; 21 Am. & Eng. Enc. Law, pp. 244, 245; *Caperton v. Schmidt*, 26 Cal. 479. It therefore appears that the freehold is involved, and the jurisdiction of this court must be sustained.

Passing to a consideration of the merits, in so far as Catherine McClellan is concerned, it is sufficient to say that the opinion of the court of appeals fully answers every contention made in her behalf. In the very able opinion of Mr. Justice Reed it is shown that she held a deed to the property at a time when the title was in litigation between the appellants as plaintiffs and her grantor as defendant, and, suppressing knowledge of her title, participated in and directed the defense; and it was very properly held, under these circumstances, that the judgment against her grantor was conclusive against her claim of title. Nothing new, in this regard, has been urged in this court. We are satisfied that the judgment of reversal entered against Catherine McClellan by the court of appeals was warranted by the record, and it is therefore affirmed.

In the district court, plaintiffs were nonsuited as to the defendant Forbes, and this judgment was, upon appeal, affirmed by the court of appeals. Plaintiffs in error contend that in this both the district court and the court of appeals were in error. Their argument in this behalf is that this is an action of trespass *quare clausum fregit*, and that in such an action all the joint trespassers are liable. While the Code abolishes all the old forms of action, such forms may be resorted to for the purposes of ascertaining the substantial rights of the parties. Wherever a party had a remedy at common law, such remedy still exists under the Code, although in his complaint he need only state "the facts constituting his cause of action in ordinary and concise language." A conclusive answer to the argument of plaintiffs in error is to be found in his pleading. The action of *quare clausum fregit* is for an injury to the possession. It is not confined to the owners of property, but can be maintained by any one in possession; but it is essential that the plaintiffs should

have had the possession, otherwise the action will not lie. In the case at bar plaintiffs do not allege that they were ever in possession of the property in controversy, and the evidence affirmatively shows that they never had such possession; hence all that has been urged upon the supposition that the action is in the nature of an action of trespass *quare clausum fregit*, and that the defendants were joint trespassers, has no application under the issues or evidence in this case. The evidence in the record tending to show Forbes' connection with the property, as said by the court of appeals, is "not of such a character as to charge him for the detention of the property, or for use and occupation." In fact, there is but slight evidence in the record applicable to the defendant Forbes. W. T. Hughes, one of the plaintiffs, testified: "It is the building used in town for political meetings. Catherine McClellan has let it to the people. Mr. Forbes has sold the tickets admitting people to its use. I don't know of his using it in any other way than that." The witness further testified: "He [Forbes] gave me to understand then that he was doing nothing more than selling tickets, and I certainly gained the impression from him that Mrs. McClellan was the principal one to address. The exact words of the interview I don't remember. I only recollect I called on him, and served notice on him. Forbes caused me to understand he was acting for Mrs. McClellan, or Job McClellan." On cross-examination the witness stated: "Possibly Forbes stated he sold tickets for the theatrical troupes. He did not state so in terms. He gave me the impression that Job McClellan was the one for me to deal with at that time,—in 1885,—Catherine McClellan or Job. She was not agent for Job." N. S. Hurd, another one of the plaintiffs, testified: "Forbes has sold the tickets for several years, and since the 14th day of May, 1885, for seats to the hall. He has never accounted to me, or any one for me, for what he has sold to the east half." This is all the evidence tending to connect the defendant Forbes with the use or occupation of the property. This shows that he was acting in the sale of tickets for either the McClellans or the theatrical troupes that from time to time occupied the hall. He never at any time had possession of the hall, or claimed that he had any right to the possession of the same. Mrs. McClellan was in possession. Assuming that her possession was without right, the defendant Forbes did not share it with her, and all that has been said about joint trespassers being jointly liable is foreign to the case. This action is for the rental value of the premises. It is predicated upon the wrongful possession of the defendants, and, Forbes not having the possession, the suit was properly dismissed as to him. This is not an action for money received for plaintiffs' use, and the evidence does not make out such a case. Finding no error in the record, the judgment will be affirmed. Affirmed.

(21 Colo. 173)

HAMILL v. BANK OF CLEAR CREEK COUNTY.

PEOPLE ex rel. HAMILL v. SAME.

(Supreme Court of Colorado. April 27, 1895.)

CONTEMPT OF COURT — TAKING POSSESSION OF PROPERTY IN SUIT—EFFECT OF SUPERSEDEAS.

Respondent sued the relator in a justice court to recover possession of land. An appeal to the county court from a judgment for respondent was dismissed, and the relator prosecuted a writ of error from the judgment of dismissal, which was by order made to operate as a supersedeas. Respondent filed a motion to dismiss the order, and pending the determination thereof, on the advice of counsel, took possession of the property, in relator's absence and without his consent. *Held*, that taking possession of the property under such circumstances constituted contempt of court. Hayt, C. J., dissents.

Action by the Bank of Clear Creek County against William A. Hamill. An appeal from a judgment for plaintiff to the county court was dismissed, and defendant brought error. Rule on defendant in error to show cause why it should not be punished for contempt in taking possession of the land in suit pending proceedings in error. Granted.

J. B. Belford and T. J. Galloway, for plaintiff. Thomas Mitchell, for defendant.

PER CURIAM. The Bank of Clear Creek County, the respondent, brought an action of unlawful detainer before a justice of the peace against W. A. Hamill, and recovered a judgment therein for the possession of what is known as the "Hamill Ranch." An appeal from that judgment was dismissed in the county court, and the defendant (relator here) is prosecuting a writ of error from such judgment of dismissal. Upon application of the plaintiff in error the writ of error was made to operate as a supersedeas to the judgment of the county court. The defendant in error thereupon filed a motion to vacate such order, and pending the determination thereof took possession of the property in controversy, as it alleges, peaceably, and during the temporary absence therefrom of the plaintiff in error; but, as the latter alleges, obtained possession by force, and through a conspiracy with the employees of the plaintiff in error, whereby they were induced to vacate and leave said premises in order that the defendant in error might obtain possession. But we think it not very material whether or not force was used or a conspiracy formed. The plaintiff in error then filed an affidavit in this court, setting forth such state of facts, and asking that the defendant in error might be cited for contempt. Upon an order from this court for the defendant in error to show cause why it should not be punished for contempt, respondent filed its answer and proofs, from which the foregoing facts appear. It admits the taking of possession, but denies that any contempt or disrespect

of this court was intended. It further contends that it had the unquestioned right to take possession of the property in controversy notwithstanding the pendency of proceedings in this court, and notwithstanding the judgment of the court below was superseded. The claim is that the supersedeas operates only upon the judgment of the court below, and is directed merely to the officers of that court, and that the only proper function and effect of such a writ is to suspend the enforcement of the judgment by the appropriate writ, and prevent the court below and its officers and the parties to the suit from any attempt to get possession of the property by virtue of the judgment itself; and that it leaves the defendant in error free to resort to any other appropriate legal remedy, and permits it, also, of its own motion, to take possession of its property while the case is still pending in the court of review. We have been cited to no case, neither have we been able to find any authority, in point, though the authorities cited by respondent as to the function of a supersedeas bear out its contention. *Dulin v. Coal Co.* (Cal.) 33 Pac. 123. Counsel say that the case is one of first impression. Possibly it is, and, if so, the reason probably is that never before has a sutor deemed it wise to resort to such questionable methods.

We are of opinion that respondent is not guilty of disobeying the strict letter of the supersedeas; but it does not follow from this that its conduct is not reprehensible. The affidavit upon which this proceeding is founded, the evidence produced on this hearing, the admissions of respondent, and the proceedings in the case pending upon error, bring to our attention a course of conduct which, while not strictly constituting the particular contempt which relator supposed was committed, nevertheless is something which ought not to be tolerated and which deserves some punishment. The respondent was the plaintiff in the action before the justice of the peace. It first asked for process to bring the relator into court in order that the controverted right of possession to this ranch might be adjudicated. Not only did it submit itself to the court's jurisdiction, but the subject-matter of the litigation (the possession of the property) was thus brought within the jurisdiction of the court. The respondent obtained a judgment in its favor in the county court. That judgment was by the order of this court superseded. This was, for the purposes of that order, equivalent to deciding that there was probable error in the judgment of the court below. The respondent thereupon filed its motion to vacate the order granting the supersedeas. Hearing upon this motion was had, elaborate oral arguments made, and briefs filed. The only object for asking to have the supersedeas vacated was to remove from the court below and from the respondent

the restraint which the granting of the writ accomplished, and thereby enable the respondent to get possession of the property by the enforcement of such judgment. After this motion was submitted for determination, and while this court was engaged in its consideration, the respondent, disregarding the proceeding which it had instituted to relieve itself from the effect of the court's previous order, virtually took the law into its own hands, and took possession of the property in controversy. Had the respondent at or before the time it thus took possession, and before it was cited to show cause why it should not be punished for contempt, been in a position to confess error, and thus have the cause remitted to the lower court, or to dismiss its motion to vacate the supersedeas, probably the conduct complained of might not be considered so censurable or flagrant; but for it, while prosecuting in court a remedy which, if granted, would enable it to get possession of the property under the protection of the judgment, deliberately to take that possession while the court was considering its application for relief, without withdrawing its motion, is nothing less than a trifling with the court whose jurisdiction had been invoked. To suffer this to be done, and permit a party to a suit to reap the benefits of such conduct or retain the advantages thus gained, would be to confess the inability of courts to protect parties litigant while the litigation is pending; would be to allow the time of the court to be consumed by useless wranglings; would be to enable a sutor to experiment with the court, and, when anticipating an adverse ruling, set at naught and disregard such proceedings begun by him, and take the law into his own hands, and at the same time impose upon the court the duty of continuing its examination of his case while he is in the enjoyment of the very thing the possession of which he has asked the court to give him. But the respondent has throughout this matter acted upon the advice of able and honorable counsel, whose learning and standing at the bar preclude any suspicion of unworthy motives, and whose course in this action has apparently received some recognition in the decision of cases somewhat analogous. He undoubtedly believed that his advice was sound, and he had no thought or intention of disregarding any duty he owed to the court. Besides this, the protestations of respect for this court made by counsel, as well as like declarations by the officers of the bank, we believe to be true and genuine, and not inspired by any fear of punishment. Considering the premises, we shall inflict no fine, but the order will be that the respondent vacate the premises, and deliver possession thereof to the relator, within 24 hours.

HAYT, C. J., dissents.

(21 Colo. 244)

**EMPIRE LAND & CANAL CO. v. BOARD
OF COM'RS OF RIO GRANDE
COUNTY et al.**

(Supreme Court of Colorado. May 20, 1895.)

**MISJOINDER OF PARTIES—DEMURRER—REVIEW ON
APPEAL—IRRIGATING DITCHES—TAXATION.**

1. Misjoinder of two persons defendant cannot be raised by joint demurrer.

2. Only such questions as are fairly before the court by the pleadings will be considered on appeal.

3. A canal owned by a corporation and its grantees, which has been exclusively used (1) to irrigate lands owned by the corporation and lands owned by its individual shareholders, (2) or to irrigate lands owned by the corporation and individuals who, by a contract with the plaintiff for the purchase of water rights, have secured a partial ownership in the canal, is exempt from separate taxation, under Const. art. 10, § 3. 28 Pac. 482, disapproved.

Error to court of appeals.

Action by the Empire Land & Canal Company against the board of county commissioners, and Orlando Bonner, treasurer, of Rio Grande county, to restrain the treasurer from collecting a tax assessed against plaintiff's property, and to cancel the tax. From a judgment of the court of appeals affirming a judgment of the district court sustaining a demurrer to the complaint, plaintiff brings error. Reversed.

This is an action brought in the district court of Rio Grande county by the plaintiff in error against the treasurer and board of county commissioners of Rio Grande county, to restrain the treasurer from proceeding to collect an alleged illegal tax assessed and levied against the Empire Canal, the property of plaintiff in error, and to obtain an order requiring the board to cancel the tax so imposed. The complaint alleges that the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the state of Colorado, and that it is the owner of the Empire Canal, part of which is situate in Rio Grande county. The third paragraph of the complaint is inserted in full, so that it may clearly appear upon what ground the plaintiff claims that the tax is illegal: "That plaintiff is the owner of many thousands of acres of lands lying under said canal, and capable of being and intended to be irrigated therefrom, and many thousands of acres of which are being irrigated from the said canal, and which lands have no other source of irrigation. That said canal is not used for the irrigation of any other lands than the lands owned and held by plaintiff, as aforesaid, except for the irrigation of lands owned and held by parties who became individual members of this plaintiff corporation by virtue of purchasing an interest in said canal, which interest so purchased is always evidenced by a deed of conveyance by which one or more shares of water rights in said canal are by this plaintiff conveyed to the purchaser, or by a contract for a deed of one or more shares of water rights as aforesaid, the contract being entered into between plaintiff and such purchaser,

when such shares or water rights shall not be fully paid for at the time of the making of the contract, and such deed being made by plaintiff to said purchaser at the date and time of full payment for such shares and water rights as are so purchased; the said contract and the said deed invariably providing that the purchaser thereof shall use the water to which he shall become entitled, by reason of purchasing such interest in said canal, on lands therein described and to be relocated by such purchaser only upon other lands owned or controlled by said purchaser. That each share or water right above mentioned and referred to represents 1.44 cubic feet per second of time, and by the purchase and ownership thereof becomes a member of plaintiff corporation, and is assessed for the maintenance of said canal as a shareholder thereof, and is thereby entitled to vote and have a voice in the management of plaintiff company; and under the terms of such contract and deed as aforesaid, when plaintiff shall have sold and shall have outstanding and in force a number of water rights, by contract or deed, or by both such contract and deed, equal to the estimated capacity of said canal to furnish water, and $\frac{2}{5}$ of the contract price for the same shall have been paid, then the holder or holders of such contracts and deeds for water rights shall have a voice and vote in the management of the affairs of said company's canal, proportioned to the interest which said purchaser's contract or deed bears to the entire number of contracts and deeds outstanding. And, when $\frac{2}{5}$ of all such outstanding rights have been fully paid for according to the terms of the several contracts entered into or deeds made, then the title to said canal shall pass to the owners and holders of contracts or deeds for such water rights at the time and on the plan following, namely, within sixty days thereafter, at such time as may be fixed by the board of directors of this plaintiff, said board of directors shall hold a meeting for the purpose, and thereat designate five persons, who are at that time owners of water rights under said canal, to be the incorporators of a new company, to be incorporated under the laws of the state of Colorado, and which said five persons, within thirty days thereafter, shall subscribe to articles incorporating a new stock company, under a new name, and said five persons shall be the directors for the first year, and, immediately following the signing and filing of the articles of incorporation, the directors thereof shall organize, make by-laws, procure a seal, and otherwise proceed as the law directs; and at said time they shall issue, of the capital stock of the new company, fully paid, to the owners of said water rights, such a proportion of the whole of said stock as the water rights each owner thereof has will bear to the whole amount of water rights sold as aforesaid. And when water rights shall have been fully paid as aforesaid, and said five

persons shall have been named as aforesaid, and notified in writing of that fact, and that said water rights had been fully paid as aforesaid, the said new company, and the stockholders thereof, shall thereafter be the owners and in control of the said canal, and the water of the same; and said canal and its lateral ditches are not used for the irrigation of any other lands than those owned and held by the plaintiff company, or individual members thereof, as above mentioned and referred to, and has never been otherwise used at any of the dates and times in this complaint mentioned, nor at all. That a very large proportion of the shares of water rights of said canal have been sold, and plaintiff is proceeding to sell the remainder thereof at a rapid rate." In all other respects the complaint sets forth facts which entitle the plaintiff to the relief prayed for against the treasurer.

J. P. Brockway, J. W. McCreery, and W. Teller, for plaintiff in error. Ira J. Bloomfield, Robinson & Love, and George P. Willson, for defendants in error.

CAMPBELL, J. (after stating the facts). To this complaint in the district court a demurrer was interposed upon two grounds which are urged here: First, that there is a misjoinder of parties defendant; and, second, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer is a joint demurrer of the two defendants, but, in order to entitle such one as is improperly joined as a defendant (if there is any such misjoinder) to raise this question, a separate demurrer should have been filed by him who is improperly joined. As this objection cannot be raised by a joint demurrer, the only question is upon the second ground. The district court sustained the demurrer, and upon appeal to the court of appeals the judgment was affirmed, and from the latter judgment the plaintiff has brought the case by writ of error to this court.

The tax is claimed to be illegal because the property upon which it was assessed and levied is exempt from taxation under section 3 of article 10 of the constitution, which is as follows: "Ditches, canals and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose." By this provision of the constitution, ditches, canals, and flumes may be divided into three general classes: (1) Those owned by one or more individuals, and exclusively used for irrigating the lands of said individuals, or the lands of any of them; (2) those owned by a corporation, and exclusively used for irrigating lands belonging to the corporation and lands belonging to shareholders of the corporation, or

lands of the corporation or the shareholders, or any thereof; (3) those owned in part by a corporation, and partly by individuals, and exclusively used for irrigating lands belonging to the corporation and to said individual owners, or the lands of the corporation or said individuals, or any thereof. While the complaint avers that the plaintiff corporation is the owner of the Empire Canal, there is nothing, except by way of inference, to show for what purpose such corporation was organized. But a fair construction of the pleading is that the principal purpose was to sell for profit lands owned by the corporation, and, as incident thereto and to facilitate the same, to build a canal, and to sell with the lands water rights to irrigate the same. That such canal may be exempt from separate taxation—that is, exempt from taxation separate from taxation of the lands irrigated by such canal—depends upon the use to which it is devoted. It is contended by plaintiff in error, first, that the word "exclusively" in the constitutional provision relates, not to the persons or corporations who, as owners, make use of the canal, but to the character of nature of that use; that, if the canal is exclusively used for the purpose of irrigating lands, the canal is exempt from taxation, whether the lands belong to the owners of the canal or to others. But this language will bear no such forced interpretation. In the absence of this provision, all canals, irrespective of the use made of them, would be subject to separate taxation. Taxation is the rule; exemption from taxation the exception. This provision was adopted to relieve from separate taxation only those canals which are exclusively used for irrigating the lands owned by those who own the canals either in whole or in part. If it exempts all canals so long as they are exclusively used for irrigation, then practically no canals can be taxed, and the provision is meaningless.

Upon the theory that the exemption applies only to canals exclusively used to irrigate lands of their owners, plaintiff in error contends, second, that the complaint shows that the canal is exclusively used to irrigate (a) only the lands of the plaintiff corporation and the lands of the individual members thereof, or (b) lands owned by the corporation and by the individuals which together own the canal. This must be determined from the complaint alone. The rule is fundamental, not now announced as something new, that, for the purposes of a demurrer, the truthfulness of the allegations of the pleading thus objected to is admitted. But a reference is here made to the doctrine because arguments have been urged in support of a supposed case not made by this complaint, and our opinion has been asked, apparently with the expectation that it would be given, upon important questions that are not now before us. If the facts pertaining to the Empire Canal, and the use that has been made of it,

are not as set forth in the complaint, the proper way to present the true or different state of facts, or to complete the partial statement contained in the complaint, is by way of answer, not by demurrer.

Our decision, then, is predicated upon the issues, and those alone, which are presented by the pleadings. This canal is exempt from taxation upon either or both of two grounds. A fair construction of the allegations of the complaint is that the various individuals to whom the plaintiff corporation has sold water rights from time to time thereby became shareholders of the plaintiff corporation, and are entitled to a vote and voice in the management and affairs of the company. It also appears from the allegations of the complaint that by these contracts of purchase the grantees of water rights have acquired an interest in the canal itself, and that the complete ownership of the canal is vested in the plaintiff corporation and its individual grantees, so that the canal has always been exclusively devoted to one or both of two uses, viz.: First, for irrigating lands owned by the plaintiff corporation and lands owned by its individual shareholders; second, for irrigating lands owned by the plaintiff corporation and by individuals who, by their contract with the plaintiff for the purchase of water rights, have secured a partial ownership in said canal, which canal was and now is owned by the plaintiff corporation and by said individual grantees.

The radical difference between these conclusions and those reached by the court of appeals in 1 Colo. App. 210, 28 Pac. 482, springs from the construction given to the averments of the pleading, and not, of necessity, from the opinions entertained by the two courts, with respect to the rights of the owners of lands who hold rights to water carried by the canal; but in view of the variance between the courts on this question, as shown in *Wyatt v. Irrigation Co.*, 18 Colo. 298, 33 Pac. 144, which was decided long after the judgment in the present suit, some reference ought perhaps to be made to one paragraph of the opinion rendered by the other court. It is said therein: "The right to demand water from the ditch, and have a given quantity per second delivered from the ditch to the consumer, carries with it no property interest in the ditch itself. It is, at most, but a contract sounding in damages in case of nonperformance on the part of the corporation." We do not regard the suggestions of fact as supported by the complaint, and as a declaration of law, as to the nature of this class of water rights, we would be compelled, in a proper case, to hold it erroneous, and at variance with the rule that was settled in the *Wyatt Case*, supra. Therefore, if the exclusive use is to irrigate lands of the corporation and its shareholders, the canal comes within the scope of the second general class above mentioned. If the canal is owned by the corporation and

individuals, and is exclusively used to irrigate only their lands, then it comes within the third general class above mentioned. No question is raised by the defendants of any indefiniteness or uncertainty in the complaint as to which of the foregoing classes this canal belongs, nor is there any objection that two causes of action have not been separately stated in the complaint. To this is applicable the observation, in the first part of this opinion, that only such questions as are fairly presented by the complaint and the general demurrer are before us for determination. It follows that the demurrer to the complaint should have been overruled. The judgment, therefore, of the court of appeals is reversed, with directions to reverse the judgment of the district court of Rio Grande county, and remand the cause to that court for further proceedings in accordance with this opinion. Reversed.

(21 Colo. 292)

BURTON v. SNYDER.

(Supreme Court of Colorado. June 3, 1895.)

REVIEW ON APPEAL—EXCEPTIONS—OBJECTION
WAIVED.

1. A motion for the discharge of a garnishee is a motion "based on the pleadings" (Civ. Code, § 387), which are made up of the interrogatories and the answer of the garnishee, and therefore, by virtue of the statute, an order overruling such a motion is reviewable on appeal without an exception being reserved thereto.

2. Defendant, by consenting to a deposit in court, by the garnishee, of the money due him, does not waive the error in overruling his motion to discharge the garnishment.

Error to district court, Gunnison county.

Action by William Snyder against Lydia Burton, aided by garnishment. There was a judgment for plaintiff, and defendant brings error. On motion to dismiss. Denied.

Defendant in error, William Snyder, commenced suit upon a promissory note executed by plaintiff in error and her husband, who were both made defendants in the action. Of the defendants, Mrs. Burton only was served with process, and she alone appeared in the action, her husband being deceased. As ancillary to this suit, Snyder caused a writ of attachment and garnishment process to issue, which was served upon the Kansas Mutual Life Association as garnishee. In answer to the garnishment process the garnishee admitted that it owed Mrs. Burton the sum of \$3,000 upon a policy of insurance upon the life of her husband. The association thereafter brought this money into court, and deposited it with the clerk, to await the ultimate judgment of the court. The answers of the garnishee were not traversed in any way, and no issue of fact was raised or passed upon by the trial court in the garnishment proceeding. The plaintiff in error, Lydia Burton, however, filed a motion asking that the garnishee be discharged, and the money turned over to her. This motion raised a

question of law upon the act of 1887 entitled "An act relating to life and casualty insurance on the assessment plan." See *Scss. Laws 1887*, p. 284. By section 10 of this act it is provided: "The money or other benefit, charity, relief, or aid to be paid, provided or rendered by any corporation authorized to do business under this act, shall not be liable to attachment or other process, and shall not be seized, taken, appropriated, or applied to any legal or equitable process, nor by operation of law, to pay any debt or liability of a policy or certificate-holder or any beneficiary named therein." The court overruled the motion to discharge the garnishee, thereby holding that the money was not exempt. The main case proceeded to judgment in favor of the plaintiff against Mrs. Burton for the sum of about \$3,500. As a part of this judgment the \$3,000 deposited with the clerk by the insurance company was ordered to be paid over to plaintiff, whereupon the defendant sued out this writ of error. No bill of exceptions having been filed, the defendant in error (plaintiff below) now moves to dismiss the writ of error.

W. D. Wright and J. C. Helm, for plaintiff in error. F. C. Brown, for defendant in error.

HAYT, C. J. (after stating the facts). The first question presented relates to the right of plaintiff in error to have the judgment of the district court reviewed upon the garnishment proceedings in the absence of an exception to that judgment. Although the garnishment proceeding is in aid of the original suit, it nevertheless may properly be treated as a separate and distinct action in so far as the pleadings are concerned; the interrogatories propounded, and the answers thereto, and the motion for a discharge of the garnishee constituting the issues upon which the matter is to be determined. *Drake, Attachm. § 452; Gunn v. Howell, 27 Ala. 663; Smith v. Heldecker, 39 Mo. 157.* As the interrogatories and answers constitute the pleadings, they need not be preserved by bill of exceptions, but, like other proceedings, become part of the record proper. *Rankin v. Simonds, 27 Ill. 352; Falconer v. Head, 31 Ala. 513; Easton v. Lowery, 29 Ala. 454.* The motion interposed in this case was, in effect, a motion for a judgment on the pleadings, and is governed by sections 60 and 387 of the Civil Code of 1887. Section 387 reads as follows: "No exceptions need be taken to opinions or decisions of courts of record sustaining or overruling demurrers or written motions affecting or based on the pleadings, or overruling motions in arrest of judgment, motions for new trials or for continuance of causes, or giving, refusing, or modifying instructions; but all such opinions and decisions together with the demurrers, motions and instructions, shall be taken as a part of the record, without being made such

by a bill of exceptions." In the absence of a statute it would perhaps have been necessary to have preserved the motion by a bill of exceptions, but the statute expressly provides that such motions shall be taken as a part of the record, without being made such by bill of exceptions; and it also provides that no exception need be taken to decisions of courts of record sustaining or overruling such motions. The contention of counsel, therefore, that an exception is necessary in order that this court may review the decision of the court below upon this motion, is set at rest by the plain language of the section. The question presented by the motion and pleadings was a naked question of law, the solution of which is dependent in no way upon any question of fact to be determined by evidence; and in fact no evidence was offered. As we understand the position of counsel for the motion, it is that no case can be reviewed in this court upon appeal or error unless an exception is duly reserved to the judgment of the trial court. In other words, the claim is that this court cannot review the judgment in any case unless there is a bill of exceptions duly certified and made part of the record, as, where an exception is necessary, it is well settled that it can only be preserved by bill. We are satisfied that no decision can be found in this state supporting the rule contended for. The jurisdiction of this court is frequently exercised to review cases upon the record proper in the absence of a bill of exceptions, and by the sections of the Code referred to the motion interposed in this case is properly a part of such record. It will, of course, be conceded that the taking of an exception and preserving the same by bill is necessary to a review of the evidence, or upon the law as applied to the evidence, and the Colorado cases go no further than this. It affirmatively appears from the record that the attention of the district court was called to the legal effect of the answers by the motion for judgment upon the pleadings, and by the express provision of the statute the formal reservation of an exception is not necessary to a review in such cases. *Fittnam, Colo. Prac. § 97.*

It is urged that as the record in this case shows that, in pursuance of a stipulation, the insurance money was deposited with the clerk of the district court to await the determination of the court as to which party had the better right thereto, this was a waiver of any objection to the judgment against plaintiff in error upon the garnishment proceeding; also a waiver on her part to the final judgment awarding the money to the plaintiff in the original proceeding. This conclusion is unwarranted. It is not unusual for parties to deposit property or a fund in litigation subject to the disposition of the court, and it has never been held that merely consenting to such deposit constitutes a waiver, such as is here claimed. The deposit was made in this instance, as is usual in such

cases, by a party not concerned with the final disposition of the money, for the purpose of avoiding annoyance from contesting claimants to the fund. The motion to dismiss the writ of error will be denied. Motion denied.

(21 Colo. 217)

PHILLIPS v. RHODES et al.

(Supreme Court of Colorado. May 20, 1895.)

FRAUDULENT CONVEYANCE TO WIFE.

A conveyance to a wife by her husband of land, without any valuable consideration, is fraudulent as to his creditors. 29 Pac. 1011, affirmed.

Error to court of appeals.

Suit in equity by Carrie E. Phillips against Ledru R. Rhodes and others to recover certain real estate. From a judgment of the court of appeals (29 Pac. 1011), affirming a judgment of the district court for defendants, D. W. Phillips, as sole heir at law of Carrie E. Phillips, deceased, brings error. Affirmed.

L. Walker, for plaintiff in error. E. B. Kellogg, for defendants in error.

PER CURIAM. This suit was instituted to set aside certain conveyances of real estate. The history of the transaction is succinctly set forth in the statement preceding the opinion of the court of appeals in Phillips v. Rhodes, 2 Colo. App. 70, 29 Pac. 1011. The opinion of that court answers every proposition of law or fact necessarily involved in the action. At best, the cause of plaintiff in error rests upon disputed questions of fact, which were determined against him at the trial upon conflicting evidence. It would be contrary to the well-established practice for this court to disturb the findings of the trial court under these circumstances. For this reason, in addition to those assigned by the court of appeals, the judgment of that court is affirmed. Affirmed.

(21 Colo. 127)

GERMAN INS. CO. OF FREEPORT, ILL.,
v. HAYDEN et al.¹

(Supreme Court of Colorado. April 20, 1895.)

INSURANCE POLICY—BREACH OF CONDITIONS—
MINING PATENT—VACATING.

1. Where an entry and certificate issued to an applicant for a patent to a placer claim were afterwards canceled by the land department, such fact, when not communicated to the insurer, will forfeit a policy wherein it was stipulated that, if the interest of the insured should become any other than a perfect title, the policy should be void.

2. Under Rev. St. U. S. §§ 2325, 2329, providing that objection may be made to granting a patent to a placer claim, where the applicant has failed to comply with the laws relating thereto, the land department, upon the protest of one who was interested in only a small portion of the lands in controversy, may cancel an entry to such lands, where they were agricultural, and not mineral.

3. A protestant to the grant of a patent on a mining claim to lands which were agricultural may appeal from the local land officer to the commissioner of the general land office, and to the secretary of the interior.

4. A policy is not forfeited, on the ground of prior insurance, where such insurance had elapsed before the policy was issued.

5. The negligence of the insurer's agent in omitting to state in the application the full amount of incumbrance on the insured's property will not avoid the policy on the ground that the incumbrances were not fully disclosed.

Appeal from district court, Arapahoe county.

Action by Thomas S. Hayden and another against the German Insurance Company of Freeport, Ill., on a policy of insurance. From a judgment for plaintiffs, defendant appeals. Reversed.

Action upon fire insurance policy. Trial to the court. Findings and judgment for the plaintiffs. Defendant appeals.

"The plaintiffs complain of the defendant, and allege: First. That the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Illinois. Second. That on the 14th day of July, 1885, Clara P. M. Leonhardy was owner of a certain frame dwelling house near the post office in Riverside, in the county of Chaffee, state of Colorado, and of a certain frame milk house near said dwelling house; and in consideration of the premium of one hundred and fifty (150) dollars paid to said defendant, the said defendant made, executed, and delivered its policy of insurance, in writing, whereby it secured said Clara P. M. Leonhardy against loss or damage by fire, to the amount of four thousand eight hundred (4,800) dollars on said dwelling house, and two hundred dollars on said milk house, from the 14th day of July, 1885, at twelve o'clock noon, to the 14th day of July, 1890, at twelve o'clock noon. Third. That on or about the said 14th day of July, 1885, the said Clara P. M. Leonhardy made, executed, and delivered her certain promissory note, payable to the order of Hayden & Dickinson, a partnership composed of the aforesaid plaintiffs, for the sum of five thousand dollars, and then and there made, executed, and delivered her certain deed of trust, whereby she conveyed the land upon which the said insured buildings stood to Job A. Cooper, trustee, for the use of said plaintiffs, to secure to said plaintiffs the payment of said note; and it was provided in said policy of insurance that the loss, if any, should be payable to the said Job A. Cooper, trustee, as his interest should appear. And plaintiffs allege that said provision of said policy was made for their sole use and benefit. Fourth. That the said Clara P. M. Leonhardy and the said plaintiffs have duly performed all the conditions of said policy on their part to be performed, and on the — day of June, 1890, the said dwelling and the said milk house were totally destroyed by fire. Fifth. That the loss of the said insured thereby was five thousand (5,000) dollars, and that said deed

¹ Rehearing denied June 7, 1895.

of trust and the debt is still wholly unpaid and unsatisfied. Sixth. That the said plaintiffs immediately after said fire, and on, to wit, the — day of June, 1890, furnished the said defendant with due proofs of said loss, according to the terms of said policy. Seventh. That no part of said money has been paid; that said sum is now due to said plaintiffs from said defendant. Wherefore, plaintiffs demand judgment for the sum of five thousand dollars, with interest thereon from the — day of June, A. D. 1890, to the date of judgment herein."

Amended answer: "Comes now the above-named defendant, and, for answer to plaintiffs' petition, says: First. That it denies each and every allegation in plaintiffs' petition, except such as are hereinafter specifically admitted. Second. Admits that defendant is a corporation, as alleged, and that defendant issued the policy of insurance sued on, for the amount alleged, and covering the property described in plaintiffs' petition. Third. Admits the execution of the note, and deed of trust in favor of plaintiffs, as alleged in plaintiffs' complaint. Fourth. Admits that the insured buildings were destroyed by fire about the time alleged by plaintiffs, but denies that the said Clara P. M. Leonhardy, or the plaintiffs, have performed all the conditions of said policy of insurance. Fifth. Denies that said assured was injured by said fire in the sum of five thousand dollars, but, on the contrary, defendant alleges that the insured buildings, at and immediately prior to said fire, were not worth to exceed two thousand dollars, and that there was no damage to any one, on account of the burning thereof, to exceed two thousand dollars. Sixth. As to whether said deed of trust and the debt secured thereby remains due and unpaid, defendant does not know; neither has it any knowledge or information sufficient to form a belief. Seventh. Defendant admits that plaintiffs have furnished the necessary proofs of loss, under the terms of the policy. Eighth. Admits that nothing has been paid under said policy, but denies that any sum is now due to plaintiffs from defendant. Ninth. Defendant, by way of further answer and defense to plaintiffs' complaint, says that it is expressly stipulated in said policy, as a condition therein, 'that insured covenants that the application hereof shall be and form a part hereof, and a warranty by the assured.' And the defendant says that on the 14th day of July, 1885, the said assured did make, sign, and submit to the defendant, a written application for said insurance, and in said application said insured did, in writing, expressly agree that the statements in the application 'shall be the sole basis of the contract between the company and the insured,' and in said application did warrant the application 'to contain a full and true description and statement of the condition, situation, value, occupation, and title of the

property proposed to be insured, and warrants the answers to each of the questions in the application to be true.' Tenth. Defendant says that in the aforesaid written application the following question was asked the assured: 'What is the title?' To which question the said assured answered, 'Good.' And defendant says that said answer was false and untrue, and a breach of the said warranty in said application and policy, because defendant says that assured's title was not good; that she did not have any title to the real estate on which said insured buildings were situate, and had no title to said buildings thereon; and that by reason of said false answer said policy was and is wholly void. Eleventh. Defendant says that in said written application the following question was asked the insured: 'Is your property incumbered; by what, and to what amount?' To which question assured answered, '\$800,' which said answer was false and untrue, and a breach of said warranty, because said assured, in said application, did not disclose the true amount of incumbrance on said property, because defendant says that at the time of making said application said property was incumbered by a deed of trust previously given upon said property by said assured, Clara P. M. Leonhardy, to Job A. Cooper, to secure to the firm of Hayden & Dickinson the payment of the sum of five thousand dollars, which said deed of trust was then and there a valid and subsisting lien on said insured property, in said sum, and that by reason of said false answer said policy was and is wholly void. Twelfth. Defendant further says that in said written application the following question was asked: 'Is there any other insurance on this property?' To which said assured answered, 'No,' when in truth and in fact said answer was false and untrue, and a breach of said warranty contained in said application and policy, because defendant says that there was then and there other insurance on said dwelling house and milk house, in the State Insurance Company of Des Moines, Iowa, in the sum of six thousand eight hundred and twenty-five dollars, and further that at said time of said application there was other insurance on said milk house described in plaintiffs' complaint, in the Denver Insurance Company, in the sum of two hundred dollars, and that, by reason of said false answer in said application with regard to other insurance, said policy was and is void. Thirteenth. Defendant further says that in said application the following question was asked assured: 'If incumbered, what is the whole value of your real estate, including buildings and land?' To which assured answered in said application as follows: 'One hundred and forty-nine acres; per acre, \$150,'—meaning thereby that said land, including buildings thereon, was worth \$150 per acre, when in truth and in fact said answer was false and untrue, because said

land, with the buildings thereon, was worth less than twenty-five dollars per acre; and by reason of said false answer said policy was and is void. Fourteenth. Defendant further says that it is stipulated in the policy of insurance sued on, as a condition therein, that 'if other prior concurrent or subsequent insurance exist, whether valid or not, on said property, or any part thereof, without the company's consent hereon, then in such case this policy shall be absolutely void.' Defendant says that, at the time of the issuing the policy here sued on, there was other prior insurance on said insured buildings, not indorsed on the policy sued on, and to which defendant did not consent, to wit, \$6,825 insurance on said insured buildings in the State Insurance Company of Des Moines, Iowa, and that after the issuance of the policy sued on there was other insurance, in the sum of \$200, taken out on the insured milk house, in the Denver Insurance Company, by reason of which the policy sued on was and is wholly void. Fifteenth. Defendant further says that it is expressly agreed and stipulated in the policy sued on, as a condition therein, 'that if the interest of the insured in the said property, or any part thereof, now is, or shall become, any other or less than a perfect legal and equitable title and ownership, free from all liens whatever, except as stated in writing thereon; if the property be incumbered by a mortgage or otherwise; or if the buildings, or either of them, stand on land of which the assured has not a perfect title,—then this policy shall be void.' Defendant says that assured, at the time of the issuance of policy, did not have, and has not now, a perfect title to said land on which the insured buildings were standing, and that said property was not free from liens, but that the same was incumbered as set forth in the eleventh defense herein, and by reason of the want of title in assured to said land on which said buildings stood, and by reason of such incumbrance or lien, this policy was and is void. Wherefore defendant, having fully answered, asks to be discharged, with costs of suit."

The replication admits that the application contains replies to questions as alleged in the answer, but denies that the amount of the incumbrance was ever stated by the applicant at \$800; alleges that the amount was given at \$5,000, the latter being the correct amount. It admits the provision of the policy with reference to forfeiture, as alleged. All other new matters set up in the answer are denied.

Stuart, Murray & Andrews and G. W. Barnett, for appellant. John H. Dennison, for appellees.

HAYT, C. J. (after stating the facts). It is admitted by the pleadings that in the application the insured, in answer to the question, "What is your title?" answered,

"Good." And it is likewise admitted that the policy contained the following stipulation: "That if the interest of the insured in the said property, or any part thereof, now is, or shall become, any other or less than a perfect legal and equitable title and ownership, free from all liens whatever, except as stated in writing thereon; if the property be incumbered by a mortgage or otherwise; or if the buildings, or either of them, stand on land of which the assured has not a perfect title,—then this policy shall be void." The facts in reference to the title to the real estate upon which the insured buildings stood are as follows: Upon the 28th day of January, 1880, and prior thereto, the title was in the United States. Upon the date mentioned, Leonhardy located the same as the Leonhardy placer claim, and on the 19th of April, 1880, filed his application for patent for this claim, covering 149.41 acres. Advertisement of said application was duly made. It does not definitely appear at what time this advertisement expired, but it is certain that no adverse claim was filed during the time within which the law permits the same to be filed, or, in fact, at any other time. On the 7th of February, 1882, one David N. Cook filed a protest against the issuance of a patent to 19.3 acres of the ground claimed by Leonhardy as a placer claim, alleging that he had filed upon the same as agricultural land; that it was agricultural, and not mineral, land. A hearing before the local officers upon this protest resulted in an order overruling it. The insured buildings were not situate upon any part of the 19.3 acres involved in the Cook protest. Seven days thereafter, to wit, on February 14, 1882, the receiver issued his final receipt to Clara P. M. Leonhardy for the surface area embraced in the Leonhardy placer claim, of 149.41 acres. From the order overruling the protest filed by Cook an appeal was taken to the commissioner of the general land office. In the general land office it was discovered that the report of the deputy surveyor upon the character of the Leonhardy placer claim was not in compliance with the rules of the department; and, it not appearing to the satisfaction of the commissioner that the lands were mineral lands, the entry was suspended, and the matter referred to the register and receiver of the local land office for a hearing, to determine the character of the entire tract, and its adaptability for placer mining. The testimony taken upon this hearing before the register and receiver is very voluminous. An opinion was filed on the 4th of May, 1883, in which it was held that the preponderance of the testimony was in favor of the proposition that the ground in dispute was more valuable for mineral than for agricultural purposes. From this decision Cook appealed. When the case again reached the commissioner, he held that the evidence did not establish the mineral character of the land, reversed the decision

of the register and receiver, and canceled the Leonhardy entry. From this order an appeal was taken to the secretary of the interior, who in turn affirmed the decision of the commissioner. Upon a motion for review of this latter decision before the honorable secretary, a written opinion was filed, reviewing the entire transaction from its inception, and affirming the previous decision, under which the Leonhardy placer claim was canceled. The final order was made by the secretary of the interior on the 9th of January, 1889. Of this order Mrs. Leonhardy had notice, but it does not appear from the evidence that the insurance company was ever notified of the cancellation of the entry, or that the company had notice of the invalidity of the Leonhardy title, at any time prior to the destruction of the insured buildings by fire, and demand for payment under the policy, although the buildings were destroyed by fire some time during the month of June, 1890,—nearly 18 months after the cancellation of the Leonhardy entry. When a clause in a contract of insurance is susceptible of two constructions, that one will be adopted which is more favorable to the assured; but, when the language of the contract is clear and unambiguous, its effect cannot be destroyed by construction. The rights of both insurer and insured must be governed by the contract solemnly executed. In this case the covenant in regard to title is clear and unambiguous. If the title fails, "then the policy shall be void." This would seem to be a wise provision, necessary to the protection of both insured and insurer. Certainly, as a general proposition, it is to their mutual interest that the inducement to incendiarism shall be reduced to the minimum. The title of the realty is an important consideration in determining the value of buildings. A building may be worth thousands of dollars to the owner of the realty, while to others it would be of but little value. Consequently, the inducement to incendiarism would be greatly increased if contracts of insurance executed upon a valuation based upon assumption that the title to the realty and to the buildings by one and the same person could be enforced if the title was not thus united. In the present instance the title failed by reason of an inherent infirmity; the land not being mineral land, and consequently not open to entry under the mining laws of the United States. The character of this land was a question of fact, the determination of which is specially committed to the appropriate officers of the land department of the government; and their decision, in all cases within their jurisdiction, is final and conclusive, in the absence of fraud. *Lindsey v. Hawes*, 2 Black, 554; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249; *Vance v. Burbank*, 101 U. S. 514.

It is claimed, however, in this case, that the land officers were acting without jurisdiction. This claim is based upon the assumption that

a protestant has no right of appeal, and upon the further claim that by the protest filed only a small portion of the placer claim was involved, the buildings not being upon such portion. The answer to this claim will be found in the statutes. By section 2329 of the Revised Statutes of the United States, it is provided that a placer claim is "subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims." In section 2325, provision is made with reference to lode claims as follows: "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." The standing of the protestant seems to be regulated by the exception in the paragraph last quoted. The statement that he is not a party, and therefore not entitled to appeal, is immaterial to the real question at issue. The law does not knowingly permit a claimant to obtain patent under the mineral laws to agricultural lands, and when a patent is applied for it is quite unimportant as to how the attention of the land department may be called to the character of the land sought to be patented. That department certainly has the right to make necessary and reasonable rules governing the manner in which the character of the land shall be made to appear, both *prima facie* and ultimately; and if these rules are not complied with, or if it appears that the land is not such as can be entered under the particular claim advanced to it, as, for instance, where agricultural lands are applied for under the mining laws, it is not only the province, but the duty, of the land department to deny the entry. It should be unnecessary to cite authorities in support of the foregoing, but, as the contrary has been seriously urged in this case, we cite the following cases: *Lindsey v. Hawes*, supra; *Pierce v. Frace* (Wash.) 26 Pac. 192; *Harkness v. Underhill*, 1 Black, 316; *McCarthy v. Mann*, 19 Wall. 20. The law does not make the local land officers the tribunal of last resort upon these questions, although upon their decision the price of the land may be accepted, and a receiver's receipt issued. The commissioner of the general land office has a right, and it is made his duty, to examine the application and proofs in support thereof before the issuance of a patent. In this case, upon such an examination, it was found that the proof failed to show that the lands embraced in the Leonhardy placer claim were mineral lands, and a hearing upon this question was ordered. Upon a subsequent review it was found that the

lands were more valuable for agricultural than for mineral purposes, and the receiver's receipt theretofore issued was accordingly ordered canceled. Upon appeal by Leonhardy to the secretary of the interior, this decision was affirmed. The land department not only had jurisdiction, but the proceedings appear to have been regular and proper. We find nothing in the case of *Godding v. Decker*, 3 Colo. App. 198, 32 Pac. 832, to militate against this conclusion. That court was then considering the position of a protestant with reference to an appeal in pre-emption conflicts, and the right was denied; but that the land office should, in a proper case, cancel an entry, upon its own motion, although certificate had been issued, is expressly recognized. And the same is true of *Wilson v. Fine*, 40 Fed. 52, where it was held that "an entry and certificate issued to a settler, under the homestead act, for land subject to entry thereunder, cannot be set aside or canceled by the land department, on its own motion, for fraud or mistake committed or occurring in obtaining or issuing it." Without expressing any opinion upon the doctrine announced, we need only call attention to the fact that it is expressly predicated upon the assumption that the land was subject to entry under the homestead act. Here the reverse is true. The land is not subject to entry under the mining laws. The title of Mrs. Leonhardy under her placer claim having been denied for the reason that the land was agricultural, and for this reason not subject to entry as mineral lands, avoided her title ab initio, and the very condition was presented which the parties had agreed should forfeit the policy of insurance. The buildings were not destroyed by fire until nearly 18 months had expired after due notice had been given Mrs. Leonhardy of the failure of her title. It was certainly her duty to have promptly notified the company of this failure, and, not having done so, she cannot recover in this action, as it is conceded that the same defenses can be made against these plaintiffs as could be made against the assured, Mrs. Leonhardy. The company assumes no greater or different burden by reason of the loss being payable to the mortgagee. No effort was made in the court below to show that the company had any notice whatever of the failure of title to the realty. Had such notice been received, and no action taken by the company, perhaps it would be estopped from denying that the policy was in force, but such estoppel would depend upon facts and circumstances not now before the court.

In view of the possibility of a new trial, we shall notice two other assignments of error which have been urged upon this appeal. It is claimed that there was a prior insurance on the property which avoided the policy, but the evidence shows that such prior insurance as there had been upon the property had lapsed at the time of the issu-

ance of the policy sued on. Before application was made for this policy, the mortgagees, acting for and on behalf of Mrs. Leonhardy, made inquiry at the office of the company which issued the prior insurance, and were informed that such insurance had been canceled, and that that company at the time had no insurance upon the property. Under these circumstances, we agree with the district court that the policy sued upon was not forfeited by reason of other insurance.

So, also, with reference to the answer as to the amount of incumbrance upon the property, viz. that it was \$800, instead of \$5,000. It is clear that this part of the application was filled out by an agent of the defendant company, and that he was at the time correctly informed as to the amount of the incumbrance upon the property, and that the error in the application occurred as the result of his negligence, and through no fault of the assured. It appearing that the agent of the company wrote down this answer in the printed form in the application, without the knowledge of the assured, and the true facts having been communicated to the agent at the time, the company is estopped to take advantage of the falsity of the answers. *Insurance Co. v. Taylor*, 14 Colo. 499, 24 Pac. 333. For the reasons stated the judgment must be reversed. Reversed.

(21 Colo. 263)

JONES v. ASPEN HARDWARE CO.¹

(Supreme Court of Colorado. May 20, 1895.)

TITLE OF ACT — SUFFICIENCY — TRANSFER TO INVALID CORPORATION — EFFECT — RIGHT TO CLAIM AS COPARTNERSHIP.

1. Acts 1887, p. 406, is entitled "An act to fix the fees to be collected by the secretary of state for incorporation, and certain other privileges," the body of the act relating entirely to the fee to be collected for filing certificates of incorporation, etc., and, in addition thereto, providing that no such corporation "shall have or exercise any corporate powers, or be permitted to do any business in this state until the said fee shall have been paid." *Held*, that such provision is so closely related to the general subject of the act as to be a proper matter for legislation under the title selected.

2. Where a company relies on its corporate capacity, it assumes the burden of establishing the same.

3. To constitute a de facto corporation there must be either a charter or a law authorizing the creation of such corporation, with an attempt in good faith to comply with its terms, and a user or attempt to exercise corporate powers thereunder.

4. Under Acts 1887, p. 406, § 1, providing that no corporation shall have or exercise any corporate powers until the fee for filing its articles of incorporation with the secretary of state is paid, a transfer of property to an association prior to the filing of such articles gives the transferee no title as a corporation.

5. A partnership sold its stock of goods to E., but on his failure to comply with the terms of the agreement, a new arrangement was made to form a corporation, and articles of incorporation were filed with the county clerk. A director's meeting was then held, at which E., who was a director, transferred to the association the stock

¹ Rehearing denied June 7, 1895.

of goods, the articles of incorporation not having yet been filed with the secretary of state as required by Act 1887, p. 406, § 1, and before the same were filed E.'s creditors attached the property so conveyed. *Held*, that the transferee might maintain an action of replevin as a partnership, and recover the goods.

6. One is not estopped to deny the corporate existence of an association by having dealt therewith, unless there is at least a *de facto* corporation.

Error to district court, Pitkin county.

Action of replevin by the Aspen Hardware Company against Albert H. Jones. From a judgment for plaintiff, defendant appeals. Reversed.

The Aspen Hardware Company instituted this suit in the court below for the purpose of recovering a stock of goods seized by the United States marshal under a writ of attachment issued out of the circuit court of the United States at the suit of Joseph A. Thatcher, plaintiff, against one A. B. Eads. The only question in the case has reference to the corporate capacity of defendant in error, it not having filed, prior to the attachment levy, its certificate of incorporation with the secretary of state, as required by statute (Sess. Laws 1887, p. 406). In the district court judgment was entered in favor of the company. The statute reads as follows: "Every corporation, joint stock company or association, incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this state, having capital stock divided into shares, shall pay to the secretary of state for the use of the state, a fee of ten dollars, in case the capital stock which said corporation, joint stock company or association, is authorized to have, does not exceed one hundred thousand dollars; but, in case the capital stock thereof is in excess of one hundred thousand dollars, the secretary of state shall collect the further sum of ten (10) cents on each and every thousand dollars of such excess, and a like fee of ten cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association, or charter of said corporation, joint stock company or association, in the office of the secretary of state; and no such corporation, joint stock company or association shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint stock company or association, until said fee shall have been paid to him. But this act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes." Acts 1887, p. 406, § 1.

A. B. McKinley, Hugh Butler, and Willson & Salmon, for plaintiff in error. W. W. Cooley and H. W. Clark, for defendant in error.

HAYT, C. J. (after stating the facts). In November, A. D. 1889, Shepard & Bowles, as copartners, were doing a general hardware business in the city of Aspen, and during that month made a sale of their business, stock in trade, good will, etc., to A. B. Eads, the consideration for this transfer being certain real estate and the assumption of certain indebtedness of the firm of Shepard & Bowles. Eads being unable to comply with the terms of the agreement, a new arrangement was made between the parties, and an organization known as the Aspen Hardware Company was formed by Bowles, Eads, and one Kettler. The articles of incorporation provided that the affairs of the company should be managed by a board of three directors, naming Bowles, Eads, and Kettler as such directors for the first year. It was the evident intention of the parties that the company should be duly and legally incorporated, and to this end they caused to be executed articles of incorporation on the 16th day of November, 1889, in due form, and immediately filed the same with the clerk and recorder of Pitkin county. For some reason, not explained by the evidence, the articles were not filed in the office of the secretary of state until after the levy of the writ of attachment hereinafter referred to, and not until the day upon which this suit in replevin was instituted, but whether before or after the commencement of this action does not clearly appear from the evidence. After the articles were filed with the county clerk, the board of directors held a meeting, elected officers, caused capital stock to be issued, etc., Eads being present and participating in this meeting, at which Bowles was elected president, Eads vice president, and Kettler secretary and treasurer. Thereupon, Eads, for a valuable consideration, sold and transferred the property to the new organization, and Mr. Bowles from that time forward conducted the business for the Aspen Hardware Company, selling goods and purchasing new goods in the corporate name. Eads, soon after the sale, left the town of Aspen, and did not return, nor personally take part in the business at that point, but continued as a director and vice president of the company, and retained a portion of his stock, although he had sold a part of it prior to the levy of the writ of attachment. The business was thus continued until July 31, 1890, when a suit was commenced by Thatcher, plaintiff, against A. B. Eads, and the property in question levied upon as the property of the defendant in that suit, and this action of replevin was immediately instituted to recover possession of the property, or its value.

The controversy in this case is narrowed to the single question of the capacity of defendant in error to take title to the prop-

erty in controversy as a corporation at the time of the attempted transfer by Eads, it not having at that time filed its articles of incorporation with the secretary of state, or paid the fee for such filing, as provided by the statute of 1887. Sess. Laws 1887, p. 406. This is the first time the effect of this statute has been before this court for consideration, although in *Edwards v. Railroad Co.*, 13 Colo. 59, 21 Pac. 1011, the constitutionality of a somewhat similar act was under review. That act was attacked upon several grounds, among which was that it was void because the subject was not clearly expressed in the title, the title being "An act to provide for the formation of corporations"; and it was held that this title was sufficient to cover legislation requiring a fee to be paid for filing the certificate of incorporation, under the principle that the same was germane to the general subject expressed in the title, and that legislation fixing the amount of such fee, time of payment, etc., was not obnoxious to the constitutional provision with reference to titles. The act of 1887, now under consideration, is entitled "An act to fix the fees to be collected by the secretary of state for incorporation and certain other privileges." The body of the act, however, relates entirely to the fee to be charged and collected for filing certificates of incorporation, articles of association, charters, or increase of capital stock of joint-stock companies, and, in addition thereto, provides that no such corporation, joint-stock company, or association "shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid. * * *" This provision is so closely allied to the general subject, which is the fixing of fees for filing certificates of incorporation, etc., that under the uniform rule of decisions in this state it must be held to be a proper matter for legislation under the title selected. *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *People v. Goddard*, 8 Colo. 432, 7 Pac. 301; *People v. Scott*, 9 Colo. 422, 12 Pac. 608; *Dallas v. Redman*, 10 Colo. 297, 15 Pac. 397; *Edwards v. Railroad Co.*, supra. In *re Pratt*, 19 Colo. 138, 34 Pac. 680. In this case the Aspen Hardware Company claims title to the property in dispute in its corporate capacity, and not as a copartnership. It is admitted that the fee for filing the certificate of incorporation with the secretary of state was not paid prior to the levy of the writ of attachment, and that the certificate was not filed in the office of the secretary of state until about the time of the bringing of the present action, the evidence leaving the exact time uncertain. It is to be remembered that in this case the corporation is the party plaintiff, and it may be stated as a general rule that when a company relies on its corporate capacity it assumes the burden of establishing such capacity. The language of the act is plain and

unambiguous. It reads, "No such corporation * * * shall have or exercise any corporate powers. * * *" The taking of title to property was certainly the exercise of a corporate power, and as such prohibited by the express terms of the statute. This is not controverted by counsel for appellee, but it is contended that Eads, having assisted in the organization of the corporation, and having sold to it the hardware stock, is estopped from denying the corporate existence of the company, and that the attaching creditor took the property subject to the same estoppel. The doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a de facto existence. The rule is stated as follows by Morawetz on Private Corporations (section 750), it having been first announced in the case of *Brouwer v. Appleby*, 1 Sandf. 158: "A defendant who has contracted with a corporation de facto is never permitted to allege any defect in its organization as affecting its capacity to contract or sue, but that all such objections, if valid, are only available on behalf of the sovereign power of the state." It is also well settled that to constitute a de facto corporation there must be either a charter or a law authorizing the creation of such a corporation, with an attempt in good faith to comply with its terms, and also a user or attempt to exercise corporate powers under it. *Duggan v. Investment Co.*, 11 Colo. 113, 17 Pac. 105; *Bates v. Wilson*, 14 Colo. 140, 24 Pac. 99. A de facto corporation can never be recognized in violation of a positive law. This principle, which seems to be supported by all the authorities, is thus stated by Morawetz on Private Corporations (section 758): "If the formation of a corporate association is not only prohibited by this general rule of the common law, but is also in violation of some principle of morality or public policy, or a positive statutory prohibition, the parties forming such association will not be legally bound by their agreement of membership, and the courts will not recognize the association, either as among its members or against third parties." To recognize the defendant as a de facto corporation, would, as we have seen, be in direct conflict with the express language of the act, which declares that without the payment of the fee the corporation shall have no corporate power.

One object of this statute is to restrict the organization of "wild-cat" corporations, it being supposed that the increased fee required by the act would, in a measure at least, prevent the overcapitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate power, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act. The taking of title to the property in controversy being

the exercise of a corporate power, and, as such, forbidden until the fee for filing has been paid, it follows that the title of the Aspen Hardware Company as a corporation cannot be upheld. Having failed to comply with the statute, the Aspen Hardware Company, at the time of the transfer, was neither a *de jure* nor a *de facto* corporation, but simply a voluntary association of individuals in the nature of a copartnership.

There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisites to the exercise of such powers. "In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter." *Abbott v. Refining Co.*, 4 Neb. 416. The omission in this case is of acts of the former class, and consequently there was no corporation *in esse* at the time of the levy of the writ, while the evidence leaves it in doubt if this omission had been supplied prior to the institution of the present action. But although it could not at the time exercise any corporate power, this did not prevent the Aspen Hardware Company from taking title to the property as a copartnership. In other words, under the conceded facts, the company was not at the time a corporation, but this will not preclude it from maintaining the action as a copartnership. The plaintiff sues as the Aspen Hardware Company, and the facts alleged show that such company was a copartnership, and not a corporation. There is nothing in the name of the association to conflict with this, as at common law partners may carry on business under any name they choose. They are bound rather by their acts than by the style which they give to themselves. *Cook, Stock & Stockh.* § 233; *Chaffe v. Ludeling*, 27 La. Ann. 607. This principle has been applied in many cases where parties have set up the defense of individual nonliability by reason of having directed an incorporation to be had, but where none in fact was consummated. *Cook, Stock & Stockh.* §§ 233, 234; *Abbott v. Refining Co.*, *supra*; *Empire Mills v. Alston Grocery Co.* (Tex. App.) 15 S. W. 505. The law having cast this liability upon the members of the association, we think they must be given the advantages accorded a copartnership. So, in this case, while we feel compelled under the statute to deny plaintiff's right of recovery as a corporation, we think they may maintain the action as a copartnership. The cause will accordingly be reversed and remanded, with directions to the district court to allow the parties to amend their pleadings as they may be advised. Reversed.

(21 Colo. 251)

PEOPLE *ex rel.* SMITH *v.* DISTRICT
COURT OF SECOND JUDICIAL DISTRICT *et al.*

(Supreme Court of Colorado. May 20, 1895.)

DIVORCE—ALIMONY AND COUNSEL FEES—FAILURE
TO PAY—COMMITMENT FOR CONTEMPT—
WRIT OF PROHIBITION.

1. A writ of prohibition is not a writ of right, but rests in the sound discretion of the court; and the only inquiries permitted are whether the inferior tribunal is exercising a jurisdiction it does not possess, or, having jurisdiction of the subject-matter and parties, it has exceeded its legitimate powers.

2. An order granted on application for temporary alimony and attorney's fees, and providing in part for the payment of counsel fees directly to plaintiff's attorney, is not void, but, at most, only an irregular exercise of jurisdiction.

3. The remedy by execution for the collection of alimony awarded in divorce proceedings (*Sess. Laws 1893*, § 9, p. 240) does not take away from the court its inherent power to punish, by way of contempt, a party refusing to obey a valid order directing him to pay alimony and counsel fees.

4. The subsequent reconciliation of the parties to a divorce suit, after an order for temporary alimony and counsel fees has been entered, and the release of defendant by plaintiff from liability thereunder, will not abrogate that portion of such order relating to the payment of counsel fees.

5. An order for temporary alimony and counsel fees is reviewable on appeal, or by writ of error, and the failure of a party to avail himself of these remedies in proper time is not ground for granting a writ of prohibition.

Original proceeding, on the relation of Hugh Smith, for a writ of prohibition to the district court of the Second judicial district, and Peter L. Palmer, district judge. Denied.

In the district court of Arapahoe county, Mary Smith instituted a suit for divorce against the relator, Hugh Smith. After filing the complaint she filed an application for temporary alimony and counsel fees. Due notice of the application was given to the defendant. The parties appeared before the court, a hearing was had, and on the 5th day of February, 1895, the court, *inter alia*, ordered the defendant, who is the relator here, to pay to the plaintiff, for temporary support and maintenance, \$60, on or before February 1, 1895, and the sum of \$60 per month on the 1st day of each month thereafter during the pendency of the action, and to "pay to Robert W. Bonyng, on or before the 10th day of February, 1895, the sum of two hundred dollars, to be applied on account of his services as counsel for the plaintiff in this action." The defendant acquiesced in this order, and made the first payment of \$60 for plaintiff's support, but failed to comply with the order for the payment of counsel fees, and the second monthly payment upon the alimony. On the 4th day of March, 1895, upon the application of plaintiff, the court issued a citation to the defendant to show cause why he should not be punished for contempt for such failure. Hearing upon the citation was fixed for the 7th of March, when the defendant appeared in court, and expressly averred that he had no desire to evade the performance of the

order touching the alimony and counsel fees, and stated in writing that he regarded the same as a binding obligation, and was as desirous of performing it as the plaintiff was of having it performed. The defendant asserted that he had made every effort to comply with the order, but, by reason of a series of misfortunes, his efforts proved abortive. Thereupon he asked for further time, solely to give him an opportunity to borrow, upon certain property which he owned, a sufficient sum of money to comply with the rule. Deeming this request for a continuance a reasonable one, the court granted time for further hearing upon such citation until the 25th day of March, following, when the defendant again appeared, and made a further showing to the effect that since the former hearing the plaintiff and the defendant had become reconciled, and were living together as husband and wife, and desired that the said suit be dismissed. Defendant further showed that the plaintiff had released and discharged him from liability in respect to the payment of the alimony and counsel fees provided in said order of the court. It appeared also that the wife had notified her counsel that she, individually, would pay him for his services. Prior to this time, however, the attorney for the wife, having heard an intimation that there was a prospect of this settlement between the parties to the suit, duly served on the clerk of the court and upon the parties a notice to the effect that he would insist upon the payment of his counsel fees provided for in said order, and objected to the dismissal of said suit, unless and until his fees were paid. The suit was not dismissed, but is still pending in the court, and there is nothing in the record to show any attempt or offer by the plaintiff to withdraw the same, except this statement that she notified her attorney of her desire that it should be dismissed. Upon the final hearing, on March 25th, the court refused to discharge the rule for the payment of counsel fees, but, on the contrary, made it absolute. Thereafter, and on the 5th day of April, the court, speaking by the judge thereof, notified relator, who was then present in court, that if said counsel fees were not paid by 10 o'clock on Monday, the 8th of April, the court would commit relator to jail for contempt of court.

Whitford & Lindsley, for plaintiff. R. W. Bonynge, for defendant.

CAMPBELL, J. (after stating the facts). 1. In this state the doctrine is well settled that a writ of prohibition is not a writ of right, but rests in the sound discretion of the court. The only inquiry permitted is as to "whether the inferior judicial tribunal is exercising a jurisdiction it does not possess, or, having jurisdiction over the subject-matter and the parties, has exceeded its legitimate powers." *Leonard v. Bartels*, 4 Colo. 95; *People v. District Court of Lake Co.*, 6 Colo. 534;

McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516, and cases cited; *People v. District Court of El Paso Co.*, 19 Colo. 343, 35 Pac. 731. The court undoubtedly had jurisdiction over the subject-matter of this suit, as well as of the parties, and had the power to make the award of counsel fees in question. On this application, therefore, the only question for the court to determine is whether the court below exceeded its jurisdiction. The position of relator is that the order, or that part of it providing for the payment of counsel fees directly to the attorney for the plaintiff, was wholly void, because it was a judgment rendered against the defendant in the action, in favor of one not a party to the suit. If this particular judgment is wholly void, then this writ should issue; certainly, unless the relator has some other speedy, ample, and adequate remedy at law, to which he should have resorted. He relies chiefly upon the decision in the case of *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345. In that case the order granted upon determination of the application for temporary alimony and counsel fees was, in effect, a judgment that the defendant in the action pay to the numerous counsel for the plaintiff certain designated sums of money therein specified. In passing upon this order the court used this language: "The order here was a direct money judgment in favor of persons not parties to the suit, and to that extent was irregular and void." It is by placing emphasis upon this last word that counsel for relator chiefly relies. Upon appeal the order in the Sharon Case was reversed, upon the ground, however, that the fees awarded were grossly excessive, although the court did remark that it was irregular and void. In the subsequent case of *Storke v. Storke*, 99 Cal. 621, 34 Pac. 339, the court held that an order, resulting from an application for temporary alimony and counsel fees, directing \$50 to be paid "to the attorney for the plaintiff," was irregular. Upon appeal from the order in question the court refused to reverse the judgment for such irregularity, but modified it, and directed the court below to change it by requiring the attorney's fee to be paid to the plaintiff; and as thus amended, the order was affirmed. The court uses the following language: "It is probable that the direction to pay the money to the attorney was a mere clerical mistake; and we think it a proper case for a modification of that part of the order, rather than a reversal." This is enough to show that the supreme court of California, at least, did not consider the judgment void, for, if it had been, a reversal must have followed; but, being merely irregular, it was a judgment within the jurisdiction of the court, and was the result either of a clerical mistake, or an irregular exercise of jurisdiction rightfully possessed. There are other cases, which we do not deem it necessary to cite, wherein orders in like cases which provide for the payment directly to the attorney of the counsel fees awarded are recognized as proper, and in accordance with the

practice in chancery courts in like cases. But it is not necessary for us to determine whether or not such order is a proper one to be made. If the court did not exceed its jurisdiction in granting the order, this writ should not, for that reason, lie. We hold that the judgment is not void, but, at most, only irregular.

2. In support of this application the relator relies upon another and distinct proposition, viz. that the court had no power to imprison the defendant for a failure to comply with a valid judgment against him for counsel fees. First, he contends that, in the absence of a statute concerning this subject, it is not contempt for a defendant to refuse to comply with such an order. It is true that the remedy is a harsh one, and should be used only in extreme cases; but its harshness and severity are not insuperable objections to its appropriateness, and to its use in a proper case. This doctrine is recognized in *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657, and in *Re Fanning*, 40 Minn. 4, 41 N. W. 1076. Our statute (Sess. Laws 1893, § 9, p. 240), we think, empowers a court, in a proper case, to apply this remedy; but, as it also authorizes the issuance of an execution for the collection of alimony thus awarded, the relator insists that, by necessary construction, all other remedies are excluded. We think not, however. The statutory remedy by execution in this case is merely cumulative. *Wharton v. Wharton*, 57 Iowa, 696, 11 N. W. 638. The attachment for contempt, moreover, exists independent of statute, and issues by a court, in the exercise of its ordinary and inherent powers; and the giving of the remedy by execution was not, in our judgment, intended to take away from the court its inherent power to punish by way of contempt, in extreme and unusual cases. The remedy, therefore, in our judgment, in the proper case, still exists. There is no complaint here that the threatened imprisonment is to be unreasonable or excessive, or that it is not the only efficient remedy. We are left without any information as to particulars. In this connection, see *O'Callaghan v. O'Callaghan*, 69 Ill. 552; 1 Enc. Pl. & Prac. p. 436 et seq., and cases cited.

3. It is unquestionably true that a subsequent change of circumstances may constitute an answer in contempt proceedings; and relator here claims that the reconciliation of the parties to the divorce suit after the order for temporary alimony and counsel fees was entered, and the release of the defendant by the plaintiff from his liability thereunder, is a sufficient answer to the citation. Undoubtedly, this is true as to the order to pay alimony to his wife, but that portion of the order which adjudged him to pay counsel fees is beyond the power of the parties to the suit to abrogate. The utmost that can be claimed by relator (which claim he expressly repudiates) is that the judgment was, in effect, one in favor of the plaintiff, for the use and benefit of her attorney. If so, she

cannot set aside this order in favor of her attorney merely because she and her husband were reconciled, and desired no longer to prosecute the suit. *Weaver v. Weaver*, 33 Ga. 172; *Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E. 914. See, also, *Aspinwall v. Sabin*, 22 Neb. 73, 34 N. W. 72, where fraud in such a settlement of the suit was alleged, and it was held that the court would maintain jurisdiction to compel the payment of the counsel fees theretofore awarded. In the case at bar it would be a legal fraud upon the counsel, if these parties could thus defeat his claim.

4. Although the court refused to discharge the rule as to the payment of counsel fees, notwithstanding the subsequent reconciliation of the parties, and their desire to dismiss the suit, yet the defendant in the case never applied to the court below to correct the particular error in the judgment wherein it is claimed to be void, nor did he, by appeal or writ of error to the court of appeals, seek to reverse this judgment for counsel fees, upon which judgment the threatened commitment for contempt was based. In *Daniels v. Daniels*, supra, it was held that an order for temporary alimony and counsel fees is an appealable order,—one that may be reviewed either upon appeal or writ of error. That decision was under the appeal act of 1885, but the reasoning of the court shows that a judgment for temporary alimony is a final judgment. Such a remedy is speedy, ample, and adequate,—one that would give relator all the relief to which he is entitled if the lower court committed error. If, by his neglect, the relator has failed to avail himself of these remedies, and, within the proper time, thus to obtain the relief to which he claims to be entitled, that is not ground for the granting of the writ of prohibition by this court. The relator had from March 25th to April 8th within which to comply with this order, or appeal from it, and from April 5th to April 8th to do so after the court notified him (which it was not obliged to do) that on the latter date he would be imprisoned if the order was not obeyed. He neglected to resort to the other remedies which were open to him, but on April 6th filed this application for a writ of prohibition. Petitioner's acquiescence in the order for payment of counsel fees, and his protestation that he would comply with it, preclude him from resorting to the extraordinary writ of prohibition, unless it is apparent upon the face of the record, and from the proceedings below, that the court exceeded its jurisdiction in granting the same. The petitioner had also a remedy by appeal from the order awarding counsel fees, which, but for his neglect in availing himself thereof, would have been efficacious, and for this reason this writ should not issue. The alternative writ heretofore issued is quashed, and the proceedings herein are dismissed, at the costs of relator.

(6 Colo. App. 311)

FRENCH v. PEOPLE.

(Court of Appeals of Colorado. May 13, 1895.)

UNLICENSED FOREIGN COMPANY—ADJUSTMENT OF LOSS—IMPOSITION OF PENALTY.

1. A statute prohibiting citizens of Colorado from contracting in a foreign state, for insurance on property in Colorado, with a company not licensed to do business in Colorado, would be unconstitutional.

2. Gen. St. c. 55 § 16, imposing a penalty on the agent of an unlicensed foreign insurance company adjusting any loss on a policy issued by such company, does not authorize the punishment, as an "accessory," of an adjuster employed by such company to advise a committee lawfully acting in the adjustment of a loss.

3. Gen. St. c. 55, § 16, prohibiting the agent of an unlicensed foreign insurance company from adjusting in Colorado a loss, does not prohibit such a company from sending into the state a professional adjuster to ascertain the amount of the loss preparatory to an adjustment in a foreign state.

Error to district court, Arapahoe county.

W. B. French was convicted of a violation of the insurance law, and brings error. Reversed.

On August 14, 1893, the Crescent Flouring Mills, in the city of Denver, the property of the Colorado Milling & Elevator Company, were destroyed by fire, on which the owners had a policy of insurance for \$10,000, issued by the Millers' National Insurance Company of Chicago. Fifteen or sixteen other insurance companies had issued policies and were interested in the loss. They had appointed a committee of three to ascertain the loss preparatory to an adjustment. The Millers' National Insurance Company was not represented by such committee, but sent French (plaintiff in error) as its agent to ascertain and adjust the amount for which it was liable on its policy. French was not in the general employment of the company as agent or otherwise. He was a professional adjuster,—an expert, particularly as to the value of mills and milling machinery,—and took employment generally from those requiring his services. The Millers' National Insurance Company had no agency or office in this state. The application for the insurance was made by letter to its home office in Chicago; accepted; and the policy sent by mail. French, on his arrival, was not made a member of the adjusting committee, but met and advised with the committee, that gladly availed itself of his superior knowledge of the subject to be determined. This was the extent of appellant's participation in the affair. An information was filed against him for a violation of the statutes of the state concerning insurance. He was arrested; tried to the court, without a jury; convicted; and a fine of \$500 imposed; and the case brought to this court by writ of error.

Vincent D. Markham and Myron H. Beach, for plaintiff in error. Eugene Engley, Atty. Gen. (H. T. Sale, of counsel), for defendant in error.

REED, P. J. (after stating the facts). Counsel for appellant attack the information in argument. The first assignment of error is "that the information does not set forth or state any facts constituting an offense against the defendant." Although it is not as full and explicit and as technically correct as it might have been, it appears to have been sufficient in substance. In my view of the case, it may be determined upon other and more satisfactory grounds. Consequently the supposed error will not be further regarded.

The statute appellant was charged with violating is section 16 of "An act to establish an insurance department in and for the state of Colorado, and to regulate the insurance companies doing business therein," Gen. St. c. 55, § 16, as follows: "It shall be unlawful for any person, company or corporation in this state, either to procure, receive or forward applications for insurance in or to issue or to deliver policies for any company or companies not having complied with the provisions of this act, or to adjust any loss, or in any manner, either directly or indirectly, to aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and licensed by the superintendent of insurance, in conformity to the provisions of this act, and any person violating the provisions of this section shall be liable to a penalty of \$500, for each and every offense." The intention of the legislature and the wisdom and necessity of the law are obvious; its object, to protect the people against irresponsible foreign insurance companies, and subject all foreign insurance companies to the supervision of the state insurance department, and, by license fees, provide a fund to defray the expenses of such department. For the purposes of this opinion, I am willing to adopt, as far as it goes, the statement as to the scope, object, and intention of the act as made by the learned attorney general in his printed argument: "The object is to regulate insurance,—a business that so intimately concerns the whole business world; to prevent persons who have no proper qualifications from engaging in the business; and to force all companies doing business in this state to pay their just quota of the fees which make up the insurance fund." Again: "But the principal object of our statute seems to be to protect the insured from fraud, and to cause all companies doing an insurance business to contribute to the insurance fund, which in turn is to be used to prevent this very fraud," etc. In this definition there is evidently an important omission in the second clause. Not all companies doing an insurance business are expected to contribute to the fund. It should be limited to those doing insurance business within the state. There is one line of argument and construction of the statute that should not pass unnoticed, as it may have, more or

less, influenced the decision, though rather vaguely and indefinitely expressed. It is, in effect, that, by reason of our statute, contracts of insurance made by residents of the state with foreign insurance companies, though legal where made, are a violation of the state law. This contract of insurance was made by the resident milling company, by correspondence, and was made at the home office of the insurance company in the city of Chicago. The attorney general says: "If the argument of counsel for plaintiff in error is to prevail, then, in order to evade the requirements of the statute, and to escape payment of dues to the superintendent of insurance, it would only be necessary to issue policies from offices outside of the state, and pay losses at the place where the policy was issued, and the adjustment and the negotiations leading up to and following it, and the fact that the contract of insurance affects property situate in Colorado, and premiums are paid by its citizens, may be laid out of the case, as being matters not properly belonging to 'the business of insurance.'" Again: "It is no defense to say that the policy was made out in Chicago, and mailed to Denver, and that the adjustment of the loss was finally consummated in Chicago, and the money paid there. The contract of insurance from the time it was received in Denver was in force here in this state until the destruction of the property insured, and the right to recover the amount of the loss existed at all times in this state, from the time of the loss until the time of the payment. It is of no consequence whether the final act of adjustment in the payment of the loss occurred in Chicago, or here, in Denver. The business of insurance was being carried on here, in Colorado, unlawfully, by the Millers' National Insurance Company, from the time it replied to Mr. Mullen's first letter up to the time of the adjournment of the committee of adjustment from Denver to Chicago; and all the acts of plaintiff in error in aid or abatement of that business were in direct contravention of the letter and spirit of our insurance law." The only logical conclusion from the argument is that, because Colorado has a law controlling the business of insurance within the state, any contract made by a citizen of the state for insurance within the state, in a foreign office, though legal where made, was a violation of state law, and illegal here. If such is a proper construction of the law, it is unnecessary to say that the law is worthless and void, abridging and restricting constitutional rights guaranteed by the constitution of the state and of the United States. To say that a resident of this state cannot make a contract pertaining to his property in this state, in Chicago, New York, or London, if lawful where made, unless a license is obtained and money contributed to a fund, is so directly in conflict with universal law as not to need further comment.

Before taking up the principal questions involved, there is another contention of the learned attorney general that may be noticed. After speaking of the participation of appellant in the action of the committee, he contends that a conviction can be had under the statute for a partial adjustment or an attempt to adjust, and reasons that it was not necessary that appellant should have been a member of the committee, that it was sufficient if he was present aiding and advising, and, in support of the proposition, cites section 701 of General Statutes, defining an "accessory" in a criminal offense, and adds the general definition of an accessory from the text-books. I am at a loss to know for what purpose this was put in. There is no claim that the committee were violating the law, or guilty of crime or criminal intention. If their pursuit and business was lawful, I cannot understand how there could be an accessory, when he was only aiding and advising in a legitimate matter. In the insurance law under which the conviction was had, there is no provision for the punishment of accessories, and the law can hardly be extended so as to warrant the conviction of a party as accessory, under the law of insurance. Penal statutes of this character, making new offenses, and providing for conviction and punishment, must, according to all the authorities, be strictly construed. The provisions cannot be extended by inference or implication or analogy to other acts.

There is no controversy in regard to the facts. Briefly stated, the case made by the evidence is: The Millers' National Insurance Company was indebted to the Colorado Milling & Elevator Company in a sum not exceeding \$10,000, for losses sustained by fire. The exact amount had to be found and settled. For the purpose of fixing the amount, the insurance company employed and sent an expert in the business. The fixing of the amount of loss and its proper distribution pro rata among the different companies interested were a necessary and indispensable preliminary to payment of the debt. The other companies had appointed a committee to investigate and ascertain the loss. Such committee had no power to finally determine the loss and provide for payment. Its conclusions were only advisory, and became operative if adopted by the principals. Consequently, its duties were only clerical, to arrive at a basis upon which an adjustment could be had. The fact is established by the evidence that there was no adjustment of any losses by the committee in this city; that it afterwards took place in the city of Chicago. The language of the statute is: "It shall be unlawful for any person * * * or to adjust any loss or in any manner either directly or indirectly, to aid in the transaction of the business of insurance with any such company," etc. The conviction in this case could only have been had under

the clause prohibiting adjustment: (1) The offense, by the words of the statute, as in all other criminal and penal acts, must have been a completed offense; the adjustment must have been made. (2) Taking the evident intention of the legislature and the construction of the statute as given by the learned attorney general, in order to be a violation of the statute the transaction must have been with the assured,—a dealing in connection with the insurance. There is no evidence whatever of any attempt at settlement or adjustment by appellant with the company that had suffered the loss. To make it an offense within the purview of the statute, the transaction must have been with the company. It was the only person who could do the business and make a contract of adjustment. The committee with which appellant met was powerless to adjust without the concurrence and agreement of the insured. Consequently no offense was established. If the law is to be construed against the people of Colorado, and insurance companies indebted to its citizens prohibited from paying, the expressed intention of the act—to protect the citizens of the state—would be perverted, and the citizen injured, instead of protected. I can see no good legal reason why an insurance company owing a debt to a citizen should be any more restricted in its right to send an agent to ascertain the amount, preparatory to payment, than any other debtor. Any construction of the statute that would have that effect would violate public policy and fundamental law, and be void.

I do not believe the construction put upon the statute in this case was within either the intention or spirit of the act, and the conviction cannot be sustained. Appellant was not the agent of the Chicago company. By reason of his technical knowledge and ability in his particular department, he was employed by any and all companies needing him. The calling, with him, was his business and profession. Being a legal business, he had a right to follow it in any state where his employment called him,—a right declared and guaranteed by the constitution of the United States; and any law abridging or restricting that right would be void. Hundreds of authorities in support of the general proposition might be cited, but see, as to legislative power and limitations, *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 4 Sup. Ct. 652; *Taylor v. Porter*, 4 Hill, 140; *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *In re Jacobs*, 98 N. Y. 98; *Live-Stock, etc., Ass'n v. Crescent City Live-Stock Landing Co.*, 1 Abb. (U. S.) 388, Fed. Cas. No. 8,408; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *People v. Marx*, 99 N. Y. 377. That appellant was not an agent of the Chicago company for any purposes prohibited by the statute, see *Weed v. Insurance Co.*, 116 N. Y. 106, 22 N. E. 229;

Insurance Co. v. Wilkinson, 13 Wall. 222; *Pechner v. Insurance Co.*, 65 N. Y. 207; *Marvin v. Life Ins. Co.*, 85 N. Y. 283. *People v. Gilbert*, 44 Hun, 522, was a case parallel with the one under consideration, construing a statute identical in its provisions. It was then held, "That, in adjusting the loss, the agent was not transacting the business of fire * * * insurance in the state, as those words were used in the statute"; "that the adjustment of a loss is merely a means of ascertaining the amount of an admitted indebtedness; and that the legislature did not intend to prohibit such adjustments by uncertified agents of fire insurance companies of other states and foreign countries, where there appeared to be nothing unlawful in the contract out of which the indebtedness had arisen." In the opinion, the learned court says: "Foreign insurance corporations were not to be permitted to come here into our own territory, and solicit business and take risks, unless they would submit to certain conditions imposed for the benefit of those who might deal with them. If they make legal contracts elsewhere, however, relating to property in this state, it is not an advantage, but an injury, to the New York property owner to prohibit them from fulfilling such contracts here. Indeed, there might be some question how far the power of the legislature extends in this direction. So that, if we consider the evident object sought to be attained by the statute, it would seem that the adjustment of a loss and indebtedness is not within purview of the prohibition, which was intended, not as a protection to New York insurance companies against outside competition, but as a safeguard to those seeking insurance in outside companies represented within the state." That contracts of insurance made out of the state by correspondence, as in this case, upon property in this state, are valid, and can be enforced, see *Lamb v. Bower*, 7 Biss. 372, Fed. Cas. No. 8,009, and cases cited.

The judgment of conviction must be reversed, and cause remanded. Reversed.

(6 Colo. App. 306)

MCGONIGLE et al. v. KLEIN.

(Court of Appeals of Colorado. May 13, 1895.)

BUILDING CONTRACT — PARTIAL ABANDONMENT — RECOVERY ON QUANTUM MERUIT — RESCISSION OF CONTRACT.

1. A contractor who has abandoned work for which he contracted cannot recover on a quantum meruit for the part done by him unless the contract was rescinded, or its complete performance was rendered impossible by the wrongful conduct of defendants.

2. The fact that the owner of a building, upon the statement by a contractor that his failure to prosecute the work was owing to his inability to get mechanics, employed extra men himself, does not show a rescission of the contract by the owner nor cause for rescission by the contractor.

Error to district court, Pueblo county.

Action by Henry Klein against James A.

McGonigle and Charles E. Gast to recover on a quantum meruit for services performed under a contract with McGonigle and to enforce a lien against the property of Gast. From a judgment for plaintiff, defendants bring error. Reversed.

Charles E. Gast entered into a contract with McGonigle by which the latter agreed to build for the former a residence according to plans of architects, as cheaply as it could be well constructed; he to receive as compensation 10 per cent. upon the cost of the building, Gast to pay the bills and contracts of McGonigle. The contractor, McGonigle, and defendant in error, as a subcontractor, entered into a written contract, the material part of which, for the purposes of the decision, was as follows: "That the said party of the first part, for and in consideration of the payments to be made to him by the said party of the second part as hereinafter provided, does hereby covenant, contract, and agree to perform all labor and furnish all material to construct the galvanized iron cornices, casting, ridge roll, terminals, finals, ventilators, skylight, downspurts, gutters, valleys, flashings, oriel window, and slate roofing on residence at corner of Eighteenth street and Greenwood avenue, Pueblo, Colorado, for Charles E. Gast, owner; all work to be done in a first-class manner, and to be agreeable to the plans, drawings, and specifications made by Sprague & Newell, architects, in a good, substantial, and workmanlike manner, to the satisfaction of and under the direction of the superintendent. And said party of the first part also does agree to find, provide, and furnish such material of such kinds, qualities, and descriptions as shall be fit, proper, and sufficient for completing and finishing all the work or works mentioned. All the work to be completed in twenty-six working days from the time the building is ready. Time to be extended only in case of a general strike. And said party of the second part, for and in consideration of said party of the first part strictly performing the covenants and agreements as above specified, by and at the time mentioned, and to the entire satisfaction of Sprague & Newell, superintendents, does hereby agree to pay to the said party of the first part the sum of eleven hundred and fifty-five (\$1,155.00) dollars, on certificates of superintendents, as the work progresses, to wit; the slate to be paid for when delivered upon the ground, balance when contract is completed and accepted." On the 11th or 12th of August Klein commenced work. Work was not properly prosecuted with an adequate force of laborers, other parts of the building being delayed. The time for the completion of the contract expired, also additional time passed, and the work was neither completed nor vigorously prosecuted. Two or three times he was notified and required to put on a greater force, and complete it, which he failed to do, giving as a reason that he could not get "slaters."

The testimony of W. B. Lepper, superintendent for the architects, was as follows: "I gave him verbal notice, in the presence of Thomas Mooring, that the building was ready for him to begin work, which he did in a day or two. After beginning work, he was very dilatory about it, and had only one man, besides himself, for some days. He did not proceed with his contract with any degree of promptness. I told him every day that he must put on more men, and push his work faster, but his excuse was that he could not find the men to put on. The condition of the work was such that he could have proceeded more promptly, and finished up his job. That work was ready and waiting for him all the time. His delays retarded the other parts of the work on the house, and the work that he did was not done in a good and workmanlike manner. It was far from being first class. Additional slaters were hired and put on the work, and this was necessary because Klein would not do anything of the kind, and his contract time of twenty-six working days had already expired, and the work was not half completed. He was notified by me several times that I would have to put on men to do the work if he did not proceed faster. When these additional slaters were put on the work, Klein then abandoned it entirely with his men and tools. He took part of the tools away the night before, and was on another job the next morning. He did not show up at the building that morning with his men." McGonigle, the contractor, procured slaters and put them at work. In regard to subsequent transactions, there was no important controversy as to the facts. Mr. Klein and Mr. Gast had an interview immediately after the slaters were put on, in which Gast informed him that he wanted the roof slating finished; wanted him to do it under his contract; that he could keep the new men or not, as he pleased; that he did not care what slaters he employed, if he finished up the job. Klein complained of the employment of the men, and would not continue his work unless Gast paid the new men at his own expense, amounting to \$65, which Gast declined to do. Klein abandoned the work, and removed his tools. \$650 had been paid on account of the contract, which would have left, had the contract been completed, \$505. Klein claimed on a quantum meruit, for labor performed, \$1,075; brought suit for \$425 against McGonigle and Gast; and filed a petition for a lien upon the building against Gast for the same sum. Gast completed the Klein contract work at an expense of \$192 in excess of the contract price with Klein. McGonigle and Gast filed answers setting up the facts, alleging nonfulfilment and abandonment of the contract by Klein, and Gast filed a cross complaint for the excess of \$192. The case was tried to the court without a jury. The court held that the plaintiff could recover on a quantum meruit, gave judgment

against McGonigle for \$166, and decreed a lien against the property of Gast for the same amount. Both parties appeal to this court.

Chas. E. Gast and H. A. Dubbs, for plaintiffs. Betts & Vates, for defendant.

REED, P. J (after stating the facts). The court erred in holding that a recovery could be had upon a quantum meruit for a part of the contract work. The contract was in writing, entire. In order to entitle the plaintiff to recover at all he must have shown either performance or that the contract had been rescinded or that the performance was rendered impossible by the wrongful acts and conduct of the defendants. On establishing either of the two latter facts, a quantum meruit recovery could have been had, not otherwise. Neither of these propositions was established by the evidence. Klein having failed to prosecute his work and complete it according to the terms of the contract, and giving as a reason his inability to get skilled mechanics, made the employment of the extra men by the owner a necessity. The act of employment was not rescission on the part of the owner nor legal cause for rescission by the contractor. The wages of the men employed, or the excess over the prices paid by the contractor, were trifling, and could have been readily adjusted. Klein's contention was that Gast should pay the entire wages, without cost to him, while he should receive the benefit of their labor. Upon the refusal of Gast, he abandoned and withdrew. The claim of Klein was trivial, technical, and inequitable. The key to the whole matter appears in the testimony of Klein. He said, "I took the whole job at \$1,155, and very soon discovered that I had taken it too low;" and it is evident, from all the evidence in the case, that he was seeking some legal excuse for abrogating the contract. The entire testimony shows that Gast did not wish or consider the contract of Klein at an end, but insisted upon its performance, and that what was done in securing help was to assist in its completion when Klein had frequently stated his inability to secure men. The authorities are conclusive and unanimous that, under the circumstances of this case, no recovery upon a quantum meruit or decree of a lien could have been had. 2 Pars. Cont. §§ 678, 679; Davis v. Hubbard, 41 Wis. 408; Bloomer v. Bernstein, L. R. 9 C. P. 588; Morgan v. Bain, L. R. 10 C. P. 15; Malbon v. Birney, 11 Wis. 107; Palm v. Railroad Co., 18 Ill. 217; Sickels v. Pattison, 14 Wend. 257; Phelps v. Sheldon, 13 Pick. 50; Planche v. Colburn, 8 Bing. 14; Goodman v. Pocock, 15 O. B. 576; U. S. v. Behan, 110 U. S. 339, 4 Sup. Ct. 81. That there could be no lien decreed, see Kinney v. Sherman, 28 Ill. 520; Bank v. Dashell, 25 Grat. 616; Vail v. Meyer, 71 Ind. 159; Grogan v. Mayor, etc., of N. Y., 2 E. D. Smith, 693.

It is evident that the court misapprehended the law controlling the case, and the judgment and decree of a lien against the property must be reversed. I am clearly of the opinion that Gast was, under the evidence, entitled to a judgment upon his cross complaint for the damages shown to have been sustained by the failure of Klein to perform his contract. The judgment and decree reversed. Reversed.

(6 Colo. App. 211)

WEBB v. JACKSON et al.

(Court of Appeals of Colorado. May 13, 1895.)

INHERITANCE BY ADOPTED CHILD.

Where, at the time of an adoption, there was no act relating to the adoption of children, the person adopted does not, by an act making him the heir of one of his adopted parents, thereby become entitled to inherit from the other.

Error to district court, Boulder county.

Action by Mary Adella Webb, as heir of Mary C. Moore, against Robert Jackson and others. From a decree for defendants, plaintiff brings error. Affirmed.

Chas. M. Campbell, for plaintiff in error. George Rogers, O. E. Jackson, and George F. Dunklee, for defendants in error.

BISSELL, J. The right to inherit property in Colorado is wholly a matter of statute. The subject of the descent and distribution of estates is controlled by legislative enactments. To determine whether, in any given case, a person is entitled to a distributive share of the decedent's estate, the court must first consider the relationship of the claimant to the decedent, and then decide the force and effect of the statute on which the claimant's rights depend. In 1860, Robert A. Moore and Mary C. were husband and wife, and residents of the county of Boulder. Prior to this date, Robert McFarland and his wife were neighbors and residents of the county until Robert was killed, in 1864, at Sand Creek. He died leaving two children, a boy, and a girl named Mary Adella. About the date first named, Moore and his wife took the girl, Mary Adella, into their family, and she became, so far as their acts and her treatment were concerned, their child by adoption, and lived with them until Robert Moore died, in March, 1886. At his death Robert left considerable property, on which his widow administered, and of which, so far as we are able to gather from the record, Mary Adella received her proportion. Of this fact we are unable to speak definitely, but it is an unimportant consideration. During Robert's lifetime, and probably on his application, the Colorado legislature passed an act to change the name of Mary Adella McFarland to Mary Adella Moore, and by the second section of the act gave her the rights of inheritance by the following specific provision: Section 2: "That the said Mary Adella Moore shall be entitled to in-

herit the same interest in the estate, real and personal, of the said Robert A. Moore, in the same manner as if she were the daughter and natural heir of the said Robert A. Moore." There were other provisions in the act, but this is the only one which we must construe. The act took effect from the date of its passage, which was February 11, 1870. The child continued to live in Robert Moore's family, and to be known by his name until and after his death, and until the death of Mary C., his wife, at a later date. On the death of Mary C. she left a will, which disposed of her property, giving it to certain named legatees, of whom Mary Adella was not one. The will was filed for probate, and, on the hearing, Mary Adella filed her claim asserting her heirship as the daughter of Mary C., and as such claimed an interest in the property. Her claim was rejected, and from the action of the lower court affirming the distribution of the property according to the provisions of the will Mary Adella prosecutes this error.

The whole question is in a nutshell, and was clearly foreshadowed by the opening paragraph of the opinion. Eliminating all consideration of lineal or collateral descent or matters of sex, it was universally true at the common law that the right of inheritance was dependent upon the blood relationship of the one who claimed to be the heir of the deceased ancestor. It is impossible to give to the blood of a child, who is brought into the family by agreement or adoption, inheritable qualities. While the learned research of counsel has sought to find confirmation of a different principle by apt quotations from that masterful delineator of the passions of the human heart, who makes Orlando say:

"I am more proud to be Sir Rowland's son,—
His youngest son,—and would not change that
calling
To be adopted heir to Frederick,"

—he has apparently been unable to put his finger on any statute which would make Mary Adella the heir of Mrs. Moore. We must therefore conclude that in this state there was no act providing for the adoption of children prior to the enactment of 1876, which is found in Gen. St. 1883, c. 1. At the time, then, of the passage of the act, first referred to, there was no law in force in Colorado which provided for the adoption of children. The only other statutes bearing on this subject are the general statutes of descent and distribution. It must be conceded the claimant did not bring herself by description or proof within the terms of those general enactments. It therefore follows Mary Adella was not the heir of Mary C. Moore, either by reason of any adoptive act on the part of Mary, or by virtue of any general statute regulating the distribution of the estates of decedents. Thus far the case is clearly brought within the scope of the authorities which hold that, to establish heirship under acts providing for the adop-

tion of children, the enactments must be looked to, to ascertain the rights of the claimant. *Furgeson v. Jones*, 17 Or. 204, 20 Pac. 842; *Ex parte Clark*, 87 Cal. 638, 25 Pac. 967; *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. 907; *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. 902; *Estate of Stevens*, 83 Cal. 322, 23 Pac. 379.

This doctrine has been carried in other cases to a still greater limit than that expressed in these decisions, which only concern the general right of adoption, and the general right of the adopted child, where the procedure is had under statutes expressly providing for the transmission to an adopted child of the right of inheritance. Some of the cases clearly hold a child may be adopted by one parent and not by another. The rights thus acquired would be simply rights in the estate of the adopting parent, and would leave the right of inheritance, as to the nonadopting parent, wholly unaffected by the act of adoption. These cases are equally conclusive on the proposition that where the adoption is under the statute of one state, and the parents ultimately remove to another, whose statutes of descent and distribution are dissimilar, the child can acquire no right in property which descends and is to be distributed according to the law in force in place of the newly-acquired residence. They likewise go so far as to hold that the right of inheritance only extends to the property of the parents who may die leaving property, and gives to the blood of the adopted child no such inheritable quality as to make the child a sister or a brother of the children of the deceased parents, with the ordinary right of inheritance which would proceed from that relationship. The right of inheritance in such cases is fixed solely by the act itself. *Estate of Sunderland*, 60 Iowa, 732, 13 N. W. 655; *Schafer v. Eneu*, 54 Pa. St. 304; *Com. v. Nancrede*, 32 Pa. St. 389; *Keegan v. Gernaghty*, 101 Ill. 26; *Barnhizel v. Ferrell*, 47 Ind. 335; *Reinders v. Koppelman*, 68 Mo. 482.

Under these well-settled principles, it only remains to construe the act of the legislature of 1870, which undertook to give to Mary Adella certain rights as the adopted child of Robert A. Moore. A recurrence to the provisions of that act unmistakably shows that the right of inheritance which the legislature gave to Mary Adella was the right to inherit from Robert A. Moore, and as the daughter and natural heir of Robert. There was no attempt to make her the natural heir of Mary, the wife, or to give her any inheritable rights as her daughter. We cannot extend the act. She was thereby made the daughter and heir of Robert, but she was not thereby made either the heir or the daughter of Mary, or given any rights of heirship as such. It therefore follows that she was not entitled to any distributive share of Mary's estate. Mrs. Moore died

leaving a will, which disposed of her property, and did not name Mary Adella as a legatee. She took nothing by the terms of the will. She was without inheritable blood, and her claim was correctly adjudged against her. The judgment of the court below accorded with the law, and will accordingly be affirmed. Affirmed.

(6 Colo. App. 319)

FLORMAN v. SCHOOL DIST. NO. 11, EL PASO COUNTY.

(Court of Appeals of Colorado. May 13, 1895.)

MECHANIC'S LIEN—SCHOOL DISTRICT.

A school district is not the owner of school property, within Sess. Laws 1889, pp. 247-253 (Gen. St. 1883, pp. 662-669), providing for a mechanic's lien in favor of contractors and subcontractors on the property of the owner.

Error to district court, El Paso county.

Action by Louis Florman against school district No. 11, in El Paso county, to enforce a mechanic's lien, and for judgment against Groves & Hackett on a contract. Judgment was given against Groves & Hackett for the amount of plaintiff's claim, and in favor of the school district on a demurrer to the complaint. From the judgment sustaining the demurrer plaintiff brings error. Affirmed.

Arrington & McAlinney, for plaintiff in error. Colburn & Dudley and G. W. Musser, for defendant in error.

THOMSON, J. This is a suit to enforce a mechanic's lien. The complaint alleges the organization of the school district defendant under the laws of this state relating to schools; a contract between it and the defendants Groves & Hackett for the construction of a schoolhouse, which reserved in the district the right to retain out of the money payable to the contractors the amount of any lien or claim chargeable to them, and for which the defendant might be made liable; the completion of the building and its acceptance and use by the school board; the furnishing of material for the building, and the performance of labor upon it by the plaintiff of the value of \$1,600, in pursuance of a contract between him and Groves & Hackett; the filing by the plaintiff of his statement of lien, in conformity with law; the retention by the school district of \$12,000 of the money due Groves & Hackett on their contract,—and prays judgment against Groves & Hackett for the amount due, and a decree establishing a lien upon the school premises. A demurrer by the school district to the complaint was sustained, judgment was entered in its favor upon the demurrer, and judgment given against Groves and Hackett for the amount of the plaintiff's claim. The plaintiff brings the case here, and assigns for error the ruling upon the demurrer.

The only question for determination is whether, by virtue of the mechanic's lien law

of this state, a lien can be acquired or enforced for labor and materials furnished to a school district in the erection of a schoolhouse. Section 1 of the act concerning mechanics' liens, in pursuance of which the statement in this case was filed, provides that whoever shall do any work or furnish any materials by contract, express or implied, with the owner of any land, his agent or trustee, for the construction, enlargement, alteration, or repair of any building or other structure upon such land, or in making any other improvement or in doing any other work upon such land, shall have a lien upon such land, building, structure, or other improvement for the amount and value of the work done or material furnished, to the extent of the interest or claim of the owner at the time of the commencement of the work, or furnishing of the materials. It also provides that, for the purposes of the act, any person having an assignable, transferable, or conveyable interest shall be deemed an owner. Subsequent sections provide for the acquisition of liens by subcontractors, the effect of which upon the property is the same as that of liens of original contractors. The lienor, upon the establishment of his claim, is entitled to a judgment against the party personally liable to him and to a decree establishing his lien upon the property, for the satisfaction of which the court shall cause the property to be sold as in the case of foreclosure of mortgages. Sess. Laws 1889, pp. 247-253; Gen. St. 1883, pp. 662-669. The right to a mechanic's lien has no existence, except by virtue of the statute. While a liberal construction should be given to its provisions, to the end that the purposes of its enactment may not be defeated, still its scope cannot be enlarged by attaching to the language employed a forced or unusual meaning. The rights and remedies of a subcontractor are, to a certain extent, measured by those of the original contractor. The foundation of the right of either to a lien is the original contract, and if that is not such as the statute contemplates, and cannot, therefore, be made the basis of a lien in favor of the original contractor, a contractor under him is entitled to none. The original contract must be made with the owner of the land upon which the building is erected, or with some person authorized to act for him, and the resultant lien is coextensive with his interest or claim in the property. An owner is one who has dominion over that which is the subject of the ownership. He has the right to make such use of it, consistent with the rights of others, as he may see fit. The ownership may extend to the entire thing, or may be limited to an interest in it; but whatever is the subject of the ownership, it is held by the owner for his own individual benefit. For the purposes of the act, an assignable, transferable, or conveyable interest or claim in the thing constitutes ownership, but the right to assign, transfer, or convey resides in the person having the interest or

claim, to be exercised at his pleasure, so that his relation to the interest or claim is that of "owner" under the general definition of the term. It therefore becomes necessary to inquire whether the relations sustained by a school district to the school property is that of owner. The education of the children of the state is a duty which devolves upon the state government. Article 9 of the constitution provides for a general system of public schools, the details to be supplied by legislation. The administration of the laws in relation to schools is confided to state officers, county officers, and district officers. A school district is a subdivision of the state for educational purposes. The several officers charged with the supervision of the schools, from the state board of education down to the directors of the school district, are merely the instruments of the state government, chosen for the purpose of effectuating its policy in relation to schools. The duties which they perform are prescribed by state law. The property which may be acquired for the purposes of the school, the manner of its acquisition, and the uses to which it shall be applied, are all regulated by legislative enactment pursuant to the constitution. No sale of the property, or disposition of the proceeds, is valid unless it is authorized by the laws of the state. The school district is created as a means for the more convenient and effective carrying out of the educational policy of the state. The entire control of schools and school property is in the state, to be exercised as it may see fit, subject to the requirements and restrictions contained in the constitution, and school officers and school districts are merely the agencies through which it acts in the performance of duties with which it is charged by that instrument. By the terms of the statute all school property within the district is held by the school board in trust for the school district, for the benefit of the school, and the school is a state institution. We do not think that either the school board or the school district is, within any definition of the term, the "owner" of the school property; and, in our opinion, the provisions of the mechanic's lien law cannot be applied to public school buildings. See *Thomas v. School Dist.*, 71 Ill. 283. But it does not follow that the plaintiff is without a remedy. He has recovered judgment against his immediate contractors. A school district is a quasi corporation, and not subject to process in garnishment; but if the board has money in its hands belonging to Groves & Hackett, and the plaintiff is unable to realize anything upon his judgment, the money can be reached by a proceeding in equity. A court of chancery will subject property and funds to the satisfaction of a judgment, when they cannot be reached by legal process, and the judgment cannot otherwise be satisfied. *Pendleton v. Perkins*, 49 Mo. 565. The judgment will be affirmed. Affirmed.

(6 Colo. App. 199)

HOCHENAUER v. HILDERBRANT.

(Court of Appeals of Colorado. May 13, 1895.)

LIABILITY UNDER LEASE—PARAMOUNT TITLE.

Where a lease stipulated that the lessor did not covenant against disturbance by the holder of a paramount title, and the lessee was not disturbed in his possession during the term, it is no defense, in an action for the rent, that the title has been adjudged in a stranger.

Appeal from district court, Pueblo county.

Action by Julius Hilderbrant against Joseph Hochenauer for rent. From a judgment for plaintiff, defendant appeals. Affirmed.

H. P. Vories and Jas. W. Coulter, for appellant. Betts & Vates, for appellee.

THOMSON, J. Prior to April 17, 1890, William S. Jackson and others were the owners in fee of about 160 acres of land in and near the city of Pueblo. A patent of the United States to their grantor for the land had been issued in September, 1870. The land was unoccupied by the owners, and a number of squatters had settled upon it, who were occupying it on the date first mentioned. Among these was Plus Lutz, who had a building upon it, a portion of which appears to have been used for the purposes of a saloon. On that date by an agreement in writing, executed by Lutz as party of the first part, and the appellant, Hochenauer, party of the second part, Lutz leased to Hochenauer the building, together with the saloon, fixtures, furniture, and all personal property in the building, except the personal effects of the lessor, for the term of one year from the date of the agreement; in consideration of which lease the lessee covenanted and agreed to pay to the lessor, as rent for the premises, \$130 per month for the first six months of the term, and \$85, per month for the residue, and also agreed to surrender possession of the premises to the lessor at the expiration of the term. The agreement of lease concluded with the following clause: "The said first party does not guaranty or covenant for the possession and enjoyment of said premises against any disturbance from paramount title." The appellant took immediate possession of the premises under his lease, and continued in such possession until the 8th day of May, 1891. An action was brought by Jackson and his co-owners against the squatters to recover possession of the land. Whether the suit was commenced before or after the date of the lease does not appear, but the appellant was not a party to it. The result of the suit was a finding that the title was in the plaintiffs, and a judgment in their favor for possession, and for costs. The date of the rendition of the judgment was December 23, 1890. Hochenauer paid rent until February 4, 1891, when he refused to make further payment. Lutz sold and assigned his claim for the residue of the rent to appellee, who brought this suit to recover it. The answer of the defendant

sets up the judgment in ejectment, and avers that he had attorned to the ejectment plaintiffs, and held the premises as their tenant from December 23, 1890, until the expiration of the lease. The defendant testified that he never paid rent for the premises to any person except Lutz; that he was not disturbed in his possession of the premises during the time he occupied them; and that no rent was ever demanded from him by the ejectment plaintiffs, or by any person other than Lutz. He said that he had an understanding or agreement with Mr. Jackson that was satisfactory to him, but what it was he did not state. Mr. Lutz testified that after the judgment in ejectment, himself and Mr. Tooke, the agent of the owners, called on the defendant in relation to the rent, and that Tooke then told the defendant that the owners had no claim on him for rent, and that he might pay it to Lutz. This statement was not denied by the defendant. The court directed the jury to find a verdict for the plaintiff, which was done, and judgment entered accordingly. We are unable to discover anything in the record which will enable the defendant to escape the payment of this claim. He went into possession under an agreement of lease in which he covenanted to pay rent to the lessor during the term and had the unmolested enjoyment of the leased property during the entire period. His reason for resisting payment is that the title was adjudged to be in parties who were strangers to the lease, but that fact alone is not a defense. An eviction, actual or constructive, must be shown. A tenant is not permitted to controvert the title under which he was let into possession, when that possession has been undisturbed, and he has enjoyed the full benefits of his contract. His allegiance is due to his landlord, and he cannot set up against him title in a stranger, unless through that title he has been divested of the possession which he acquired by the demise. 1 Wood, Landl. & Ten. § 232; Hawes v. Shaw, 100 Mass. 187; Vernam v. Smith, 15 N. Y. 327; Tilghman v. Little, 13 Ill. 239; Milsap v. Stone, 2 Colo. 137; Hammond v. Rose, 11 Colo. 524, 19 Pac. 466. From the concluding clause in the lease it would appear that the real condition of the title was understood by both parties, and that the defendant took the premises subject to the contingency of being expelled by the owners of the paramount title. He was content to take whatever right of possession his lessor could give him, and in consideration of that covenanted to pay the rent. He occupied the premises under his lease for the full term, without disturbance from any quarter. No claim or pretense of claim was made against him hostile to his obligation to his lessor, and justice requires that he should perform the agreement in consideration of which the possession was given him. The court properly directed a verdict for the plaintiff, and the resultant judgment will be affirmed. Affirmed.

(6 Colo. App. 202)

TATE et al. v. PEOPLE, to Use of DEWEES. (Court of Appeals of Colorado. May 13, 1895.) CORONER ACTING FOR SHERIFF—WHEN PROPER—ACTION ON SHERIFF'S BOND—FAILURE TO PAY OVER MONEY—DEFENSES—GARNISHMENT OF DEPUTY.

1. Gen. St. 1883, § 612 et seq., providing that in certain cases the coroner shall act as sheriff, does not authorize the coroner, upon an execution issued to him, to serve summons in garnishment upon a deputy sheriff.

2. The fact that money collected on execution was garnished in the hands of a deputy sheriff is no defense in an action against the sheriff therefor by the execution creditor.

3. Where a sheriff's bond was conditioned merely that he would turn over all moneys, etc., that would come into his hands as such officer to his successors in office, a suit cannot be maintained thereon by one to whom the sheriff failed to turn over moneys collected on an execution.

4. A denial in an answer that a judgment was assigned for a valuable consideration is a negative pregnant, which admits the assignment, but denies the sufficiency of the consideration.

Appeal from district court, Prowers county.

Action by the people of the state of Colorado, to the use of Thomas B. Dewees, against F. M. Tate and others, on Tate's official bond as sheriff of Prowers county. From a judgment for plaintiff, defendants appeal. Reversed.

C. C. Goodale, for appellants. D. McCaskill, for appellee.

THOMSON, J. This is a suit upon a sheriff's bond. The defendant F. M. Tate was in November, 1891, elected sheriff of Prowers county, and before entering upon the duties of his office executed to the people of the state of Colorado a bond in the penal sum of \$6,000, with the defendants James Graham, Martin Graham, and C. H. Frybarger as sureties, which was approved as the statute requires. During the November term, 1891, of the district court of Prowers county, Edith P. Craddock recovered a judgment in that court against John E. Godding, which, as is alleged, was assigned in writing to the relator for a valuable consideration. The relator caused an execution to be issued upon the judgment to the defendant Tate as sheriff, who thereupon caused to be collected from the execution defendant, upon the execution, \$518.36, which he failed and refused to pay to the relator. One of the defenses is that the money was collected by C. D. Baldwin, the undersheriff, and that the money was garnished in his hands by the State Bank of Rocky Ford, upon a judgment recovered by it in the county court of Otero county, against Edith P. Craddock, for \$586.25. The summons in garnishment was served upon Baldwin by J. A. Woodcock, the coroner of Prowers county, to whom execution upon the judgment had been issued and directed. To the interrogatories submitted, Baldwin answered that he had in his possession and under his control \$518.36, which he had collected upon the execution issued in the case of Craddock v. God-

ling, and judgment was rendered against him upon his answer. He thereupon paid to the coroner the amount of the judgment.

At the trial of this cause, to prove the assignment to the relator, a witness was introduced who testified that he had a limited acquaintance with the handwriting of Edith P. Craddock, and that from that acquaintance he believed the signature to the assignment to be hers. It was objected that he had not shown himself qualified to testify as to her signature, but the objection was overruled. The same objection is urged here. We think the witness testified to a sufficient acquaintance with the assignor's handwriting to admit his testimony, and to require counter proof from the defendants. But the specific denial in the answer relating to the assignment is not so framed as to require proof upon the subject. The defendants deny that Edith P. Craddock, for a good and valuable consideration, sold and assigned the judgment to the relator. This is a negative pregnant. The utmost effect it can have is to admit the assignment, and deny the sufficiency of the consideration, but, in our opinion, the question of consideration is immaterial. If the proceedings in garnishment set up in the answer would constitute no defense as against the judgment plaintiff herself, then they are unavailing as against her assignee, whether the assignment was with or without consideration.

A discussion of the question, which would otherwise be important, to what extent, under the laws of this state, a sheriff may be subject to garnishment in respect of money held by him in his official capacity, is unnecessary, because in this case the sheriff was not garnished.

First. The execution upon which the garnishment was made was issued to the coroner, and the summons in garnishment was served by him. A coroner can exercise the powers and perform the duties of the sheriff only in certain specified cases. If there is no sheriff in an organized county, the coroner acts as such until one is appointed or elected. If the sheriff is a party to the case in which the process issues, the writ is served and executed by the coroner. When affidavit is made by a party to an action, his agent or attorney, that the sheriff will not, by reason of partiality, prejudice, consanguinity, or interest, faithfully perform his duties in the suit, the process must be directed to the coroner. Gen. St. 1883, §§ 612-614. There are no other conditions upon which the coroner is authorized to perform any of the duties of the sheriff. The defendant Tate was the sheriff of Prowers county, he was not a party to the case in which the execution issued, and there was no affidavit made that he might not for any cause faithfully perform his duties in the premises. No reason is shown why the execution was not issued to the sheriff. If the money could be garnished in his hands, he

could levy the execution upon it. Where the acts of the coroner in the performance of the sheriff's duties are relied upon in support of a claim or defense, the existence of some one of the statutory conditions of his authority must be made affirmatively to appear. The service by the coroner of the garnishment process upon Baldwin was a nullity, and, as against the relator, the judgment in the proceeding was void.

Second. The summons in garnishment was not served upon the sheriff, and he was not a party to the garnishment proceeding. The answer of Baldwin set forth that the money was collected by virtue of an execution issued upon the judgment recovered by Edith P. Craddock, and, while he answered that it was in his possession, yet, as a matter of law, it was not. The undersheriff is a general deputy, appointed by the sheriff to hold during the latter's pleasure. The sheriff is responsible for his default or misconduct. His official acts are the official acts of the sheriff, and are done in his name. Money collected by the undersheriff upon execution is in law in the possession of the sheriff, and it is the sheriff, and not the undersheriff, who is liable to the creditor for its misappropriation. The sheriff must pay the money over to the execution creditor, and has no right to know any other claimant, unless a lien has, in virtue of some legal process, attached to the fund. As the money is in law in his hands, the lien must fasten upon it in his hands, and he must be a party to any proceeding by which the lien is sought to be created. The garnishment of the undersheriff could not act upon the fund, because in law he neither possessed nor controlled it, and the judgment against him, as garnishee, for the amount, was unauthorized. The rights of the relator, or of his assignor, were in no manner affected by it. *Terwilliger v. Wheeler*, 35 Barb. 620; *Hampton v. Brown*, 13 Ired. 18; *Strickland v. Smith*, 53 Ga. 79; *Murfree, Sher.* § 554. If this were a suit by Dewees against the sheriff alone for a violation of his official duty, the garnishment proceedings would be no defense. They would not excuse him for withholding the money. But the foundation of the action is his bond, and the liability of the obligors upon that instrument is limited by the terms of their contract. The bond in suit is conditioned as follows: "Now, therefore, the condition of this obligation is such that if the said F. M. Tate shall well and faithfully perform the duties and calling of said office according to law, and turn over all moneys, books, and papers that may come into his hands, as such officer, to his successors in office, then this obligation shall be void; otherwise to be and remain in full force and effect." The conditions of the bond required by the statute are that the sheriff shall well and faithfully perform and execute the duties of his office, without fraud, deceit, or oppression, pay over all moneys that may

come into his hands as sheriff, and deliver to his successor all writs, papers, and other things, pertaining to his office, which may be so required by law. Gen. St. § 594. It is the second condition of the statutory bond which applies to money collected by the sheriff, and it is the second condition of the bond in suit which undertakes to direct the disposition to be made by Tate of money received by him as an officer. It requires him to turn the money over, not to the party entitled to it, but to his successors in office, so that the condition was not broken by his failure to pay it to the relator. In fact, payment to the relator would have been a breach of the condition. In order to avoid a breach, he must violate a duty with which he is charged by law. But this suit is upon that bond, and there can be no recovery upon it outside of its terms. It is a practically worthless piece of paper, and why it was accepted and approved as the official bond of the sheriff we are unable to conjecture, but we must take it as it is, and not as it ought to be. The sheriff is personally liable to the aggrieved party for his retention of the money, but this suit, being upon the bond, must fail. The judgment will be reversed. Reversed.

(6 Colo. App. 303)

WALSH v. ALLEN.

(Court of Appeals of Colorado. May 13, 1895.)

ACTION ON NOTE—PARTIES—CHAMPERTY.

1. A person to whom a note has been assigned after maturity is the real party in interest, and may maintain an action thereon.

2. An assignment of a note in consideration that the assignee will pay to the assignor part of the proceeds, when collected by suit, is not champertous.

Appeal from district court, Arapahoe county.

Action by Charles L. Allen against P. Walsh on a note. From a judgment for plaintiff, defendant appeals. Affirmed.

W. T. Rogers, for appellant. Charles L. Allen, in pro. per.

THOMSON, J. On April 11, 1891, the appellant (defendant below), through J. B. Gordon, as his agent, negotiated with one Conroy for an exchange of five town lots, of which the defendant was the equitable owner,—having a contract for a deed to them, with other lots, from the Interior Land & Immigration Company,—and against which there was an incumbrance of \$375, for a stock of merchandise owned by Conroy. Conroy refused to accept the lots, on account of the incumbrance. It was then agreed between the defendant and Gordon that the latter should convey five unincumbered lots owned by him, of equal value with the plaintiff's lots, to Conroy, in exchange for the stock, and that, in return, Gordon should receive a deed for the plaintiff's lots, subject to the incumbrance, and

should be made whole by a note for \$375 to be executed to him by the defendant. Conroy assented to the arrangement, and accordingly received a conveyance from Gordon of his five lots, and turned the stock of goods over to the defendant, who thereupon executed his note to Gordon for \$375, and gave him an order upon the Immigration Company for a deed to five of the lots contracted to the defendant. Upon the order being presented, the company refused to cause the deed to be executed, because its contract with the defendant was for nine lots, to be embraced in one deed, and the making of two deeds would involve an extra expense. The lots were afterwards conveyed to the defendant, and Gordon demanded a deed to them from him, which he refused. The lots have never been conveyed to Gordon. After the maturity of the note, Gordon assigned and transferred it to the plaintiff, Allen, who thereupon instituted this suit upon it. Judgment was given in his favor, and the defendant appealed.

We confess that we are unable to understand the theory of the defense, in so far as it goes to the merits of the controversy. The defendant had the benefit of Gordon's unincumbered lots, upon his agreement to replace them with his own incumbered lots, and to balance the incumbrance with his note for the amount. Gordon gave up his own lots. He never received the defendant's lots. The defendant took the stock of goods, and if he can defeat this action he gets the goods for nothing, and Gordon gets nothing for his lots. This would be a very profitable transaction for the defendant, if we could see our way clear to adopt his theory; but we cannot, because, as we have said, we do not understand it.

Defendant's counsel says that on account of some understanding between the plaintiff and Gordon that a portion of the avails of the note, when collected, are to be paid to the latter, the plaintiff is not the real party in interest, and therefore not entitled to maintain this suit. The legal title to the note vested in the plaintiff by the assignment, and he is ipso facto the real party in interest, within the meaning of the Code. *Gomer v. Stockdale* (Colo. App.) 39 Pac. 355.

Counsel also says that the assignment, by reason of the character of its consideration, is infected with champerty. Upon what principle he considers himself in a position to raise a question of this kind, he does not state. It was not raised in the trial court, and we are not disposed to discuss it. It is sufficient for present purposes to say that the consideration of the note was not champertous. The defendant owes the debt; its payment to the plaintiff will extinguish it; and what the consideration of the assignment was, or whether there was any, is a question in which the defendant has not the slightest concern. *Woodbury v. Hinckley*, 3

Colo. App. 210, 32 Pac. 860; *Welch v. Mayer*, 4 Colo. App. 440, 36 Pac. 613. The judgment will be affirmed. Affirmed.

(6 Colo. App. 279)

NELSON et al. v. BOARD OF COM'RS OF GARFIELD COUNTY.

(Court of Appeals of Colorado. May 13, 1895.)

COUNTIES—CONSTRUCTION OF BRIDGES—LOCATION.

Where counties and municipalities are, within their respective limits, given full power and control, in the one case over highways and in the other over streets and bridges, a county cannot construct a bridge, within a town, only accessible over streets and highways controlled by the town.

Error to district court, Garfield county.

Bill by John Nelson and others, taxpayers, to join the board of county commissioners of Garfield county from constructing a bridge. Bill dismissed, and the taxpayers bring error. Reversed.

Edward T. Taylor and John T. Shumate, for plaintiffs in error. C. W. Darrow, J. L. Hodges, and A. M. Stevenson, for defendant in error.

BISSELL, J. Sundry taxpayers of Garfield county filed a bill to restrain the board of county commissioners from executing and carrying out a contract to erect a bridge across Grand river. Respecting the bill, it is enough to state it contained all the requisite averments to entitle the complainants to maintain their suit, if the essentials were sustained by proof. A mass of testimony respecting the locality of the bridge and the existence of a highway on the southerly side of the river was produced, but the bulk of it may be dismissed from consideration. The whole case turns on the question of the power of the board of county commissioners of Garfield county to build a bridge on the site selected. There are but a few facts essential to the discussion or to the easy apprehension of the case. The proposed bridge was to be erected across the river, and its northerly terminus would be at the foot of Third street in the town of New Castle. On the south side of the river the town had not been platted, but the land was owned by the Glenwood Hot Springs Company. To reach the river a right of way would of necessity have to be purchased, and the approaches to the bridge constructed. The entire bridge would be located in the town of New Castle. Both the approaches would be in the same municipal corporation, and the only access to it in any direction would be over streets or highways controlled by the municipal authorities. The building of the bridge and its approaches, together with the estimated cost to acquire the right of way, would bring the total expenditure very close to thirteen or fourteen thousand dollars, at the very lowest estimate placed on it. A preliminary injunction was

granted, but, on final hearing, it was dissolved, and the bill dismissed. The taxpayers prosecute the appeal.

The evident convenience to the public which would result from the building of the bridge, and the possible necessity for its construction, have led the court to examine the case with considerable care, and to reach its conclusion after much hesitation. The lack of jurisdiction and authority in the board of county commissioners to construct a bridge at the point selected is so thoroughly settled by the current of decisions as to compel us to reverse the judgment. The nature of the corporate authority possessed by a county is not involved in the litigation. The wide difference which exists between powers possessed by a municipal corporation and those which may be exercised by the governing body of a county is recognized in every case where the subject has been considered. The county is organized for governmental purposes, and is in reality part of the state's organization, possessing such jurisdiction and such power as the legislature has seen fit to confer. On the other hand, the municipality, while created under the general law and by virtue of the powers granted by the legislature, is the voluntary act of the inhabitants of the corporation, and, when completed, it may only exercise the delegated powers subject to well-recognized rules of law, which affix a vastly different liability on their exercise. Several state courts have decided where power was delegated to both the county and the municipal authorities, and there was no limitation in the statute on the power of the county board to act within the limits of the incorporated town, their powers would for many purposes be coextensive with the territorial limits of the county, even though they might be exercised within municipal limits. These cases are not very satisfactory. The reasons given are neither persuasive nor convincing, and are not in harmony with the general current of authority. We likewise conclude the decisions of the supreme court of this state are not in line with these cases. Our statutes respecting counties, towns, and cities, so far as we have been able to discover and so far as they have been referred to by counsel, contain no specific provision restricting the powers of boards of county commissioners to such parts of the county as may not be included within the limits of incorporated towns and cities. Yet, if we follow those cases which hold the jurisdiction of towns to be exclusive within the limits of their organization, we can sustain our conclusion. In *re Public Road*, 54 N. J. Law, 539, 24 Atl. 759; *City of Goshen v. Myers*, 119 Ind. 196, 21 N. E. 657; *McGrew v. Stewart*, 51 Kan. 185, 32 Pac. 896; *Peoria & P. U. Ry. Co. v. People*, 144 Ill. 458, 33 N. E. 873; *Clark v. Com.*, 14 Bush, 166; *Gallaher v. Head*, 72 Iowa, 173, 33 N. W. 620; *Tucker v. Conrad*, 103 Ind. 349, 2 N. E. 803; *State v. Jones*, 18 Tex. 874; *Cowan's Case*, 1 Overt. 311; *Elliott, Roads*

& S. c. 19. Much of the argument in these cases is of the ab inconvenienti sort, but of exceeding force and evident utility. It is impossible to concede to boards of county commissioners authority to build bridges and construct roads within the limits of towns without producing an endless confusion and an ultimate conflict. It is a little difficult to apprehend the status of the right to control a bridge built by the county government within a city, or to determine exactly the status of the title to the property. To carry this speculation to any logical conclusion would be idle, but it is suggestive of the difficulties which would arise from the enforcement of any other rule. Many illustrations of the absurdity of the contention could be given, but it is enough to rest our conclusion upon this very substantial current of decisions. The precise question was not before the supreme court in the cases which will be cited, but, in many matters which were essential to their conclusions, the court has declared the law in exact accord with this line. The whole subject is covered by the three chapters of the General Statutes, 23, 95, and 109. Both organizations are clothed with ample power to carry out the declared purposes for which they are organized, and, within their respective limits, are given full power and control, in the one case over highways and in the other case over streets and bridges. This delegation of authority has been held to be entirely within the power of the legislature, and when granted, and exercised under the grant, to be entirely exclusive. *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *City of Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632; *Railroad Co. v. Domke*, 11 Colo. 247, 17 Pac. 777. Those cases concern the power and control which municipal corporations exercise over streets, and the general liability for any failure to care for them. It was concluded municipal corporations were liable for neglect in the discharge of this duty, but the liability was put on the ground that the corporation was invested with the exclusive right to care for its streets, which carried with it a correlative responsibility for any neglect in the discharge of this duty or in the exercise of this power. These conclusions are in entire accord with the doctrine of the other cases which have been cited. We therefore conclude the board of county commissioners of Garfield county were without authority to construct or maintain a bridge within the limits of the town of New Castle, and the appropriation of the county funds to that purpose was such an illegitimate use of the funds of the county as gave a right of action to taxpayers who might be injured by the expenditure. *Crampton v. Zabriskie*, 101 U. S. 601. Further proceedings in this case will not probably alter the essential facts on which the decision rests, but the case will be reversed, and remanded for further proceedings in the court below in conformity with this opinion. Reversed.

(6 Colo. A. 269)

LIGGETT v. BOARD OF COM'RS OF KIOWA COUNTY.

(Court of Appeals of Colorado. May 13, 1895.)

CONTRACTS BY COUNTY COMMISSIONERS.

A contract made with the board of county commissioners at their regular meeting in the first week of January, to act as county printer for that year, is valid, notwithstanding a majority of the board, as it then existed, was to go out of office the ensuing week.

Error to district court, Kiowa county.

Action by C. Frost Liggett against the board of county commissioners of Kiowa county. From a judgment for defendant, plaintiff brings error. Reversed.

O. G. Hess, for plaintiff in error. L. A. Crane and F. E. Torbit, for defendant in error.

BISSELL, J. The affairs of Kiowa county were directed in the year 1891 by three county commissioners, named Sherman, Rusk, and Beal. While these commissioners were in office, Liggett, the plaintiff in error, made a proposition to the board to act as the purchasing agent and printer for the county for two years, at the net price of \$750 per annum. The commissioners accepted the proposition, not as made, but for the term of one year; the contract to go into effect and be binding on the execution by Liggett of a bond in the sum named to guaranty its performance. Liggett apparently acceded to the modification of his proposition, for he executed a bond according to the order of the commissioners, did his work, and got his pay. In the latter part of the year, and in the month of December, Liggett made another proposition to the board, in modification of the one offered in the preceding January, reduced the sum charged to \$700 for the year 1892, and agreed to act as purchasing agent and public printer for that amount. The modification seems to have been the result of a reduction in the appropriation for the year 1892. When the appropriation was made for this purpose for the year 1892, the sum of \$700 was fixed by the county as the amount applicable to this purpose. The board permitted the modification, accepted the proposition as modified, and thereby, so far as can be discovered from this record, agreed with Liggett that, for the year 1892, he should do the county printing and purchase its stationery supplies for the sum of \$700. The board resolved that the bond originally filed should be taken as a bond for the faithful performance of the contract for the ensuing year. We are unable to determine whether this action would render the bond legally operative against the sureties, and permit it to stand as a guaranty for the due performance of the contract. Our attention has not been called to any statute requiring such a bond in order to render an agreement with a party binding on the county, and we do not, therefore, pass upon the legality of the board's action in this

particular. If the statute requires a bond, and what was done did not bind the sureties on the bond executed in the preceding January, it is possible that out of this circumstance there may be a defense to the suit which Liggett has instituted. We expressly leave these questions open, because the case below turned upon a simple proposition. The county pleaded no other defense than a general denial, except that the contract was to continue after the expiration of the terms of office of the commissioners who entered into it. The case was decided on this theory. It will be remembered the modification of the original proposition was made in December. Under the statute, boards of county commissioners are bound to hold their first regular meeting for the year on the first Monday in January. Gen. St. 1883, § 531. At that regular meeting, this board, which was then in office, did what has been stated. What is disclosed by the record would appear to constitute an agreement between the parties, unless, as has been suggested, there be some defense growing out of the acceptance of the bond, or the failure to execute a new one, which is not disclosed. For some reason which does not appear, Beal and Rusk went out of office on the second Tuesday in January, 1892, and were succeeded by Allen and Biddle, who went into office on the second Tuesday of that month. Sherman remained in. How it happened that two commissioners went out we do not know. Under the general scheme of the statute respecting boards of county commissioners, one officer goes out every three years. However this may be, on the 12th of January, Allen, Biddle, and Sherman constituted the board. Some time during that month, and probably the later part of it, Miller, who was the publisher of a rival paper, called the "Leader," offered to do the county's work for the year of 1892 for two-thirds of the fixed rate. This proposition was accepted. The contract with the Chivington Chief, and Liggett, its proprietor, was abrogated, and the board proceeded to contract with Mr. Miller. It is not shown, but we presume, there was a change in the political complexion of the board. Why the Liggett contract was abrogated, and the Miller contract made, the proceedings do not show. The board assumed they had a right to set aside the contract, and had full authority to enter into an agreement with Miller. All these facts were disclosed by the evidence which was received. The plaintiff, Liggett, then undertook to show his losses, and to make the requisite proof to establish them. He offered enough in connection with what was received to make out a cause of action, and entitle him to some recovery. How much we are not able to ascertain. Some of the proof which he offered was not put in proper shape, and did not accord with the rules of evidence which determine the mode of proof, and the kind of evidence which must be offered to

entitle a plaintiff to recover for the breach of a contract. It is not necessary to review the case in this aspect, because the law is well settled as to what damages a party may recover in such actions, and what testimony he must produce to obtain a judgment. Most of the proof which the plaintiff offered was rejected on the ground that since a majority of the board were going out of office in the month of January, 1892, they could not contract with reference to county printing for any portion of the period which would follow the expiration of their term.

This is the only practical proposition which is involved in this hearing,—the only one in reality to which much importance is attached, or to which much time is devoted in the briefs of counsel,—and is manifestly the theory on which the court excluded the testimony. If the court was right, the judgment must be affirmed. If his conception of the law in this particular was erroneous, it must be reversed. There are some authorities in Kansas and Indiana which substantially hold that a board may not contract with reference to matters which must be completed or done after the expiration of the term of the officers who enter into the engagement. The Indiana authorities are not in harmony on this question, and they seem to draw a distinction between contracts which are to be executed within what is termed a reasonable time and those which are to run for so long a period that the courts would regard them as prejudicial to the public's interests, and therefore against public policy and void. With this distinction, a case could easily be conceived which on principle should be adjudged invalid within the rule laid down by one of the Indiana cases. *Board v. Taylor*, 123 Ind. 148, 23 N. E. 752; *Reubelt v. School Town of Noblesville*, 106 Ind. 478, 7 N. E. 206. We do not intend to enter into a discussion of this distinction, because under none of the cases would this contract be adjudged void, as against public policy, because of the time it was to run. It was simply for the year 1892, and, if the board could contract at all with reference to the matter or for that period, the contract would be reasonable, and could not be, as a matter of law, adjudged void because prejudicial to the public interest. But for the going out of office of two of the members, the contract might possibly have been adopted by the board as reorganized on the second Tuesday in January. It is useless to speculate about it, because the board was a new one, and it undertook to repudiate the agreement. It thus becomes a naked question of power on the part of the old board to make this agreement with Liggett. The question of the power of the governing bodies of these quasi corporations has been made the subject of considerable discussion in the books. It is not a matter of argument, so far as concerns the general powers

of the county board to make such a contract. Under our scheme, the commissioners are the governing body, and by statute they are clothed with full authority to make all contracts which are essential to the management of the county's affairs. The status of counties as corporations has been the subject of considerable discussion, and, while they are defined as quasi corporations, it is always conceded that as such they have, to the extent of the powers which are conferred upon them, full authority to act and to contract as may corporations generally. *Stermer v. Board* (Colo. App.) 38 Pac. 839.

Where the officers or trustees of a quasi corporation are empowered to act with reference to any particular matter, it is generally conceded their contract will be valid and binding, even though some part of its performance may be impossible until after the expiration of the term of the officers who may enter into the engagement. *Walt v. Ray*, 67 N. Y. 36; *Gillis v. Space*, 63 Barb. 177; *Silver v. Cummings*, 7 Wend. 183; *Williams v. Keech*, 4 Hill, 168. It does not seem to be possible to hold otherwise under the general rules of law fixing the liability of corporations for the acts of their duly-authorized agents. When it is conceded that a county is a quasi corporation, possessed of certain statutory powers, and a suit is brought on a contract which is evidently within the scope of its power, the county may not escape liability on the hypothesis that its performance could not be completed until after the term of the officers who entered into it. All corporations must act by agents. In one class of cases they are boards of directors, and in the other they are officers elected by the people or appointed by the proper authorities. In whatever way the agents may acquire title to their office, so long as they are properly exercising their powers, the corporations which they represent must be held bound by the obligations into which they lawfully enter. The only exception to this general rule may possibly lie in the direction of the Indiana decisions, when, from the terms and the character of the convention, it can be judicially determined to be void, because against public policy. Whether any other exception would arise if it should be pleaded and proven that the contract was collusively and fraudulently made by the retiring board, to the knowledge of the contracting party who brought the suit, need not be decided. No such case is made by the record. Improper motives may not be imputed to the officers without proof of facts which warrant the inference. The purposes of the officers are not matters for discussion, without direct proof on the subject. *McCormick v. City of Boston*, 120 Mass. 499; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730; *Oglesby v. Attrill*, 105 U. S. 605. The record does not pretend to show the making of the agreement for the

purpose of anticipating action by the new board or to foreclose it on this subject. According to the judgment of the board as it was then constituted, an immediate necessity may have existed to make it. The contract may have seemed one which would best subserve the county's interest. The board was in office; it had full authority to act with reference to all matters which legitimately came before it at that time; and in the absence of any proof showing fraud and collusion, or that the agreement must of necessity be so vitally injurious to the public's interests as to render the agreement void as against public policy, the contract cannot be adjudged invalid because it was to be completed after the term of the majority of the board as it then existed should have expired. The county is a continuous organization. Many contracts can be conceived and suggested which of necessity could not be performed during the term of office of an entire board of county commissioners. To hold contracts invalid because part or all of a board cease to exercise public functions would be to put these corporations at an enormous disadvantage in making the contracts which are essential to the safe, prudent, and economical management of the affairs of a county. The contract was not void, and, on sufficient proof of its execution and its breach, the plaintiff may recover the damages which he can establish. The court erred in holding otherwise, and the case must be reversed, and remanded for a new trial in conformity with this opinion. Reversed.

(6 Colo. App. 289)

CURRAN et al. v. CLIFFORD.

(Court of Appeals of Colorado. May 13, 1895.)

CONTRACTS—PERFORMANCE.

A contract to put a gravel roof on a building, to be done in first-class shape, and guaranteed for a certain time, does not require the personal services of the contractor, so as to prevent his hiring another to do it under his supervision and instruction.

Appeal from Arapahoe county court.

Action by W. H. Curran & Son against M. D. Clifford on a contract. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Thos. F. Ashworth, for appellants.

THOMSON, J. In the latter part of August, 1893, the appellee contracted with the appellants to roof a building for him on Market street, Denver. By the terms of the contract, the roof was to be of gravel, and to be made three-ply. The work was to be done in a first-class manner, and guaranteed by the appellants for five years. The price agreed upon for the job was \$237. Appellants made an agreement with a Mr. Githens to do the work under their supervision, and in conformity with their instructions, for \$154. The appellants had selected the material for the roof, and commenced work, and

Mr. Githens had brought two loads of gravel to be used on the roof, when the appellee ordered the work stopped, saying that he had let the contract to another party, and refused to permit them to proceed further. He gave no reason for this action, except that he objected to Mr. Githens. They accordingly left, and did not return. The appellants brought this action before a justice of the peace to recover the damages sustained by reason of their being prevented from completing their contract, and recovered judgment for \$79. The defendant appealed to the county court. The evidence for the plaintiffs, at the trial there, disclosed the facts as we have stated them, and also showed that the plaintiffs had sustained substantial damage; and upon that evidence the court, at the defendant's instance, gave judgment of nonsuit in his favor. The record does not advise us why the nonsuit was granted. Probably, the court accepted the reason given by the defendant in his motion, which was that the evidence disclosed a contract between the parties requiring the personal services of the plaintiffs, and which was not a contract that could be turned over to somebody else to perform. The evidence does not disclose such a contract, and the work was not turned over to somebody else to perform, except under the supervision and direction of the plaintiffs. Upon the evidence, as it stood, the plaintiffs were entitled to judgment; and, if there was any reason why it should not be given, the defendant should have been required to show it. The judgment will be reversed. Reversed.

(6 Colo. App. 228)

SMITH v. SCHLINK.

(Court of Appeals of Colorado. May 13, 1895.)

JUSTICE OF THE PEACE—JURISDICTION—ACTION INVOLVING BOUNDARIES.

Where one of two adjoining tenants, each, respectively, in possession of land and buildings thereon up to a dividing fence, removes the fence onto the land of the other, an action by the other for damages for the taking of the lands and buildings thereon is not an action in which title or boundaries of lands are in dispute, of which a justice could not have jurisdiction, there being no dispute as to where the fence was, and it makes no difference that plaintiff introduced evidence to show that the true line was where the fence had stood.

Appeal from Arapahoe county court.

Action by Joseph P. Schlink against William H. Smith for damages for the taking of land. Judgment for plaintiff. Defendant appeals. Affirmed.

George F. Dunklee and O. E. Jackson, for appellant. Thos. B. Stuart and Chas. A. Murray, for appellee.

THOMSON, J. On the 15th day of September, 1891, A. P. Campbell, by a written instrument of that date, sold and transferred to Joseph P. Schlink the houses, wharves,

fixtures, and personal property within the inclosure of the Berkeley Amusement & Land Company's grounds at Berkeley Lake, together with a lease of the grounds previously given by the Denver Land & Security Company to John Ellitch, and to the ownership of which Campbell had succeeded. Among the buildings transferred was a building in the shape of an octagon, which constitutes part of the matter in controversy in this case. Schlink had been in possession of the property since the preceding spring, under what arrangement does not appear, but it does appear that he received his possession from Campbell. On the 1st day of April, 1890, the Continental Land & Security Company, successors to the Denver Land & Security Company, executed a lease to James G. Tesch of an irregular, triangular shaped piece of ground, bounded by a row of trees, and described by metes and bounds, adjoining the ground which Schlink received from Campbell. On the 5th day of November, 1891, an assignment from Tesch to William H. Smith was indorsed on the back of the lease. The assignment is limited in its terms, and does not state very clearly what it was intended to transfer, but it seems to be conceded that it gave the assignee the right to occupy the triangular piece of ground. Tesch was in possession of these premises at the time Schlink took possession of the ground and property transferred to him, and remained in possession until he made the assignment to Smith. At the time of Schlink's entry there was a fence between the ground of which he took possession and that occupied by Tesch. The fence followed a row of trees. Schlink's possession extended to the fence, and included the octagonal building of which we have spoken. His right of possession was never questioned by Tesch. Some time in the fall or winter of 1891, during the temporary absence of Schlink, and without his knowledge or consent, Smith moved the fence over upon the ground of which Schlink was possessed, taking possession of a strip of an average width of about 15 feet. The octagonal building was upon the strip which Smith thus transferred to himself, and was afterwards occupied and used by him as a tool house. This action was brought by Schlink to recover damages for the taking of the land and house. It was instituted before a justice of the peace, and went by appeal to the county court, where a trial resulted in a judgment for plaintiff of \$197.50.

There was evidence introduced by the plaintiff tending to show that, according to a survey which he had caused to be made, the fence, as it originally stood, was upon the true line between himself and the defendant; and it is argued in defendant's behalf that therefore the boundaries of land were in dispute, so that the justice had no jurisdiction to hear the cause, and, it having come to the county court by appeal from

the justice, that court was equally without jurisdiction. By the terms of the statute, if, in any action before a justice of the peace relating to real estate, it shall appear that the title or boundaries are in dispute, it becomes his duty to certify the cause and transmit the papers to the district court of the same county. But there was no question of controverted boundaries in this case, within the meaning of the law. The location of the line between the grounds of which the parties respectively were in possession was not in dispute. There was no conflict in the evidence upon that point. It conclusively appeared that when the plaintiff went into possession the two tracts were divided by a fence, and that the plaintiff's possession extended to the fence. The defendant, until he removed the fence, had never been in possession of any part of the ground within the plaintiff's inclosure, nor had the defendant's grantor ever been in such possession. The survey made to show that the true line was where the fence had stood was unnecessary, and the evidence concerning it was immaterial. The plaintiff's right of action grows out of the invasion of a possession which he actually had, and whose boundary, as between himself and the defendant, was the fence. When the defendant removed the fence, he committed a trespass. If he thought he had a rightful claim to the ground which he took, the courts were open for the adjudication of his title; but no title, or claim of title, is a justification of his forcible assumption of possession.

Objection is made to some of the instructions. In so far as they are based on unnecessary evidence, or require a finding upon facts concerning which there was no dispute, they are objectionable, but it is not from the defendant that the objection can come. The court should have instructed the jury that upon the evidence the plaintiff was entitled to a verdict, submitting to them only the question of its amount. By involving that in uncertainty which should have been made certain, the plaintiff's case was imperiled, but the defendant was not hurt. The instructions are not otherwise open to objection.

Rulings of the court upon the admission of evidence are also called in question. Immaterial evidence was admitted for the plaintiff, over the defendant's objection, whose only tendency could be to throw confusion into the plaintiff's case, and in so far benefit the defendant. The rulings were erroneous, but they cannot be questioned by him. Testimony of witnesses as to the value of the house, and as to other facts showing the amount of damage sustained, was objected to in the trial court for incompetency. Whatever else may be said concerning it, it was not incompetent. The grounds of objection taken at the trial are the only ones that can be noticed here. We find

nothing in the record to demand a reversal of the judgment, and it will therefore be affirmed. Affirmed.

(6 Colo. App. 216)

FIRST NAT. BANK OF DENVER v. SCHMIDT et al.

(Court of Appeals of Colorado. May 13, 1895.)

BILL OF LADING—TRANSFER—STOPPAGE IN TRANSITU—PLEADING.

1. As against the right of a vendor to stop goods in transitu, a bank to which the vendee has transferred the bill of lading as security is a holder for value, even though the transfer was for a pre-existing debt, and not for a loan made on the promise of such transfer.

2. The fact that a transfer of a bill of lading to a bank, as security, was after its doors were closed for the day for the purpose of deposit and check, does not affect its right as against the vendor, who stops the goods in transit, though, before its doors are again opened, it learns of the insolvency of the vendee.

3. The facts that a firm was largely indebted to a bank, that collaterals were demanded as security for a further loan, that three days after the making of a loan, on the promise of a transfer of a bill of lading, and one day after the transfer was made, the bank took steps to attach the property of the firm, will not overcome direct evidence that the bank was without knowledge of the firm's insolvency, or of facts which would charge it with such knowledge.

4. A vendor cannot question the right of a bank, to which the vendee transferred the bill of lading of goods sold, to contract as it did with the vendee, this being a question only between the original parties to the contract, or the bank and the government from which it derived its authority.

5. Failure of a bank to allege in its complaint, and to prove, its incorporation, is cured by the allegation of the answer that it was a national bank, organized and incorporated under the national bank act.

Appeal from district court, Arapahoe county.

Action by the First National Bank of Denver against Schmidt & Ziegler for goods claimed by plaintiff under a transfer of a bill of lading, and stopped in transitu by defendants. Judgment for defendants, and plaintiff appeals. Reversed.

John L. Jerome and Thomas H. Hood, for appellant. John T. Bottom, for appellees.

BISSELL, J. Which equity must prevail in a suit between a bona fide transferee for value of a bill of lading and a vendor of goods who attempts to exercise the right of stoppage in transitu has never been doubted since their legal status was defined in the leading case of *Lickbarrow v. Mason*, 4 Brown Parl. Cas. 57, 2 Term R. 63, decided in the house of lords in 1793. In such cases the principal things to be inquired about are the circumstances of the transfer and the means employed by the vendor in his attempts to stop the goods.

For some five or six years prior to the spring of 1892, Boehm & Co. had been large wholesale rectifiers and dealers in spirits. They did business with the First National Bank of Denver. In the course of their deal-

ings they were frequently large borrowers of money, and procured extensive accommodations from the bank by way of advances on drafts drawn by them on their customers, and loans on their own and their customers' commercial paper and overdrafts, which accrued in the general course of business. The firm had a substantial and large credit with the bank, and the account varied from the ordinary credit maintained by such a house to an indebtedness of \$150,000. The debt was cared for in various ways,—sometimes by payments in cash, and sometimes by the deposit of other forms of commercial credit. During the later part of the dealings between the bank and the house, Boehm & Co. were accustomed to protect their liabilities by daily deposits of warehouse receipts and bills of lading, which covered goods in stock and in transit. On the 10th of March, 1892, Boehm & Co. were indebted in a very large sum, amounting, speaking generally, to upward of \$100,000. The firm required more money on that day, and applied to the bank for a loan of \$15,000 which the bank declined to make without some engagement on the part of the company to protect or "cover" the loan, as the English bankers have it. It is very clear the firm agreed on that day to protect this loan by the deposit of sundry warehouse receipts and bills of lading, if the bank would advance the money. There is no very clear testimony as to what receipts or what bills of lading were to be delivered to the bank. The cashier gave evidence that Mr. Boehm mentioned, as part of the securities which he was to deposit, a bill of lading for some goods which were coming from New Orleans. It is not plain whether the class or description or amount of this particular shipment was stated. On the testimony, it seems to be a general statement or promise by Boehm to deliver a bill of lading of some goods which were about to be shipped from New Orleans. It transpired that, some time in February, Boehm & Co. had made an order on the appellees, Schmidt & Ziegler, for a lot of wine. On the 4th of March, the firm received a letter from the New Orleans house acknowledging the receipt of the order and promising to ship it at once, and, in the natural course of events, the bill of lading for the goods was due on the 10th of March. Acting on the strength of this engagement by Boehm & Co., the bank, between Monday and Saturday, advanced upward of \$15,000. The last of the funds was paid on Boehm's account on Saturday, the 12th. The bill of lading arrived, according to the testimony, on Saturday, the 12th of March, and was delivered to the bank. This statement is made on the strength of the evidence, disregarding all speculation as to the probabilities of the arrival of the goods from New Orleans, or as to the day on which the bill of lading was mailed from that city. The cashier of the bank testified that, according

to his best recollection, the bill of lading was given to him on Saturday. The surviving member of the firm, N. Steenbock, also testified to the same point. This is the only direct evidence as to the time when the bill of lading arrived and was delivered. A number of depositions were taken in New Orleans, and an attempt was made to show the mailing of the bill on the 10th, whereby an inference could be drawn that it would have been impossible for the bill to have arrived before Sunday. The testimony in New Orleans was given either by employes of the railroad company or clerks of the vendors, whose duties were to attend to the shipment of the goods, the transmission of the accounts and bills, and the issuance of the bills of lading by the railroad company to the vendors. None of them had any specific recollection concerning the matter. On the strength, however, of their general custom respecting such transactions, the witnesses testified generally that, while they had no specific memory about this particular matter, the bill, though dated the 9th, was probably not procured until the 10th nor mailed until that day. This evidence of the general and prevailing custom in such matters cannot be allowed to overcome the definite recollection of the two living witnesses who received the instrument. The finding of the court respecting this matter is not very plain, though in his opinion he intimates the delivery to have been on Sunday. We do not depart from our custom to yield our own judgment on any matter of fact to the finding of the nisi prius court, because in this particular the case is not at all dependent on the court's conclusion. As we view it, it would make very little legal difference whether the bill was delivered on Saturday or Sunday. We are, however, so clearly of the opinion that the case as made justifies no other conclusion, that we state our judgment about this matter of delivery. On the evidence, it is very satisfactorily shown that the bill passed into the hands of the bank on Saturday. We attach no importance whatever to the hour of its delivery,—whether before or after the bank was generally closed to the public. We are bound to know the course of dealings between banks and their customers. Everybody understands that it is a very common occurrence for a customer to arrange for a loan and receive a credit in the bank, on which he can check on his promise to cover or protect the credit by a subsequent delivery of some kind of security. The agreement is frequently carried out in respect to the delivery of the securities after the bank has technically closed. The bank cannot be said to lose its rights acquired by a transaction with its customer had after its doors are technically shut to the general public for the purposes of deposit and check. The bill of lading of these goods was indorsed by Boehm & Co. and delivered to the bank in

performance of the agreement made on the 10th of March, when the greater part of the \$15,000 was paid over to the firm. The subsequent delivery of the bill on Saturday was in fulfillment of the agreement made by Boehm at the time the bank did its part in the payment of the money. On Sunday, the 13th, the bank became suspicious of the solvency of Boehm & Co., and took steps for the protection of their interests. A statement between the bank and the house was made up, attorneys were consulted, and, on the morning of the 14th, an attachment was levied on whatever assets the firm had. Aside from this single circumstance, there is nothing in the record which tends to show any knowledge on the part of the bank's officers of the insolvency of Boehm & Co. Whatever testimony was given tended to establish a belief on the part of the bank that Boehm & Co. were solvent. As we all know, it frequently happens that a bank has its suspicions aroused concerning a customer's solvency long before it acquires any actual knowledge about it, and long before there is any question respecting it in the mind of the general mercantile public. Nothing is more sensitive to the financial atmospheric condition than a customer's credit in a bank. To protect themselves, and their depositors' money which is loaned to the merchant, banks are always watchful and wary, and, on the slightest fall of the financial barometer, are swift to protect their money. The examination of the cashier was not very vigorously pursued to establish knowledge of Boehm & Co.'s insolvency. We have no right to indulge in inferences about it, because the direct testimony is to the contrary. Whatever the witnesses said was directly to the point of a lack of knowledge or conviction on the part of the bank's officers that the firm was insolvent. We must, therefore, assume the bank took the bill in good faith, and advanced money on the strength of its indorsement and delivery, and, under the evidence, were bona fide holders for value. The goods left New Orleans on the 11th of March, and were stopped on directions given to the carrier on either the 14th or the 15th of the same month. Thereupon the bank brought suit to recover the goods. Schmidt & Ziegler defended, and, under an arrangement between counsel, the fund was held to await the result of the litigation. The consignors defended the action, and a trial was had between them and the bank which resulted in a judgment for Schmidt & Ziegler, from which the bank appealed.

This judgment is not supported by the proof. The equities of the bank which sprung from their advancement to Boehm & Co. on the faith of the indorsement of the bill of lading must prevail over the legal right, which always accrues to a vendor of goods, to stop them in transit when he is informed of the insolvency of the vendee.

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The case presents but a single fact about which there is any diversity in the cases. As we view the testimony, even this matter is eliminated from the case. The appellees place great reliance on what they contend were the circumstances of the transfer. The fact of the advance on the strength of the indorsement of the bill is urgently disputed on the theory of a lack of connection between the loan and the indorsement of the instrument. Many cases are cited on the proposition that, if the transfer be made as a security for an antecedent debt, the holder shall not be taken to have received it for value and to be entitled to the protection which comes to one who occupies that relation to the security. If this were the law in Colorado, we might be compelled to support our position by demonstrating the accuracy of our statement that the loan was, in fact, made on the basis of the indorsement of the security. There is small necessity for this discussion, since it has long been settled in Colorado that an antecedent debt is a good consideration, whether in the actual purchase of property or an acceptance of it as security for the payment of the antecedent debt. *Knox v. McFarren*, 4 Colo. 586; *McMurtrie v. Riddell*, 9 Colo. 497, 13 Pac. 181; *Bank v. McClelland*, 9 Colo. 608, 13 Pac. 723; *Haraszthy v. Shandel*, 1 Colo. App. 137, 27 Pac. 876. In this state, then, there need be no concurrence between the advancement of the money and the delivery of the security. Whatever may be the fact respecting the particular advance of \$15,000 and the indorsement of the bill, the legal status of the bank would be unchanged. It would be a holder for value, whichever way the fact might be found. We do not concede the appellees' contention in regard to this fact. There is no evidence whatever respecting the transaction save what was given by the cashier. His direct evidence was to the point that the bank loaned \$15,000 on its faith in the promise which Boehm made to deliver to it securities to cover the credit. The evidence even goes further than this, and shows the promise was made to deliver this particular security, since no other goods were expected from New Orleans save those which had then been shipped by the appellees. The case is thus brought directly within the purview of *Leask v. Scott*, 2 Q. B. Div. 376; It was there adjudged that a holder of a bill of lading received subsequent to an advance, which was made on the strength of a promise by the transferor to cover his account, made the banker a holder for value. The cases generally concede that an advance made on the strength of a promise to deliver a particular security will make the banker a holder for value. According to this case, a general promise to cover, followed by performance, will be equally effectual. We conclude the facts in this case show not only a general promise to cover the credit, followed by either a total or partial perform-

ance, but a specific promise to cover by the delivery of this particular bill. In any event, the bank brought itself strictly within the legal definition of a holder for value.

The only other consideration, which, under the record, is of very slight consequence, respects the good faith of the bank in accepting the security. Knowledge of the indorsers' insolvency is seldom a matter of presumption. The extent of the indebtedness to the bank, the call for collaterals, which was heeded, followed shortly and sharply by an attachment to collect the debt, do not necessarily compel us to infer that Boehm & Co. were insolvent, or that the bank had knowledge of their financial condition. Whatever significance might be given to this proof, in the absence of direct testimony on the subject we are not at liberty to indulge in speculations, and permit our inferences to overcome the direct testimony in the case. Direct evidence was given about the bank's knowledge of this fact, and it was established that the bank was without knowledge either of the insolvency of the firm or of such facts respecting its financial condition as would legally charge them with knowledge about it. In fact, the proof is that the money was loaned on the 10th, and the attachment proceedings were not begun until the following Monday, nor steps taken in that direction until Sunday, the 13th. What changes may have occurred which influenced the bank we do not know. We can simply take the record as we find it. We do not intend to be understood as declaring the matter to be settled by the present record, nor are we able to anticipate what the subsequent trial, if one is had, may show; all we decide is that the bank must be held on the present case to have had no knowledge of the insolvency of Boehm & Co., and they are, therefore, left to enjoy the rights and to reap the fruits of the equities which flow from the receipt in good faith for a valuable consideration of a properly indorsed bill of lading. These are well defined, clear, and unquestioned. *Port. Bills Lading*, c. 37; 2 *Daniel, Neg. Inst.* (4th Ed.) § 1730 et seq.; *Becker v. Hallgarten*, 86 N. Y. 167; *Forbes v. Railroad Co.*, 133 Mass. 154.

On the oral argument and by a subsequent brief, the appellees seek to question the authority of the bank to maintain the suit for lack of either allegation or proof of their incorporation. The question does not appear to be one of any gravity or importance, nor do we incline to the opinion that the appellees may question the right of the bank to contract as it did with Boehm & Co. about this bill of lading. The legality of their act seems to be a question only between the original parties to it, or the government from which the bank derives its authority. *Bank v. Whiting*, 103 U. S. 99; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640.

In one of the defenses, the appellees alleged a lack of authority on the part of the bank to

make the loan, and averred it was a national bank, organized and incorporated under the national bank act, which, after judgment, would certainly be treated as a sufficient admission to entitle the bank to maintain its suit when the only question was whether by allegation and proof the bank's corporate capacity had been established. The complaint was probably defective in this particular, but this will not compel us to affirm the judgment, and it is a matter very easily corrected by amendment when the case returns for a new trial.

Some other matters have been brought to our attention, but it does not seem necessary to determine them, or assign the reasons for our judgment about them. For the errors already discussed, and resolved in favor of the appellant, the judgment must be reversed, and remanded for a new trial. Reversed.

(107 Cal. 382)

AHERN et ux. v. McCARTHY. (No. 15,761.) (Supreme Court of California. June 1, 1895.)

DEED ABSOLUTE—WHEN A MORTGAGE—EVIDENCE.

1. Defendant held a second mortgage on plaintiffs' land. On default on the first mortgage, both mortgagees threatened to foreclose, whereupon plaintiffs conveyed the land absolutely to defendant, who took possession, and leased part of the premises for a small rental to plaintiffs, and assumed the payment of the first mortgage, and each of the parties executed to the other a release of all claims. *Held*, that the evidence was not sufficient to show the deed a mortgage.

2. A deed absolute in form, given to secure the payment of a debt, is an equitable mortgage, and may be so proved by parol evidence.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Jeremiah Ahern and wife against Bridget McCarthy to have a deed absolute in form declared to be a mortgage. From a judgment for defendant, plaintiffs appeal. Affirmed.

Reddy, Campbell & Metson, for appellants. E. R. Taylor, for respondent.

BELCHER, C. On the 6th of October, 1886, the plaintiffs, who were husband and wife, executed to the defendant a deed, absolute in form, of a lot of land in the city of San Francisco, and in September, 1890, they commenced this action to obtain a decree adjudging that the said deed was in fact a mortgage, given to secure the payment of money due and to become due from plaintiffs to defendant, and that they be allowed to redeem the property on payment of the amount found due the defendant, and also that defendant be required to account for the rents and profits of the property while in her possession. The answer denied that the deed was given to secure the payment of any money, or that it was or was intended to be a mortgage, and alleged that it was given

and received as an absolute conveyance. The court below found upon all the issues raised by the pleadings against the plaintiffs, and gave judgment in favor of the defendant, from which, and from an order denying their motion for a new trial, the plaintiffs appeal.

The appellants contend that the findings were not justified by the evidence, and that is the only ground urged for a reversal. It is a general and well-settled rule of law that a deed absolute in form, if given to secure the payment of a debt, will be treated in equity as a mortgage, and the facts and circumstances attending its execution may be shown by parol evidence. The law upon this subject is stated in *Pom. Eq. Jur.* (2d Ed.) § 1196, as follows: "The general doctrine is fully established, and certainly prevails in a great majority of the states, that the grantor and his representatives are always allowed in equity to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt, and thus to be a mortgage, although the parties deliberately and knowingly executed the instrument in its existing form, and without any allegations of fraud, mistake, or accident in its mode of execution. As in the last preceding case, the sure test and the essential requisites are the continued existence of a debt. If there is no indebtedness, the conveyance cannot be a mortgage. If there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the absolute deed as a mortgage. The presumption, of course, arises that the instrument is what it purports on its face to be,—an absolute conveyance of the land. To overcome this presumption, and to establish its character as a mortgage, the cases all agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail. Whenever a deed absolute on its face is thus treated as a mortgage, the parties are clothed with all the rights, are subject to all the liabilities, and are entitled to all the remedies of ordinary mortgagors and mortgagees. The grantee may maintain an action for the foreclosure of the grantor's equity of redemption. The grantor may maintain an action to redeem and to compel a reconveyance upon his payment of the debt secured. If the grantee goes into possession, he is in reality a mortgagee in possession, and as such is liable to account for the rents and profits."

It was shown in this case that on the 22d day of September, 1884, the plaintiff Mary Ahern was the owner of the lot in question, and living thereon with her family, and that on that day she and her husband executed to the German Savings & Loan Society their promissory note for the sum of \$2,000, payable one year after date, with interest at the rate of seven-twelfths of 1 per cent. per month, payable monthly in advance, and at the same time, to secure payment of the note, executed to the said society a mortgage upon the said

lot. Afterwards, on the 27th day of the same month, the plaintiffs executed to the defendant their promissory note for the sum of \$1,900, payable two years after date, with interest at the rate of seven-twelfths of 1 per cent. per month, payable monthly, and, to secure payment thereof, executed to defendant a mortgage upon the said lot. It was provided in this mortgage that it was subject to the mortgage to the German Savings & Loan Society, and "that, in case default be made in the payment of the principal or interest of the note and mortgage to the German Savings & Loan Society, then the promissory note above described and secured by these presents shall immediately become due and payable." Mrs. Ahern and the defendant, whose maiden name was Bridget Wallace, were sisters, and the latter resided with the former from time to time until she was married in 1888. In August, 1886, several months' interest was due and unpaid on each of said notes, and the plaintiffs had no money, or means to raise money, to pay the same. Both mortgagees threatened to foreclose unless payment was made, and the question was what should be done. At some time the plaintiffs placed the property in the hands of a real-estate agent for sale, and he reported that he had been offered \$5,000 for it. The defendant advised the plaintiffs not to sell the property, but to convey it to her, and they concluded to and did withdraw it from the agent. Defendant promised, if plaintiffs conveyed it to her, to lease to them the lower floor of the building for three years at \$10 per month rent, and that the rent for 20 months should be applied to the payment of an indebtedness of \$200 due from the plaintiffs to other parties, and also that she would assume the payment of the note and mortgage to the German Savings & Loan Society. The negotiations between the parties continued until October 6th, when the deed in controversy was executed. At that time, and as a part of the transaction, the defendant satisfied her mortgage on the record, and delivered to the plaintiffs the note and mortgage. She also executed to the plaintiffs the lease she had promised to give them, and each of the parties executed to the other a release of all claims and demands, of whatever nature, accrued or existing up to that date. The plaintiffs also gave written notice to a tenant on the upper floor of the building that they had conveyed the property to the defendant, and that he would therefore for the future pay rent to her. Thereafter the plaintiffs occupied the lower floor of the building under their lease, and the rent therefor was paid and applied as it was agreed it should be. In August, 1889, the defendant paid the note to the German Savings & Loan Society, and the mortgage given to secure the same was satisfied and discharged. The above is a brief outline of the undisputed facts of the case. As to most of the other facts the evidence was conflicting. The

plaintiffs testified that the defendant agreed to take and hold the deed as security for the payment of the debts, secured by mortgages on the property, until such time as they could pay the same. The defendant denied that there was any such agreement or understanding, and said, in effect, that the deed was given and accepted as an absolute conveyance.

Whether the deed can be treated as a mortgage or not must depend upon whether there was a continuing indebtedness from plaintiffs to defendant to be secured by it; for, if there was no indebtedness, there clearly could be no mortgage. In view of all the facts and circumstances shown, and particularly in view of the fact that at the time of the execution of the deed the parties thereto expressly released each other from all claims and demands accrued or existing up to that date, we do not see how it can be said that the evidence was "clear, unequivocal, and convincing" that there was an existing debt, and that the deed was intended to secure its payment. In our opinion, the judgment cannot be reversed upon the ground that the findings were not justified by the evidence, and we therefore advise that the judgment and order be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(107 Cal. 369)

SUTTER v. OMNIBUS CABLE CO. (No. 15,669.)¹

(Supreme Court of California. May 31, 1895.)

NEGLECT—WHAT CONSTITUTES.

It is negligence for a street-car driver, after stopping his car on a busy street, to detach his horses, and swing them from the track into the street, without observing whether any teams are approaching from the rear, whereby a collision occurs.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by William Sutter, an infant, by his guardian, against the Omnibus Cable Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lloyd & Wood and W. H. L. Barnes, for appellant. A. Morgenthal, for respondent.

TEMPLE, J. This action was brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant. Plaintiff recovered judgment, and defendant appeals from the judgment, and from an order refusing a new trial. The point presented here is that there was not only a total lack of evidence tending to show negligence on the part of defendant, but that it was proven by evidence which was not contradicted that the injury was caused by in-

evitable accident. The following extract from the opinion of the learned judge of the trial court gives a short and concise statement of the facts in regard to the event: "Peter Duffey, the said driver, a witness for defendant, explained how the horses came to run away. It seems that defendant keeps its stables at the corner of Third and Tehama streets, where horses are changed to and from the cars, which are propelled by horses on this Third street line. On the day in question, when the defendant's horses ran away and injured this lad, the said driver was taking his car along Third street, and when he came to Tehama street he stopped his car, pulled the pin which holds the pole to the car in front,—and to which the horses were attached,—swung his team, attached to this pole, around at right angles to the car, and into the portion of the street or roadway lying between the car track and the curbstone of Third street, intending to take the team into the stable, and replace them with another and fresh span of horses. When the driver so swung his team around, and from the front of the car, they collided with a team being driven up from behind the car. The team, consisting of two horses, was attached to a wagon, and was rapidly traveling in the same direction as the car, probably following the car, so far as can be inferred from the evidence. The car driver said: 'Just as I was swinging my team around, a wagon came by, right by the car, and struck my off horse, banging right up against my team, banged the off horse right up against the right one, and they got on a jump.' The horses then ran away, dragging the driver with them, throwing him down and pulling away from him, and then dashing along Tehama street, and injuring the boy, as before noted. The driver testified on cross-examination that he neither looked nor listened for any approaching team when he unhitched the horses from the car and swung them off from the car tracks into the roadway, where they were struck by the team attached to the wagon. He said, in effect, that it was not his business to look or listen for approaching teams; that he didn't expect a team would run against his horses; that it was the business of approaching teams to avoid a collision with him. It would appear from this witness' testimony that he swung his car team directly into this approaching team. At any rate, the collision was immediate, so he testified, on the swinging of the car team into the roadway." Third street is the direct line to the S. P. R. R. Depot, and is much traveled by trucks and other vehicles. The horses were turned to the right,—directly into the approaching team. The car being confined to the tracks, persons driving along the street, in the same direction, would not anticipate that the team would turn across the track. Coming from behind, they could not see the movements of the driver or team. Can we say, as matter of law, that to swing the team across the track into the crowded, busy street, under

¹ Rehearing denied.

ich circumstances, does not tend to prove negligence? For my part, I cannot see how the jury could have found otherwise than as they did. Appellant's counsel says, if the driver had looked, he would have seen teams approaching, and, if this was negligence, it could have been negligent to have turned his horses, so long as any one was near, and he would have stood all day; and he thinks that the application of a modicum of commonsense would show him that he was not bound to look to see if some reckless and vicious person would not run into him. All this might tend to prove that it is negligent for defendant to turn his horses at this point, but the illustration of counsel is not a fair one. The driver turned his horses into a team which was already abreast of him. If he had seen that there was room to turn his horses, and get into the street far enough from an approaching wagon to be seen, he might expect drivers of other vehicles to avoid colliding with him. If the place selected for turning his horses was crowded with teams that he could not do, means should have been provided to stop the rush long enough to turn; and, if this could not be done, he ought not to have attempted the movement. It would be a demonstration that the place chosen was inappropriate. The judgment and order are affirmed.

Concur: HENSHAW, J.; McFARLAND, J.

Cal. 340)

MILLER et al. v. KEHOE et al. (No. 15,785.)
 Supreme Court of California. May 27, 1895.)
 FRAUDULENT CONVEYANCES—ACTION BY ASSIGNEE
 —RIGHT TO COSTS.

1. Where the evidence was conflicting, the ruling of the court thereon will not be disturbed.
2. An assignee cannot recover property claimed in fraud of creditors several months before the insolvency proceedings were instituted.
3. In an action by the creditors and assignee against grantor to set aside a conveyance, a decree which allows the creditors' attorney's fees the assignee's costs to be deducted from the proceeds of sale of the land, and, after paying creditors, the residue to be paid to the grantor giving the assignee no share in the fund, is erroneous, as counsel fees are not recoverable by successful parties against one who is solely interested, nor is an assignee entitled to where the case was decided against him.

Partment 2. Appeal from superior court, city and county of San Francisco; J. C. Hebbard, Judge.

Appeal by Henry Miller and others against Margaret Kehoe and another to set aside a conveyance. From a judgment for plaintiffs against defendants appeal. Modified in part.

Attorneys: E. A. Murasky, for appellants. E. A. Miller, for assignee. Mastick, Belcher, Van & Mastick and N. D. Anderson, for respondents.

FACTS. This action was commenced by the plaintiffs, Miller, Horn, and

Chapman, against the defendants, Margaret Kehoe and her husband, John W. Kehoe. It was averred in the complaint that said plaintiffs were creditors of the defendant John Kehoe; that said John was the owner of certain described real property which he had conveyed to his wife, the defendant Margaret, with intent to defraud his creditors; and that he had commenced proceedings in insolvency which prevented plaintiffs from obtaining judgments against him. The purpose of the action was to have the conveyance from said John to said Margaret declared fraudulent, and to have the property conveyed sold, and the proceeds of the sale applied to the satisfaction of defendant's debts. It is averred that the action was brought on behalf of said plaintiffs, and also in behalf of other creditors "who may come in and make themselves plaintiffs to this action and contribute to the expenses thereof"; and it appears that certain other creditors did come in as plaintiffs. It was also prayed that, when an assignee in insolvency of said John W. Kehoe should be appointed, he should also be made a party; and E. G. Rudolph, having been afterwards appointed as such assignee, appeared, and filed a pleading, in which he also averred that said conveyance from John to Margaret Kehoe was fraudulent, and prayed that it be decreed that the property described therein was part of the assets of said insolvent, John Kehoe, and passed to said assignee, Rudolph. The defendants, John and Margaret Kehoe, answered, denying that said conveyance was fraudulent, and averring that the property described therein was acquired with the separate funds of the said Margaret, and was her separate property. The court found that the said conveyance was made without any consideration, and with intent to hinder, delay, and defraud the plaintiffs and other creditors. It found, however, against the assignee, Rudolph; finding that he "is not and was not entitled to have the said deed canceled or annulled, nor to recover the said property as assets of the said insolvent estate to be administered by him in insolvency." But the court allowed him his costs. In the judgment, the court, after adjudging the said conveyance to be void as against plaintiffs and other creditors, and that certain amounts of money were due the various plaintiffs, decreed that a receiver appointed for that purpose should sell the said real property, and out of the proceeds of the sale pay the costs, and then to the attorneys for certain plaintiffs \$900 as attorneys' fee, and to the attorney for certain other plaintiffs the sum of \$400, and to the attorney for said assignee in insolvency \$400; that the balance of "said fund" should be distributed among the creditors in accordance with their respective rights; and that the residue should go to the defendant Mar-

garet J. Kehoe. The defendants, Margaret and John Kehoe, appeal from the judgment, and from an order denying a new trial.

The contention of appellants that the evidence is insufficient to support the finding that the conveyance from John to Margaret Kehoe was made to hinder and defraud creditors cannot be maintained. There was evidence on both sides of that issue; and, as it presents a substantial conflict, we cannot disturb the finding. Neither do we think that there was any material error committed with respect to the admissibility of evidence offered on that issue.

As the conveyance was made several months before the proceeding in insolvency was instituted, the court was right in holding that the assignee in insolvency was not entitled to recover the property as assets of the insolvent estate.

We think, however, that the court below erred in decreeing that attorney's fees should be paid to the plaintiffs or to the assignee in insolvency out of the gross proceeds of the sale of the property. That would be to make the defendant Margaret pay the attorneys' fees of plaintiffs out of the "residue" coming to her; and for this there is no warrant of law. For a short time the law of the state allowed certain attorney's fees to the prevailing party in an action; but that provision was repealed in 1855 (St. 1855, p. 250); and since then "the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." The general rule is that counsel fees are not recoverable by a successful party in an action either at law or equity (*Williams v. McDougall*, 39 Cal. 85; *Salmima v. Juri*, 96 Cal. 418, 31 Pac. 365), except in the enumerated instances where they are expressly allowed by statute. Counsel for respondents contend that this part of the decree can be maintained under the rule, sometimes applied in equity, that where it is necessary to bring an action for the preservation or distribution of a fund, and the action is brought by one beneficiary for the benefit of himself and all the other beneficiaries, the plaintiff may have a reasonable counsel fee out of the fund. This is merely compelling all the persons for whose benefit the action is brought to bear their share of the expenses of the suit, and is equitable and just. But evidently the rule applies only to a case where all the parties have a common interest. It clearly does not allow a plaintiff who brings suit for himself and others interested with him to recover counsel fees against a defendant who denies the right of any and all the beneficiaries, and sets up in himself an independent and hostile right or title to the thing in litigation. In the latter case the plaintiff would be no more entitled to recover counsel fees from the defendant than he would be in an action of debt or eject-

ment. The only case cited by respondent on the point is *Patrick v. Montader*, 13 Cal. 434. In that case the court, without discussing the question, merely says that "the plaintiff's reasonable costs, disbursements, and counsel fees should be first deducted from the fund." But the case was a contest between attaching creditors over money in the hands of the sheriff, who had obtained it through a sale of an insolvent debtor's property; the amount of the money being much less than the demands of the creditors. Here, then, the money in the hands of the sheriff was a fund belonging to the attaching creditors, in which they were all interested, and in which the judgment debtor in the attachment suits had no interest whatever. There was no "residue" coming to him, and he was not a party to the action. And the money in the hands of the sheriff was the "fund" out of which the attorney's fee was allowed. But in the case at bar the residue of the proceeds of the sale of the property in excess of the amount due the creditors, with ordinary costs and expenses of sale, was no part of any "fund" belonging to plaintiffs out of which they could carve counsel fees. If there was any "fund" at all, within the meaning of the rule invoked, it was only that part of the proceeds of the sale of the property which was necessary to satisfy the claims of the creditors. *Aleman v. Wensinger*, 40 Cal. 288, presents a proper case for the allowance of counsel fees, for in that case all the parties had a common interest in the property or fund involved in the action. With respect to the assignee in insolvency, it is clear that he was not entitled to counsel fees even upon respondents' theory, for it was expressly found that he had no interest in what is called the "fund." Neither do we see how he can have costs out of said fund.

The cause is remanded, with directions to the superior court to modify the judgment by striking out all that part thereof which directs the receiver to pay out of the proceeds of the sale attorney's fees to the attorneys of any of the plaintiffs, and to pay any attorney's fees to the said assignee in insolvency; and also by striking out that part of said judgment which decrees that the costs of said assignee be "paid out of said fund." In all other respects the judgment is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(107 Cal. 214.)

PEOPLE ex rel. RICKS WATER CO. v.
ELK RIVER MILL & LUM-
BER CO. (No. 15,720.)¹

(Supreme Court of California. May 2, 1895.)

POLLUTION OF WATER COURSE.

1. A complaint for nuisance, charging defendant with polluting the waters of a river with

¹ Rehearing denied.

offensive matter from "a sawmill, outhouses, stables, and other fixtures which usually accompany a sawmill," will embrace a finding that the cause of pollution was a hog pen and the manure pile of a stable maintained in connection with the sawmill.

2. Where there are lower riparian owners, one has no right to pollute the waters of a stream by maintaining a cow stable and hog pen on its banks, but must keep his stock a reasonable distance therefrom.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by the people of the state of California, upon the relation of the Ricks Water Company, against the Elk River Mill & Lumber Company, to abate a nuisance. From a judgment for plaintiff, defendant appeals. Affirmed.

F. A. Cutler and S. M. Buck, for appellant. J. F. Puter, Barclay Henley, J. N. Gillett, and Atty. Gen. Hart, for respondent.

TEMPLE, J. This appeal is by the defendant from the judgment and upon the judgment roll. The action was brought on relation of the Ricks Water Company to abate certain structures as nuisances. Among other things, it was charged that the defendant had constructed and was maintaining on the banks of the south fork of Elk river "a large sawmill, and also a cook-house, outhouses, barn, and stables, and other fixtures which usually accompany a sawmill." It was averred "that said defendant has caused and permitted, and does cause and permit, all sewage, offal, waste, and fetid matter from said sawmill, cook-house, and stables to be drained and deposited in the waters of said stream, and continues to do so, thereby contaminating, polluting, and rendering the same unwholesome, and unfit for culinary and other general domestic purposes, and offensive to the senses." As to most of the structures mentioned, the court found that they did not constitute nuisances, but it was found as follows: "That on the banks of said stream, just above the mill dam, defendant had erected a large stable, in which it houses from twenty-five to thirty head of cows; that the droppings from these cattle are deposited upon the banks of said stream, and near thereto, where the land gradually slopes to the same; that there now exists at said point a pile of manure about seventy feet in length, eight feet deep, and sixteen to eighteen feet in width, and which has been accumulating there for years; that the defendant allows and permits this large pile of manure to lie there and rot on the bank of said stream, and the drainage therefrom flows directly into the waters of said stream, and pollutes the same, and renders the waters thereof offensive to the senses and unwholesome and unfit for domestic uses; that defendant also maintains near said stream a corral or pen, in which it keeps about twenty-five hogs; that the said stream forms one side of said pen, and the urine and droppings and filth

from said hogs find their way into said stream, thereby polluting the waters thereof, and rendering the same offensive to the senses and unwholesome and unfit for domestic uses." And as matter of law it was found that the hog pen and manure pile constitute nuisances, and defendant was enjoined from maintaining them. From this part of the decree defendant appeals, and his first point is that this finding is not within the issues. The hog pen and manure pile are not mentioned in the complaint, and it is not found that they are such fixtures as usually accompany a sawmill. The complaint, however, speaks of outhouses and stables, and I think the findings sufficiently show that the cow stable and hog pen are maintained in connection with the mill plant; and, notwithstanding appellant's criticism, that the manure pile is caused by the cow stable. Beyond this, the complaint seems to be that the court did not suppress the stable itself, rather than the use of it, which renders it a nuisance. I do not think there was any error here of which the defendant can complain.

2. The court found that Elk river is not a navigable stream. It is contended that it follows from that fact that fouling its waters cannot constitute a public nuisance. But it is found that "the waters of Elk river at and below the defendant's dam were, and have been, and now are, used by a considerable number of persons, who reside along the banks of said stream below the defendant's mill and dam." This constitutes such a public use as would make a pollution of the water by any unreasonable use a public nuisance. We may leave out of view, therefore, the claims of the Ricks Water Company and the inhabitants of the city of Eureka altogether. While, as to lower riparian owners, the defendant is entitled to a reasonable use of the water, he has no right to pollute the stream by putting such matter directly into it. The decision does not go to the extent that appellant apprehends. It does not determine that one may not depasture stock upon the lands comprising the watershed drained by the river, because they would necessarily pollute the water, nor that he cannot maintain stables and hog pens upon the land, but only that they must not be in, or directly upon, the banks of the stream. It holds that this is an unreasonable use of such streams by a riparian owner as against lower riparian owners. But if stock, not confined upon the river banks, following their natural instincts, cause such pollution, it would be a different matter. So, if the hog pen and the cow stable were at a reasonable distance from the river, the fact that the winter rains washed some impurities into the stream would be something of which lower riparian proprietors could not complain. The acts enjoined are equivalent to actually putting the polluting material directly into the water. If the conformation

of defendant's land is such that he cannot carry on a dairy without putting such filth directly into the water, then he must find some other use for the land. This seems to be the effect of the rule laid down in *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 Pac. 1152. The judgment is affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

(5 Cal. Unrep. 31)

BANCROFT v. BANCROFT. (No. 15,848.)¹
(Supreme Court of California. May 8, 1895.)

CONTRACTS—MENACE—UNDUE INFLUENCE.

1. A contract for sale of stock, which plaintiff owned and had pledged to a bank, was not obtained by "menace," within the definition of Civ. Code, § 1570, "a threat of injury to the character," where defendant said that he would inform the bank that plaintiff was not the owner of the stock if plaintiff did not make the contract.

2. Nor can the contract be said to have been obtained by undue influence, plaintiff being a mature man, in the possession of all his faculties, who for several years had been manager of the corporation in which were the shares, though defendant, who was the owner of the majority of the corporation's stock, and plaintiff's uncle, had been accustomed in a great measure to direct plaintiff's action, and was a tyrannical and overbearing man.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Sewell, Judge.

Action by W. B. Bancroft against H. H. Bancroft for damages for inducing plaintiff to make a contract. A demurrer was sustained to the complaint, and plaintiff appeals. Affirmed.

Mastick, Belcher & Mastick, for appellant. E. J. McCutchen, for respondent.

MCFARLAND, J. A demurrer to the amended complaint was sustained, and, plaintiff declining to further amend, judgment was rendered for defendant, from which plaintiff appeals. The complaint is substantially as follows: Defendant is the uncle of plaintiff, and ever since the latter's boyhood plaintiff was under the control and direction of defendant, and in his employ, and a part of the time resided with him. Defendant was accustomed in a great measure to guide and direct plaintiff's actions in business and other matters; was tyrannical and overbearing, and impatient of opposition; and thus had and retained great influence over plaintiff, who was accustomed to rely upon and be guided by defendant in matters of business. Defendant owned much more than a majority of the stock of a certain corporation called the Bancroft Company, and entirely controlled and managed its affairs. Defendant was the president of said corporation, and plaintiff was employed as the manager of its business. In September, 1887, plain-

tiff became the owner of 1,345 shares of the stock of said corporation, and continued to own the same until the 13th day of February, 1891. In November, 1890, plaintiff borrowed \$3,500 from the People's Home Savings Bank, and as security therefor pledged to said bank said 1,345 shares of stock. On February 12, 1891, defendant demanded of plaintiff that plaintiff should transfer and deliver to defendant the said 1,345 shares of stock, and all his interest in the assets and property of said corporation, for the sum of \$5,000, and then and there "informed plaintiff that unless he should forthwith transfer to him (defendant) the said stock and property on the terms aforesaid, he (defendant) would inform the said bank that plaintiff was not the owner of said stock, or any part thereof, and that plaintiff had pledged said stock without right or authority." He also said that he (defendant) would not pay more than \$2,000 of said indebtedness of plaintiff to said bank, and would levy assessments on the stock of said corporation to the extent of closing out its business. "Thereupon plaintiff, solely through the influence possessed over him by defendant, and his habitual fear of defendant, and terrified by the threats aforesaid, and fully believing that defendant would carry said threats into execution, and would make to said bank and to others the statements so threatened, and that by reason of such statements plaintiff's character and reputation would be blasted and destroyed in the community in which he was residing and doing business, on the 13th day of February, 1891, acceded to said demand." Thereupon defendant directed plaintiff to deliver said stock to the said Bancroft Company, and to give to said company a bill of sale of all his interest in the property of said corporation, which plaintiff did on said day, "solely for the reasons aforesaid." The said company paid said indebtedness to said bank, and paid the balance of the \$5,000 to plaintiff. It is averred that "plaintiff's consent to so transfer and deliver said stock to said corporation and to execute the bill of sale aforesaid was not freely given, but was obtained solely by the means aforesaid, and in consequence of the menace and the undue influence so exercised by defendant as aforesaid." Also "that, as plaintiff is informed and believes, the value of said 1,345 shares of stock on the said 13th day of February, 1891, was the sum of fifty thousand dollars, as was then well known to defendant, and plaintiff has been damaged by the wrongful acts of defendant as aforesaid in the sum of forty-five thousand dollars." It is also averred, upon information and belief, that after said transaction defendant so mismanaged the affairs of said corporation that "the said shares of stock became and were at the commencement of this action greatly depreciated, and of little or no value." The prayer is for "judgment against defendant for the sum of forty-five thousand dollars and for costs

¹ Rehearing granted.

of suit." It does not appear when the action was commenced, but the present complaint was filed November 6, 1893, 19 months after the alleged cause of action accrued.

The foregoing are the material averments of the complaint somewhat condensed. The demurrer was both general and special, and we think that it was properly sustained for a want of a statement of sufficient facts to constitute a cause of action. The theory of the complaint is that plaintiff's consent to the said sale of the stock was not "free." The Code provides that "an apparent consent is not real or free when obtained through (1) duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake." Civ. Code, § 1567. The averments of the complaint certainly do not show duress, fraud, or mistake. It is contended that they show "menace," because they show a threat of "injury to the character," under section 1570, Civ. Code. The averment on this point is that defendant said he "would inform the bank that plaintiff was not the owner of said stock." But plaintiff, as the complaint shows, was the owner of the stock; and, this being so, it is impossible to conceive that a mere idle threat of defendant to say that plaintiff was not the owner was such an attack on his character as to overcome his free will. In an opinion delivered by the learned judge of the court below when sustaining the demurrer he says that the complaint does not show any ground for avoiding the sale through want of the free consent of plaintiff, unless that ground be undue influence; and that in such a case the remedy is rescission. Section 1566, Civ. Code, provides that "a consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission." Defendant contends that the remedy of rescission is only cumulative, and that in such a case a party, without rescinding, may maintain an action for damages under the general provision of section 3281. Nevertheless no case has been found, and counsel seem to admit that no case can be found, where a general action for damages has been maintained upon the ground of undue influence in procuring a contract. If such an action can be maintained, then the principle that a party must rescind promptly can be avoided. But we need not determine this point definitely, because, in our opinion, the facts averred do not make a case for either rescission or damages on the ground of undue influence. The complaint does not attribute to plaintiff either infancy or idioy or any mental or moral imbecility. He was a mature man, in the possession of all his faculties, and for several years before the transaction complained of had been the general business manager of the Bancroft Company, with full and special opportunity to know its affairs and condition. And it is impossible to contemplate that under these circumstances he was induced by any facts, which he avers as constituting un-

due influence, to sell for \$5,000 property which was worth \$50,000. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(107 Cal. 363)

PERRY v. MALARIN. (No. 15,736.)¹
(Supreme Court of California. May 20, 1895.)

INJURY TO PASSENGER ON STREET CAR.

In an action to recover for injury while a passenger on a street car, it appeared that the car was being driven five to seven miles an hour, in a suburban district, when the horses, becoming frightened, pulled the car off the track, and ran away; that plaintiff, out of fear, jumped from the car, and was injured. Those who remained in the car were uninjured. *Held*, that defendant was not guilty of negligence.

Department 2. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by Lella Perry against Juan Malarin to recover for personal injuries while a passenger on a street car. From a judgment for plaintiff, defendant appeals. Reversed.

S. F. Gell, J. J. Wyatt, and R. H. Willey, for appellant. W. A. Kearney and C. F. Lucey, for respondent.

TEMPLE, J. On the 18th of February, 1893, plaintiff and her sister were passengers on a street car running from Pacific Grove, in Monterey county, to the Hotel Del Monte. It was an open car, drawn by two horses. Plaintiff sat upon the rear seat. As the car passed the Pacific Ocean House, on Alvarado street, the team shied, and pulled the car from the track. Plaintiff's sister (as she testified) was thrown from the car by the jolt made when it left the track. Plaintiff was not thrown out, but, after the car had been drawn about 120 feet, jumped out, and in so doing was injured. From the track the horses moved rapidly along the street, first towards the sidewalk, and then the driver was able to pull them in towards the track, when they again moved towards the sidewalk, and were finally stopped when the car was against the curb; having gone about 180 feet after the derailment. Had plaintiff remained in the car, as she might have done, she would not have been injured, but she says she jumped out, fearing that the car would strike against the curb and be overturned. The street was not paved, and was perfectly level. The curb was 13 inches high. Defendant operated the street railroad, and plaintiff brings this action to recover damages for the injury which she alleges was caused by defendant's negligence.

Though defendant does not admit that the rule applies to this case, he accepted the proposition that the mere fact of the accident raises a presumption of negligence, and casts upon the defendant the burden of showing how and why the accident occurred, and that it was one which he could not

¹ Rehearing denied.

have guarded against by the use of the utmost skill, diligence, and foresight. Appellant contends that this was done by testimony which is uncontradicted. He proved that the track was in perfect condition; that the car was properly constructed, and in good order; that the driver was experienced and careful; and that at the time of the derailment he was at his post, holding the reins in one hand and the brake in the other. The derailment was not caused by any defect in the appliances or want of attention on the part of the driver. His witnesses also testified that the horses were gentle, well broken, and had been used on the road continuously for about two years, and had never been known to shy or become unmanageable before. He also showed how and why the derailment occurred; that, while the car was proceeding at the usual speed, an express wagon was driven rapidly in front of the team, and suddenly stopped, and a man with a bundle jumped suddenly in front of the horses, and towards them, thereby startling them, and causing them for the moment to become unmanageable. There was, however, testimony for plaintiff to the effect that one of the horses was what is called a "California broncho," and that he had once run away; also, that the car was moving at an unusual speed when the accident occurred. Plaintiff testified: "A little before we came to the Pacific Ocean House, on Alvarado street, the horses started to go very much faster, and were going at almost a run, when all of a sudden they gave a sudden jerk, and pulled the car from the track," etc. And, again: "I did not see the horses pulling the car from the time the car left the track until I jumped from the car. I think the horses were running, from the speed with which the car was going, and the sudden jerk they made when they left the track." Her sister testified: "The car ran rapidly from the time they pulled the car from the track until I saw my sister jump," etc. "Q. Did the team go at an unusual rate of speed on that day? A. They were simply tearing along. * * * I have frequently rode on those cars before. The driver was driving much faster than usual from the time he entered Alvarado street." Other witnesses, testifying for the defendant, stated that the horses were not going at an unusual speed, but were trotting along at the rate of from five to seven miles per hour. I think it must be admitted that testimony introduced by defendant, taken by itself, was sufficient to rebut the presumption of negligence. If it was not sufficient, it is difficult to imagine any testimony which could have sufficed for that purpose. There was a perfect track, car and harness in good repair, gentle horses, and a skillful driver, alert and

at his post, and the showing of how and why the accident occurred; and, since the event which startled the horses could not have been foreseen, it is manifest that all was done which could have been done by the utmost skill and care. The bare statement of a witness that one horse had once run away, without showing when or under what circumstances, or that defendant knew it or ought to have known it, does not tend to show negligence.

The question, then, is, does the mere fact that the horses were going at an unusual speed tend to prove negligence? I think not. The drive seems to be a long one, and between a village (Pacific Grove) and Monterey city. Apparently they were in the habit of driving in a trot, or from five to seven miles per hour could not be the usual speed. The horses may have been going at an unusual speed, and yet not at a dangerous gait. The allusion to their running evidently had reference to the movement after they became frightened. It cannot be doubted that after that time everything was done which could have been done. The jury were evidently carried away by sympathy for the plaintiff, which is quite natural. But, however deplorable the injury may be, defendant cannot be mulcted for it, unless he has been negligent. I think he has successfully rebutted the presumption arising from the fact of the accident. The judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

PERRY v. MALARIN. (No. 15,753.)¹
(Supreme Court of California. May 29, 1895.)

Department 2. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by Kate Perry against Juan Malarin for injuries received while a passenger on one of defendant's street-railway cars. Judgment for plaintiff, and defendant appeals. Reversed.

S. F. Geil, J. J. Wyatt, and R. H. Willey, for appellant. W. A. Kearney and C. F. Lucey, for respondent.

TEMPLE, J. This is an appeal from a judgment, and from an order refusing a new trial. The action is for damages alleged to have resulted from the negligence of the defendant. The facts are quite similar to those shown in the case of Perry v. Same Defendant (No. 15,736; just decided) 40 Pac. 489, the injuries having been caused by the same accident mentioned in that case. The evidence in this case is, however, more favorable to defendant than it was in that case, although in the main features it is the same or quite similar. For reasons similar to those stated in the opinion rendered in that case, the judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

¹ Rehearing denied.

TODDARD v. SUPERIOR COURT OF
STANISLAUS COUNTY et al.
(S. F. 101.)

Supreme Court of California. May 6, 1895.)

WRIT OF PROHIBITION.

The proper proceeding to review an order of injunction is by certiorari, and not by prohibition.

1. bank. Appeal from superior court, Stanislaus county; W. O. Minor, Judge. Petition by G. R. Stoddard, as collector, for writ of prohibition against the superior court of Stanislaus county and another. Denied.

C. Wright and R. Percy Wright, for plaintiff.

EATY, C. J. The petition for a writ of prohibition herein is denied, for the reason that the court is of the opinion that a writ of certiorari to review any order for an injunction the superior court may make will better conserve the rights of all parties than writ prayed for.

al. Unrep. 35)

CUNNINGHAM et al. v. NORTON. (No. 15,764.)

Supreme Court of California. May 23, 1895.)

GUARANTY—CONSIDERATION—ACTION BY ASSIGNEE
—NOTICE OF ASSIGNMENT.

1. In an action by an assignee on a guaranty executed to plaintiff's husband for rent under a lease of his property making rents payable to her, plaintiff and her husband testified that the guaranty, the date of which was blank, was executed before the delivery of the lease, and as part of the same transaction. The guarantor admitted that when he signed the guaranty he did not know whether the lease had been delivered, or whether the lessee was in possession of the premises. Held, that the guaranty was good under Code, § 2792, providing that, where an original obligation is entered into in consideration of a guaranty, no other consideration is necessary to the guaranty.

2. An objection of no consideration for a guaranty cannot be made where the complaint does not allege that it was made for a good consideration, and this is not denied in the answer.

3. No notice of the assignment of a guaranty is necessary before suit by the assignee, where the guarantor has not made any payment to the assignor.

4. The assent of the guarantor to the assignment of a guaranty for rent is not necessary.

5. In an action on a guaranty to pay rent which remains due and unpaid, it is immaterial whether the lessee could have paid the rent or

commissioners' decision. Department 2. Appeal from superior court, San Mateo county. George H. Buck, Judge.

Petition by Richard Cunningham, administrator, and another, against W. H. Norton, guarantor, for rent. From a judgment for plaintiffs, defendant appeals. Affirmed.

Edw. M. Lucas, for appellant. Edw. F. Patrick, for respondents.

LYNES, C. Richard Cunningham was the owner of certain premises known as the

"San Bruno Hotel," and leased the same to M. J. McBride; the rent to be paid to his wife, Mary Cunningham, since deceased. Norton, the appellant here, executed a written guaranty that he would pay to Richard Cunningham all rents that might remain due and unpaid, "according to the terms of the written lease of the San Bruno Hotel"; and this action is upon said guaranty, to recover the sum of \$550, which the lessee had failed to pay. The complaint alleged that the guaranty was executed and delivered at the time the lease was delivered, and in consideration of the delivery of the lease, as well as for other good and valuable consideration, and that, prior to the commencement of the action, Richard Cunningham, to whom the guaranty was executed, assigned to Mary Cunningham, for a good consideration, said demand and cause of action. The answer denied these allegations, and denied "that there is due from defendant" said or any sum whatever. No other allegations were put in issue by the answer. The cause was tried without a jury, and findings and judgment went for plaintiffs, and this appeal is from the judgment and order denying defendant's motion for a new trial.

Some exceptions were taken to evidence, but, as none of them are specified as error, they cannot be noticed.

It is specified that there was no evidence showing that there was any consideration to support the guaranty. Appellant does not discuss the evidence. He seems to rely upon the claim or assertion that the guaranty was not executed or entered into at the same time the lease was executed. The date of the guaranty was left blank, but Mrs. Cunningham, who was then in life, testified that she was present when the guaranty was signed by defendant; that the lease had not been delivered; that she would not give the lease until he signed the guaranty; and that the whole transaction was done at the same time and place. The defendant testified that McBride, the lessee, was his son-in-law; that he went to the office when the paper was executed, at McBride's request, to become security for him upon the lease, and that he did it to help him, and that he did not know whether the lease had been delivered at that time, or not; and that McBride was then in possession of the leased premises. Upon cross-examination he admitted that he did not know whether McBride was in possession, or not, but supposed he was, while Richard Cunningham testified positively that the lease was not delivered, nor McBride let into possession, until after the guaranty was executed by defendant. The guaranty was therefore good, under section 2792 of the Civil Code.¹

¹ Civ. Code, § 2792, provides: "Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist."

Appellant also contends that the assignment of the cause of action arising upon the guaranty could not be made without an expressed consideration. The complaint, however, alleged that it was made for a good consideration, and this was not denied in the answer. No notice of the assignment was necessary before suit. The defendant not having made any payment to the assignor, he was not prejudiced. It is immaterial whether McBride could have paid the rent or not. It is conceded that he had not paid it. The fact that he had not was not denied in the answer. The guaranty was not that the lessee was good or solvent, or that the rent was collectible from the lessee, but that he would pay if the lessee did not. The consent of the guarantor to the assignment was not necessary, nor were the rights of the guarantor against McBride affected thereby.

I find no contradiction or inconsistency in the findings, and none are pointed out by counsel. The findings are clearly justified by the evidence, they are not against law, and the court did not err in ordering judgment for the plaintiff. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(107 Cal. 373)

HEYDENFELDT v. JACOBS et al. (No. 15,717.)

(Supreme Court of California. May 31, 1895.)

LIFE INSURANCE POLICY—WIDOW AND CHILDREN AS PAYEES—DISTRIBUTION OF PROCEEDS—PERSONAL LIABILITY OF EXECUTORS—ESTOPPEL.

1. An allegation that deceased left "seven minor children, to wit, plaintiff, * * * then about twenty years and ten months," and six others, who are named, is a sufficient averment of plaintiff's minority.

2. A provision that a life insurance policy shall be payable to "C., wife of S., or any wife that may survive him, and minor children living at the time of his death," does not limit the payment to the children of any particular wife, but refers to all minor children of the insured.

3. Under a life insurance policy payable to the wife of the insured, or any wife that may survive him, and minor children living at the time of his death, the beneficiaries take per capita, and the law of descents and distributions does not apply.

4. A policy of life insurance payable to the widow and surviving children of the insured is no part of the assets of the estate, and, if collected by the executors, the latter are personally liable to the beneficiaries for the amount.

5. Where the executors are sued personally for wrongfully collecting the proceeds of an insurance policy payable to the heirs, the statement in the complaint that, when they collected such proceeds, defendants were acting as executors, is immaterial.

6. In an action against executors personally by an heir of deceased to recover the proceeds of a life insurance policy in which plaintiff was a beneficiary, defendants alleged that such proceeds had been inventoried as a part of the assets of

the estate, and included in the final distribution, and that plaintiff had appeared in proceedings connected with the administration of the estate, and made no objections to the proceeds of such policy being so treated and distributed. *Held*, that this did not show an estoppel, there being no allegation that defendants did not know, and had no means of knowing, to whom the policy belonged, or that they relied on the acts of plaintiff, and were thereby induced to treat the proceeds as assets.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Frederick O. Heydenfeldt against Julius Jacobs and others to recover a part of the proceeds of a life insurance policy. From a judgment for plaintiff, defendants appeal. Affirmed.

Pierson & Mitchell and Knight & Hegger, for appellants. T. M. Osmond, for respondent.

McFARLAND, J. The plaintiff is the son of Solomon Heydenfeldt, deceased. The said deceased, in his lifetime, procured a policy of insurance upon his life from the Brooklyn Insurance Company of New York for \$10,000, payable to "Catherine, wife of Solomon Heydenfeldt, or any wife that may survive him, and minor children living at the time of his death." Said Catherine having died during the lifetime of the deceased, he married Elisabeth A. Heydenfeldt, who is now his widow. He also left seven minor children, of whom plaintiff is one. The defendants who are executors of said deceased, collected said policy from said insurance company, and this action is brought to recover from defendants one-eighth of the amount of said policy. Defendants demurred to the complaint on general and on some special grounds, and their demurrer having been overruled, they answered. Plaintiff made a motion for judgment on the pleadings on the ground that the answer did not set up any defense, and, after argument, the motion was granted, and judgment for plaintiff was entered. Defendants appeal from the judgment.

If the views of the court below were correct as to the legal merits of the case, then the judgment, upon the pleadings, was right; for proof of the averments in the answer would have been immaterial, and the denials were merely of matters of law. And we think the views of the court were correct. There is no denial in the answer that respondent was a minor child of the deceased at the death of the latter, but it is contended that the averment on that subject in the complaint is insufficient. The averment is that at the time of the death of the deceased there were "seven minor children, to wit, plaintiff above named, Frederick O. Heydenfeldt, then of the age of about twenty years and ten months," and six others, who are named. It is not necessary to consider how the words "about twenty years and

1 months" should be construed if they stood alone, for, as they are immediately preceded by the statement that plaintiff was a minor, the whole clause is clearly sufficient as an averment of his minority. The deceased had children by both wives, and it contended that the policy ran to the surviving widow and her minor children. But

think that the true construction of the language (above quoted) clearly is that the policy was payable to his present wife, Catharine, or to any wife who might survive him, and to the minor children of the deceased. There is no limitation to his children by any particular wife. The contention that the amount of the policy should go one-third to the widow and two-thirds to the seven children, according to the statute of succession, cannot be maintained. The fund was a part of the assets of the estate of the deceased, and the law of descents and distributions has no applicability to the case. The persons named in the policy take per capita. *Felix v. Ancient Order of United Workmen*, 31 Kan. 81, 1 Pac. 281; *Campbell Wiggins, Rice*, Eq. 10.

The appellants were sued personally and as executors. The unnecessary statement in the complaint of the fact that when they collected the policy they were acting as executors is of no consequence. The policy was no part of the assets of the estate, the appellants had no right, as executors, to collect; and, if liable at all, they are liable personally,—as they were sued,—and not as executors. And, having wrongfully come into possession of the amount of the policy, whether by mistake or otherwise,—they are the trustees "of the thing gained for the benefit of the person who would otherwise have had it." Civ. Code, §§ 2223, 2224. Whether or not the respondent could have maintained an action for his share of the policy against the insurance company is a question not here involved.

The point for a reversal most insisted on by appellants is based on an alleged estoppel.

It is averred in the answer that the amount of said policy was treated by appellants as part of the assets of the estate of Solomon Heydenfeldt, deceased; that so reported, inventoried, and accounted for; and that there was a final distribution of all of the estate, which included the amount of said policy, under the last will of the deceased, to the said Elisabeth, widow of the deceased, and to her assignee, Crittenden.

It is further averred that since July 1891, the respondent had notice and admitted that the proceeds of the said policy were included in the inventory of the estate of said deceased, and were claimed to be a part of said estate subject to distribution under said will; that he appeared personally and by counsel in the proceedings conducted with the administration of said estate; that he made no objection to said proceeds being considered and distributed as

part of said estate, and that the same was done with his knowledge and consent; and that, therefore, he "is now estopped from setting up any claim to any portion of said proceeds of said life insurance policy." We are satisfied, however, that the case made out by the averments of the answer is lacking in nearly all the essential elements of an estoppel. *Dean v. Parker*, 88 Cal. 283, 26 Pac. 91. It is not averred, for instance, that the appellants did not know, or had no means of knowing, to whom the proceeds of the policy belonged. Indeed, it is almost impossible to conceive how, under their averments in the answer, they could have been ignorant of the true state of the title to said proceeds. Moreover, there is no averment that they relied upon the alleged conduct of the respondent, and were induced thereby to deal with said proceeds in manner as alleged in the answer. A contest for the proceeds of the policy could not have been inaugurated by respondent in the probate court. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

HEYDENFELDT v. JACOBS et al. (No. 15,748.)

(Supreme Court of California. May 31, 1895.)

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Ine O. Heydenfeldt against Julius Jacobs and others to recover a part of the proceeds of a life insurance policy. From a judgment for plaintiff, defendants appeal. Affirmed.

Pierson & Mitchell and Knight & Heggerty, for appellants. T. M. Osmont, for respondent.

PER CURIAM. Upon the authority of *Heydenfeldt v. Jacobs* (No. 15,717, this day decided) 40 Pac. 492, the judgment herein is affirmed.

(107 Cal. 391)
SANDELL et al. v. SHERMAN et al. (No. 15,683.)

(Supreme Court of California. June 3, 1895.)

EXAMINATION OF WITNESS—INSTRUCTIONS—MALICIOUS PROSECUTION—BURDEN OF PROOF—ADVICE OF COUNSEL.

1. It is no abuse of discretion for the court to excuse a witness from testifying further on cross-examination, where much time had been taken up on one point, and counsel did not ask permission to examine further on other matters.

2. Where a charge, taken as a whole, is correct, error cannot be based on certain expressions, which, when standing alone, are erroneous.

3. In an action for malicious prosecution, a charge that plaintiff must show such facts as will warrant the jury in finding malice and want of probable cause is not erroneous, as leaving to the jury the determination of what constitutes probable cause.

4. In an action for malicious prosecution, a charge that defendants are not liable if they believed and acted on the advice of counsel, after a full and fair statement of the case, is not erroneous because it does not further state that defendants must have acted in good faith.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Catherine Sandell and another against Obadiah D. Sherman and others for malicious prosecution. From a judgment for defendants, plaintiffs appeal. Affirmed.

George Lawrence, for appellants. Ash & Mathews, for respondents.

SEARIS, C. Action for the malicious prosecution of an application in the superior court to have a guardian appointed of the estate of Catherine Sandell, the female plaintiff. Defendants had a verdict and judgment, from which judgment, and from an order denying their motion for a new trial, plaintiffs appeal.

The first error assigned by appellants is based upon an alleged abuse of discretion by the court, at the trial, in excusing Margaret O. Broeder from further testifying, while under cross-examination, and before the same was completed. Mrs. Broeder, the witness, was one of the defendants in the case, and a daughter of Mrs. Sandell, the female plaintiff. She had testified at length to the effect that her mother, the plaintiff, had long been in feeble health, and weak in body and mind; that at the age of 70 years she had married Sandell, the other plaintiff, who was a young man. She then detailed the troubles that followed; the conveyance of property by her mother to her husband; and as to her belief in the incapacity of her mother to manage her property; and her statements to counsel of the facts, and the advice of the latter to apply for a guardian over her mother's property, which was done, etc. The cross-examination, covering over six pages of the transcript, was confined to questioning the witness as to her testimony before the superior court in the proceeding for the appointment of a guardian, and, in so doing, probably led the court below to believe that time was being needlessly consumed. The court thereupon remarked as follows: "I think you have taken enough time, Mr. Lawrence, with this witness. I will excuse you, madam." Counsel for appellants did not then suggest any other point upon which he desired to cross-examine the witness. Had he done so; and asked to be permitted to examine upon other branches of the testimony, permission would probably have been granted to do so. The scope within which cross-examination is to be confined, and the time requisite therefor, are subject to certain well-defined rules, largely a matter of discretion with the trial court. In the present instance no abuse of such discretion is apparent, and no cause for reversal is presented.

The only other objections urged in favor of reversal relate to the instructions given to the jury. Their length (over 17 pages of the transcript) precludes their being set out

in full. Excerpts taken from them, and presented as independent propositions, unsupported and unexplained by the context, would lead to the conclusion that error is involved; but, when taken together, as a whole, and certain expressions used therein are viewed in the light of the accompanying explanations, it is believed they contain a correct exposition of the law applicable to the case. To illustrate, this sentence is found in the instructions: "I instruct you that the affirmative of the issue here is upon the plaintiffs. They must, in this case, show such facts, in order to establish their cause, as will warrant you in finding that there was malice and want of probable cause on the part of these defendants, in doing the things which they did, and they must establish that by a preponderance of testimony." Appellants contend that this instruction left the jury to determine for themselves what facts constituted probable cause, whereas probable cause is always a question of law; citing *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937; *Eastin v. Bank*, 66 Cal. 125, 4 Pac. 1106; *Fulton v. Onesti*, 68 Cal. 575, 6 Pac. 491; *Harkrader v. Moore*, 44 Cal. 152; *Grant v. Moore*, 29 Cal. 644. What facts and circumstances amount to probable cause is a pure question of law. Whether they exist, or not, in any particular case, is a pure question of fact. The former is exclusively for the court; the latter, for the jury. *Newell, Mal. Pros.* p. 14. The same author says, at page 276, what in most cases is manifestly true, viz.: "The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact, and to be determined by the jury; but whether, supposing this to be true, they amount to probable cause, is a question of law." It has been sometimes regretted by the courts that it is not by the law of England, as by that of Scotland, a question for a jury. *Perryman v. Lister*, L. R. 3 Exch. 197, L. R. 4 H. L. 521. But considerations of public policy have hitherto, both in England and this country, dictated the rule as hereinbefore enunciated. But, conceding all this, it is not perceived that the court erred in the paragraph quoted. It will be observed that the object of the instruction was to impress upon the minds of the jury the fact that the burden of proof, under the pleadings, was upon the plaintiffs to establish the two propositions essential to a recovery, viz. malice and a want of probable cause. The language of the instruction follows closely the rule as contained in the books in reference to the proofs necessary to be made by a plaintiff in such cases. The court had already instructed the jury that they were the sole and exclusive judges of the facts, but that "the question of want of probable cause is a question for the court, as a question of law," and had stated to the jury that if certain facts, which were enumerated, existed, prob-

the cause was shown, and they should find defendants, and that certain other enumerated facts, if found to exist, would show want of probable cause for instituting the proceedings complained of, and the verdict could be for the plaintiff. The jury was instructed to determine whether or not established facts do or do not amount to probable cause. The expression used by the court was not an apt one, perhaps; but that misled the jury into supposing that they were to find upon the question of law as to probable cause is a conclusion which, in the face of the repeated instructions of the court to that subject, cannot be fairly reached.

The other objections to the instructions are more technical than real. The more important one is founded upon the language of the third instruction given at the request of defendants. It is as follows: "(3) I instruct you that if the defendants, before filing the petition to have a guardian appointed for the plaintiff, sought the advice of counsel, a respectable attorney at law, and of good standing, regularly admitted to practice, and who was practicing his profession in all the courts of this state, and stated to him all the facts upon which the application for guardianship was based, and made a full and fair statement of all the facts of that case to his counsel, and he advised that they file a petition for the appointment of a guardian for the plaintiff in this action, and, being and acting on such advice, they filed their petition, it is a good defense in this case, and it makes no difference if their petition was denied by the court." It is urged that this instruction was erroneous, for the reasons (a) that it leaves out the element of good faith on the part of defendants in seeking the advice of counsel; (b) that it does not charge that they should have stated to attorney all the facts within their knowledge, or which they reasonably could have ascertained; (c) that it does not state that the counsel advised them in good faith; (d) it does not contain the element of good faith on the part of defendants; (e) it contradicts plaintiffs' third instruction. The general instruction in reference to the advice of counsel as a defense in actions for malicious prosecution, and which is amply supported by authority, is as follows: "Where a party has communicated to his counsel all the facts material to the case, of which he has knowledge, or could have ascertained by reasonable diligence and inquiry, and has acted upon the advice received, honestly and in good faith, the absence of malice is established, want of probable cause is negatived, and action for malicious prosecution will not lie."

Newell, Mal. Pros. p. 310, and cases therein cited. See, also, Potter v. Seale, 8 Cal.

Levy v. Brannan, 39 Cal. 485; Wild v. Wild, 56 Cal. 136, 137; Jones v. Jones, 71 Cal. 89, 11 Pac. 817. Tested by the foregoing rule, we fail to see any serious objection to the instruction. If the defendants made

a "full and fair statement of all the facts of the case to their counsel," and if he advised that they file a petition for the appointment of a guardian, etc., and if they, "believing and acting on the advice," did so, they must have acted in good faith. The question of the good faith of counsel in giving the advice is not an element in the problem. Nor is any contradiction observed between the instruction and the third instruction given at the request of plaintiffs. The latter is much fuller in detail than the former, but states the law precisely the same, and then proceeds to instruct the jury that if the defendants consulted an attorney as a means of covering malice, and did not believe the advice given to them, or did not act in good faith under the advice, or did not believe there was cause for the institution of the proceeding, or if they instituted such proceeding from a fixed and malicious determination of their own, and not from the advice of counsel, or that they did not make a full, fair, and true statement of all the facts known to them to their attorney, then it was no defense, and, if the proceeding was prosecuted maliciously, then the verdict should be for plaintiffs. It is worthy of remark, also, that, at the close of the instruction immediately following the one objected to, the court instructed the jury that they were "the judges of the facts whether the defendants made a full and fair statement of all the facts to their attorney before obtaining his advice to file a petition for the appointment of guardian." The instructions, taken as a whole, contained a full and fair exposition of the law applicable to the case, and were as favorable to plaintiffs as either the facts or law would warrant. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(107 Cal. 378)

GRIFFIN & SKELLEY CO. v. MAGNOLIA & HEALDSBURG FRUIT-CANNERY CO. et al. (No. 15,607.)

(Supreme Court of California. May 31, 1895.)

VENUE—PRACTICE—RULING ON DEMURRER.

1. Const. art. 12, § 16, providing that a corporation may be sued in the county where the contract is made, or where the breach occurs, etc., is merely permissive; and by joining another defendant, whose residence is in a different county, plaintiff waives the benefit of such provision.

2. A ruling on a demurrer to a complaint cannot be made until after a decision on a motion for change of venue. Ah Fong v. Sterne, 21 Pac. 381, 79 Cal. 33, followed.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the Griffin & Skelley Company against the Magnolia & Healdsburg Fruit-Cannery Company and another for breach of contract. From an order overruling a motion for change of venue, defendants appeal. Reversed.

Ruthledge & Pressley, A. B. Ware, and W. S. Goodfellow, for appellants. Mastick, Belcher & Mastick, for respondent.

HARRISON, J. The plaintiff commenced this action in the superior court of the city and county of San Francisco against the defendants to recover from the corporation defendant certain damages that had resulted from its breach of contract with plaintiff, and to recover from the defendant Merchant, upon an allegation that he is a stockholder in the corporation defendant, his proportionate amount of the corporate liability of his codefendant. The principal place of business of the defendant corporation is in the county of Sonoma, and the residence of Merchant is in the same county. Upon an affidavit showing these facts, the defendants asked that the place of trial be changed to Sonoma county, and the plaintiff resisted the application upon the ground that the contract between it and the defendant corporation was made in San Francisco. The court denied the motion, and from this order the defendants have appealed.

Section 16 of article 12 of the constitution provides: "A corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases." It is contended on behalf of the plaintiff that by virtue of this section the action was properly commenced in the city and county of San Francisco, and that the court properly refused to change the place of trial. In *Brady v. Times-Mirror Co.*, 39 Pac. 209, the plaintiff commenced the action in San Diego county against the corporation, whose place of business was in the county of Los Angeles, and joined with it, as a codefendant, Otis, whose residence was in the county of Los Angeles. The defendants moved for a change of the place of trial, and, in reversing the order denying their motion, we said, in reference to this section of the constitution: "Under the provisions of this section, if the action had been brought against the Times-Mirror Company alone, the plaintiff's right to have the action tried in San Diego would be undoubted; but by including in the action other defendants, whose residence is outside of the county of San Diego, she waived the right given by this provision of the constitution, and the motion of the defendants must be determined by the provisions of the statute." See, also, *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356. This provision of the constitu-

tion is in entire harmony with the provisions of the Code of Civil Procedure, and raises no conflict therewith. The plaintiff may at all times avail himself of the privilege given by the section, if the only defendant in the action is the corporation; but if he chooses to join as defendants in the action others, whose residence is in a different county, he waives the benefit of the provision. Such joining of other defendants is his own act, and he cannot in this manner deprive them of a right held by them. *Ah Fong v. Sternes*, 79 Cal. 33, 21 Pac. 381. If a plaintiff would avail himself of the privilege given by this exception to the general rule, he must bring himself clearly within the exception, and is not at liberty, while availing himself of this privilege, to deprive a defendant other than the corporation of a right equally great, which the statute has given him, to have the cause of action against him tried in the county of his residence. This provision of the constitution is merely permissive to the plaintiff. *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157. And the provision therein that the court may "change the place of trial, as in other cases," indicates that it is no more controlling upon the action of the court than if it were a mere statutory enactment. Being a provision of the constitution, the legislature cannot deprive the plaintiff of the privilege which it confers, but he has not thereby received any greater privilege than if the same provision had been made by statute. In either case it is only a rule of procedure to be acted upon by the court in connection with other rules of procedure.

The plaintiff was not required to make Merchant a defendant in the action. His liability as a stockholder is distinct from that of the corporation, and only a several judgment for his proportion of the corporate liability can be rendered against him. Civ. Code, § 322. Whether he could be united in the same action with the corporation does not arise upon this motion. That question can arise only upon a demurrer to the complaint, and a ruling upon such demurrer could not be made until after a decision upon the motion to change the place of trial. *Ah Fong v. Sternes*, supra. The order is reversed.

We concur: GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

VAN FLEET, J., being disqualified, did not participate in the foregoing decision.

(107 Cal. 402)

DEMARTINI et al. v. CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,742.) (Supreme Court of California. June 4, 1895.)
DEDICATION OF STREET—ACCEPTANCE—EVIDENCE—INJUNCTION SUIT—BURDEN OF PROOF.

1. To defeat a suit to enjoin the city authorities from taking possession of land in the possee-

n of plaintiff as being a part of a street, it is incumbent on defendants to show the city's right thereto.

2. Where plaintiffs had been in possession of land under claim of title for more than 20 years, and the evidence was conflicting as to the extent to which the public used the land, but it was clearly tended to show that the user was merely permissive, a finding that no part of it had ever been dedicated or accepted as a public street will not be disturbed on appeal.

3. Where land was not a part of one of the originally reserved streets, but came to private ownership under an alcalde grant, the right to use it as a public street depends upon whether it has been dedicated as such.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hubbard, Judge.

Action by A. Demartini and others against the city and county of San Francisco and answer to enjoin defendants from opening up street. From a judgment for plaintiffs and an order denying a motion for a new trial, defendants appeal. Affirmed.

Larry T. Creswell and A. Heyneman, for plaintiffs. Tilden & Tilden, for respondents.

AN FLEET, J. Plaintiffs brought this action to enjoin the superintendent of streets of the city and county of San Francisco from removing the improvements from, and opening up as a public street, a certain strip of land in said city and county. Plaintiffs had judgment in the court below. The defendants moved for a new trial, which was denied, and they appeal from the order upon statement of the case. Fifty-vara lots numbered 38 and 14 are situated in the block square of said city and county lying between Broadway and Pacific and Kearny and Montgomery streets. Lot 38 is a rectangular lot situated on the northwesterly corner of the block, with a front of 137½ feet on Broadway and a like extent on Kearny. Lot 14 lies immediately to the east of and adjoining lot 38, with the same frontage on Broadway as the last-named lot, and running back southerly to an equal depth. The plaintiffs claim to be the owners and in possession of that portion of 50-vara lot 14, lying adjacent to lot 38 on the east, having a front of 39 feet and 9 inches on Broadway, and running back the full depth of 137½ feet, commencing at Kearny street, and running eastward and upon the most southerly part of 50-vara lot 38, is a narrow alley or strip known as "St. Charles Street," some 14 feet wide, which is opened up the full width of said lot 38; while running from Broadway, and on the entire easterly line of that part of lot 14 above described, as claimed by plaintiffs, is an alley 14 feet wide, known as "Rowland Alley." The land in dispute is a strip 17½ feet wide and about 39 feet and 9 inches long on the southerly line of plaintiffs' lot, as now claimed by them, and which, if thrown open, would extend to St. Charles street or alley so as to connect it with Rowland alley. The claim of the defendants is that the premises in dispute comprise and constitute a part of St. Charles street, and is a public way, made so by dedication of the owners thereof and acceptance by the public. The plaintiffs claim, to the contrary, that the land in dispute never was dedicated or opened as a street, and has never been open to public use or travel; that St. Charles street is a cul de sac, which never at any time extended across any portion of said lot 14, but terminated at the easterly line of lot 38.

The court below found: "(1) That the plaintiffs are and have been in possession of all of the land and premises described in the complaint, claiming title thereto, ever since the month of July, 1884, and that the possession of said lot of land has been held by the predecessors of the plaintiffs ever since prior to the year 1865; and that there are and have been for many years improvements upon all of said premises, which improvements are the property of plaintiffs. (2) That St. Charles street, mentioned and described in the complaint, does not extend easterly from or beyond the easterly line of fifty-vara lot 38, and said St. Charles street does not pass across, along, or upon any portion of fifty-vara lot No. 14, and that no part of the land described in the complaint has ever been dedicated or accepted or used as a public street or highway, and no part thereof is a public street."

The main contention in the case is that these findings are not supported by the evidence, but from a careful examination of the evidence we think this claim cannot be maintained. As to the first finding, there is in fact no substantial conflict in the evidence, and the lower court would not have been warranted in a conclusion contrary to that reached. Counsel's position with reference to this finding would seem to be substantially the same as that pressed upon his motion for a nonsuit,—that it was essential for plaintiffs, in order to maintain their action, to establish title in fee in themselves. In this view counsel is mistaken. It was only necessary for that purpose that plaintiffs show actual occupation or possession at the time of bringing the suit. This being presumptive evidence of title, it was incumbent upon the defendants to show a better right in order to defeat the action. In *Tate v. Sacramento*, 50 Cal. 242, it is said: "At the commencement of the action the plaintiff was, and for many years had been, in the actual occupation of the premises in controversy. His possession was prima facie evidence of title, and must be presumed to have been rightful, until the contrary appear. But the defendant contends that the land on which the plaintiff's building stands constitutes a part of Third street, north of I street, and that the buildings are a nuisance, which the city authorities may lawfully remove. In support of this claim it was incumbent on

the defendant to show affirmatively that Third street, north of I street, had been dedicated as a public street." The evidence shows, as suggested, without substantial conflict, that, as found by the court, plaintiffs and their predecessors have been in possession of the premises, under claim of title, for more than 20 years.

As to the second finding, there is not only a substantial conflict in the evidence upon which it rests, but we think it clearly preponderates in favor of the facts as found by the court. The evidence shows that the alley now known as "St. Charles Street," but which at different times has been known as "St. Charles Place," and sometimes as "St. Charles Alley," had been from early in the "fifties" used by the residents on that block and in that neighborhood as a convenient way between their homes and places of business. During these early years that portion of the city was not thickly settled, and, the district being hilly, it was the habit of the residents to go upon trails or paths wherever it was most convenient to travel, without reference to established streets. At this time, at least down to 1854, there were no houses on lot 14. In 1856, Mr. Fiske, who owned the part of 50-vara lot 38, across which St. Charles street runs, fenced up the street, but the owners on the south of the alley paid him for one-half of the width, and he again opened it; and in January, 1857, an agreement was entered into by those owning 50-vara lot 38, by which it was declared that the strip of land now known as "St. Charles Street" "shall remain subject to our disposition, and under our control, for our mutual use and benefit." At that time Mrs. Jane Rowland owned the portion of 50-vara lot number 14, now owned by plaintiffs, including the land in dispute; and, as Broadway was not then cut through or graded, Mrs. Rowland asked and was granted permission to use St. Charles alley or street as a way to get to and from her lot, and a fence which Mr. Fiske had erected on the line between lots 38 and 14 was removed for that purpose. This left a way open for people to go from Kearny street, by way of St. Charles street, across lots and through to Montgomery street, as had been their habit before the fences were put up. Subsequently, however, when Broadway was opened and graded, and the people on lot 14 could get out that way, they opened, by agreement among themselves, a private way, now called "Rowland Alley," and used that as a means of ingress and egress to and from their homes. This was about 1863-64, and thereupon Mrs. Rowland herself put up a fence on the line between lots 38 and 14, where it had formerly been established by Mr. Fiske, and fenced the strip of land now in dispute off from its connection with St. Charles street or alley. This fence has, with one or two short interruptions, remained to the present time, confining St. Charles street

to a cul de sac, extending only across lot 38. In putting up this fence Mrs. Rowland left a gate for foot passengers from her lot into St. Charles street, and for some years people in the neighborhood, and tradesmen administering to their wants, and perhaps others, were accustomed to use this gate as a means of getting from St. Charles street to Rowland alley and thence to Broadway, and also in going through by way of St. Charles street to Montgomery place and Montgomery street. The evidence is quite conflicting as to the extent to which travel was wont to go across the disputed land during any of the period mentioned, but it very clearly tends to show that whatever user there was by the public was a mere sufferance or permissive use by the owners of the fee. This is largely true, also, as to St. Charles street as now opened, and likewise of Rowland alley. It is very doubtful if, under the evidence, those alleys can be regarded as other than private ways, opened by the consent and for the use and convenience of the contiguous owners, and as not intended as public streets. Certainly, as to the land in question, while there is evidence of its use by the public at different times in the manner we have stated, there is no evidence of such unequivocal intent by the owners to dedicate to such use as would warrant us in overturning the finding to the contrary. "To constitute a valid and complete dedication, two things must concur, to wit, an intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use; and an acceptance by the public of the dedication." *San Francisco v. Canavan*, 42 Cal. 554. "Dedication is never to be presumed without evidence of an unequivocal intention on the part of the owner." *Quinn v. Anderson*, 70 Cal. 456, 11 Pac. 746. While user may be sufficient to show an acceptance by the public of an offer to dedicate, it is not sufficient of itself to establish dedication by the owner, except it appear clearly that such user was with the knowledge and consent of the latter, or without his objection, and under such circumstances as to fairly give rise to the presumption that the owner intended to dedicate to such use. The appellants claim that Mrs. Rowland, in 1856, in a declaration or schedule filed of her separate property, recognized St. Charles street or alley as then existing across lot 14, and some stress is laid upon this fact as an evidence upon her part of dedication. But the description of her lot in that schedule shows that Mrs. Rowland did not regard or recognize St. Charles street as crossing her lot, but as running along its southern boundary. She describes her lot as beginning on the northerly line of St. Charles street, and running northerly to Broadway 137½ feet,—showing that she then supposed the street to exist entirely without the limits of lot 14. And all her other acts at about the same time, and ever subsequently, show clearly

that she did not regard the street as crossing her lot.

Much stress is also laid upon the fact that upon the engineer's map, and other official maps of the city, the strip in dispute appears to have been laid down as a part of St. Charles street or alley; but this of itself raises no conclusive presumption that the land has become a public street, either by dedication or otherwise. Where, as here, the land was not a part of one of the originally reserved streets, but came to private ownership under an alcalde grant, the right to take it as a public street depends upon whether it has been dedicated as such. *Whelan v. Boyd*, 93 Cal. 500, 29 Pac. 69. The evidence shows that at and before the time those maps were made and filed these premises were fenced, and have never since been opened to use as a street. The order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(21 Colo. 208)

CRYMBLE et al. v. MULVANEY.¹

(Supreme Court of Colorado. May 6, 1895.)

CORPORATE PROPERTY—PURCHASE BY DIRECTOR—FRAUD AS AGAINST CREDITOR—DELIVERY OF POSSESSION—WRONGFUL ATTACHMENT—DAMAGES.

1. A purchase by a director, who is also the manager of the corporation, of the corporate property, which is subsequently ratified by the stockholders, and which is not fraudulent in fact, is not fraudulent in law, as against corporate creditors.

2. The fact that a sale by a corporation was negotiated by a director who was actuated by a desire to protect a certain creditor of the corporation, for whom he was agent, does not invalidate the sale, it having been ratified by the stockholders.

3. Where there is no actual fraud in a sale by a corporation, corporate creditors cannot attack it for constructive fraud arising from the trust relationship between the purchaser and the corporation.

4. A corporation carrying on a retail and wholesale business used a warehouse, on which there was no sign, solely for storing its goods. On a sale by the corporation of its wholesale business to its manager, he took actual possession of the goods in the warehouse; removed other goods, which he had purchased, and which had been theretofore in the retail store, to the warehouse; opened a retail and wholesale store in the warehouse, cutting windows therein; placed the sign "Office" over the door; and advertised himself in a newspaper as the successor to the corporation. *Held*, that there was a sufficient delivery of the goods to render the sale valid, as against corporate creditors.

5. Damages for injury to the credit of a merchant by reason of the unlawful seizure of his goods and store under attachment against his vendor, and also for loss of profits after a return of possession, and resumption of business by the merchant, are not recoverable, they being too speculative.

6. In an action for the unlawful seizure of merchandise under an attachment against plaintiff's vendor, the mere fact that defendants had knowledge of the facts surrounding the sale to plaintiff, which they erroneously claimed was

fraudulent, as being a sale by a corporation to its manager,—their object being to subject the goods to the satisfaction of a just claim against the corporation,—does not sufficiently show such an evil intent on the part of defendants, or a reckless disregard of plaintiff's rights, as to justify the recovery of exemplary damages.

Appeal from district court, Chaffee county.

Action by Peter Mulvaney against Hugh Crymble and another. There was a judgment for plaintiff, and defendants appeal. Reversed.

This is an action brought by the appellee to recover damages for the alleged unlawful taking of certain goods, wares, and merchandise by the appellants. The nature of the case, and the questions involved, can be better understood by a brief statement of so much of the pleadings as present the material issues. The complaint, *inter alia*, alleges in substance, that appellee was, at the time of the grievance complained of, a merchant carrying on a wholesale and retail business; that on or about the 18th of December, 1890, the C. S. Morey Mercantile Company placed in the hands of the other appellant, as sheriff of the county of Chaffee, a pretended writ of attachment, purporting to have been sued out of the district court of Arapahoe county, in the state of Colorado, by the said C. S. Morey Mercantile Company, in a certain cause wherein it was plaintiff and the Salida Mercantile Company was defendant; that said Crymble, as sheriff, at the request and by the direction of said company, executed the writ of attachment by levying upon and taking into his possession, and from the possession of appellee, his entire stock in trade, consisting of groceries, hardware, harness, farming implements, and other chattels; that, in so taking into his possession the goods and chattels complained of, the said Crymble unlawfully broke into the appellee's store and place of business, and took complete possession thereof, and excluded appellee therefrom, completely stopping his trade and business, preventing him from continuing his business for the period of 20 days, to the appellee's damage in the sum of \$1,000; that on the 7th day of January, 1891, said Crymble returned to appellee a portion of the property so taken; that a part of said property was of a perishable nature, and had decayed and depreciated in value while unlawfully retained by said Crymble, to appellee's loss and damage in the sum of \$200; that the market price of a portion of the goods so taken and held depreciated in value \$300; that the value of the goods taken and retained was \$7,000; that the taking of the property by said Crymble was attended with circumstances of malice and insult, and by wanton disregard of appellee's rights and feelings; that at the time of said unlawful taking he was conducting a prosperous business, and had large credit with wholesale and jobbing houses in Colorado, as well as with the citizens of Chaffee county; that by reason of the unlawful acts of appel-

¹ Rehearing denied June 7, 1895.

lants his trade and credit have been temporarily destroyed, and will be seriously injured for a long period in the future; and he has been financially cramped and distressed, to his damage in the sum of \$10,000. Prays for judgment against appellants in the sum of \$18,500, and for costs of suit. The answer of appellants admits that said Crymble, as sheriff of Chaffee county, at the request and by the direction of said appellant the C. S. Morey Mercantile Company, did execute the writ of attachment in said complaint mentioned, by levying upon and taking into his possession certain stock in trade, consisting of groceries, hardware, harness, wagons, farming implements, and other chattels, but denies that said goods were taken from the possession of appellee. Denies that Crymble, in the taking of the same into his possession, unlawfully broke into appellee's store or place of business. Alleges that the writ of attachment was sued out of the district court of Arapahoe county on the 17th day of December, 1890, in a certain suit wherein the C. S. Morey Mercantile Company was plaintiff and the Salida Mercantile Company was defendant, to secure the payment of a certain indebtedness due from the said Salida Mercantile Company, which said indebtedness was for the sum of \$1,520.67; that judgment was rendered in favor of said plaintiff for said sum, and sustaining said attachment. They further allege that the Salida Mercantile Company was the owner of, and in possession of, the goods, wares, and merchandise taken by the said sheriff under said writ of attachment, but that intending to cheat, hinder, and defraud the C. S. Morey Mercantile Company, and the other creditors of said Salida Mercantile Company, and to put its effects out of the reach of said creditors, the said Salida Mercantile Company did fraudulently convey and assign its said goods, wares, and merchandise to appellee. Allege that there was no immediate, or any, change of possession of the said goods from the Salida Mercantile Company to appellee; that when the writs of attachment were levied upon said goods and chattels they were in the possession of said Salida Mercantile Company; that the appellee, for a long time prior to the pretended sale by the Salida Mercantile Company to him, was the vice president and general manager of the Salida Mercantile Company; that he had sole supervision of the business of said company; that said pretended sale was made and conducted by said manager to himself individually, and was made by the Salida Mercantile Company, and accepted by appellee, with the intent to hinder, delay, and defraud the C. S. Morey Mercantile Company, and other creditors of said Salida Mercantile Company. The cause was tried to a jury. Verdict and judgment for \$6,849. To reverse this judgment, defendants below bring the case here on appeal.

O'Donnell & Decker, for appellants. C. S. Libby, for appellee.

GODDARD, J. (after stating the facts). It will be seen from the foregoing statement that appellants attack the validity of the sale of the goods in question by the Salida Mercantile Company to appellee, upon the ground both of fraud in fact and fraud in law. In support of the first ground, while they do not question the adequacy of the consideration paid by appellee, or claim that he committed any fraud upon the company or its stockholders in purchasing the goods, they insist that by reason of his fiduciary relations to the company, being a director and its manager, he was disqualified from purchasing at all, since in doing so he would act in a double capacity, and his interest as buyer would conflict with his duty as a director. It may be conceded that a director, under the principle that controls the law of agency, is incapacitated from acting in the capacity of buyer from the company, and at the same time as its agent in making the sale. But it does not follow, as contended by counsel for appellants, that a director, in dealing with his company, necessarily acts in this double capacity. He certainly does not in case the company is represented in the transaction by its other directors, who constitute a majority of the board, and he does not assume to represent the company, but deals with such majority. Under such circumstances this principle of agency has no application, and he is not disqualified from dealing with the corporation, when so represented by other agents. Ang. & A. Corp. §§ 233, 312; 1 Beach, Corp. § 242; 1 Mor. Priv. Corp. §§ 521, 527; Harts v. Brown, 77 Ill. 226; Beach v. Miller, 130 Ill. 162, 22 N. E. 464; Buell v. Buckingham, 16 Iowa, 284.

It appears from the evidence that the Salida Mercantile Company was a duly-incorporated company, and carrying on a wholesale and retail mercantile business at the city of Salida, in Chaffee county, from January 1 to November 10, 1890. Messrs. Motz, Johnson, Flynn, Mulvaney, and Dodge were its stockholders, and also constituted its board of directors. Up to October 14, 1890, Mulvaney was its president, when he resigned that office, and was elected vice president and general manager. At a meeting of the board of directors on November 2, 1890, he, as manager, was instructed to find a purchaser for the entire stock and business of the company, and, if such a buyer could not be found, to use such means in disposing of the stock as he deemed best for the interests of the company and its creditors. On November 16th, with the assistance of Mr. Dodge, one of the directors, he sold the retail part of the business to Albright & Hawkins; and upon the request of Dodge and Flynn, acting in behalf of the other directors and stockholders, he agreed to purchase the wholesale

part of the business at the invoice price of the goods, and, in pursuance of this agreement, gave his notes and acceptances to the company. On November 16th, at a meeting of the stockholders and board of directors, he made a report of these transactions, which report was "accepted as fully satisfactory to the stockholders and directors." Thus it will be seen that, while the sale to Mulvaney was negotiated by Dodge and Flynn, it was fully ratified and confirmed by the board of directors and stockholders of the company, and the objection that it was a sale by Mulvaney to himself is without foundation in fact. Nor do we think that the fact that Dodge, at the time of negotiating the sale, was also an agent of the Struby-Estabrook Company, another creditor of the Salida Mercantile Company, and was actuated by a desire to protect that particular creditor, in any way affects the validity of the transaction. And furthermore, if, for any of the reasons urged, the validity of the sale might, as between Mulvaney and the company, or its stockholders, be questioned, there being no actual fraud, it does not lie in the mouths of appellants to question its validity. As was said by Judge Dillon in the case of *Buell v. Buckingham*, supra: "As the principal or parties interested may confirm the sale, a mere stranger cannot make the objection that the trustee was the purchaser, or that the sale was irregular. The remedy belongs only to persons who had an interest in the property before the sale, and no other person can apply to set aside the sale."

It is urged in support of the second objection to the validity of the sale—that there was not such a delivery and change of possession of the property as is required by section 14 of our statute of frauds—that, under the circumstances of the case, Mulvaney, as general manager of the company, could not deliver the possession of the goods to himself, as an individual. It is well settled by the decisions of this court that the acts necessary to constitute a sufficient delivery and change of possession of the subject of sale required by this section of our statute depend, in a great measure, upon the nature and situation of the property. As was said in *Cook v. Mann*, 6 Colo. 21: "When the subject of the sale does not reasonably admit of an actual delivery, it is sufficient if the vendee assume that control and dominion of the property so as reasonably to indicate to all concerned the change of ownership. The case of goods in a warehouse, brick in a kiln, and lumber in a raft are familiar illustrations where removal is not impossible, but unusual, and out of the regular course of trade. In such cases, if there is a full surrender upon the part of the vendor, and a full assumption on the part of the vendee, of the control and dominion of the subject of the sale, the delivery is sufficient." It appears from the record in this case that the Salida Mercantile Company occupied a store

on the corner of F and Second streets, where it carried on its retail business and kept its office, and used the warehouse at the corner of First and G streets for storage purposes, wherein it kept its wholesale stock. This building had no sign of the Salida Mercantile Company on it, and was only opened when goods were placed therein or taken therefrom. The retail stock sold to Albright & Hawkins was in the store on the corner of F and Second streets, and was taken possession of by them. The goods purchased by Mulvaney that were in the store at F and Second streets were removed by him to this warehouse. Upon consummating the sale he took actual possession of the goods therein, and opened up a wholesale and retail business in this latter place, and kept it open during business hours; had windows and a door cut in the corner and at the front of the building, and placed the sign "office" over the door facing the street, and over the window; also put up a sign, "Harness Making & Repairing;" put an advertisement in the newspaper that, as successor to the Salida Mercantile Company, he was doing business at the corner of First and G streets.

From the nature and situation of the goods, these facts and circumstances are sufficient to sustain the finding of the jury that there was a sufficient compliance with the requirements of the statute. We think, therefore, that the sale was valid, and that the appellee, upon the testimony, was entitled to recover the actual value of the goods taken and retained, together with interest thereon, and damages for the depreciation and loss of those taken and returned, and perhaps for the loss of trade and business during the time the sheriff held possession of the building, and excluded him therefrom,—such loss being the natural and proximate result of that act,—if competent and satisfactory proof of such loss can be made. Yet we are clearly of the opinion that the court below erred in submitting to the jury the question of the loss of profits thereafter, and of injury to the credit of appellee; also in submitting to them the question of exemplary damages. The loss of profits resulting from an injury to the business after its resumption, and until the commencement of the action, and the loss of credit, are too remote and speculative, and are not allowable, under the clear weight of authority. To justify a recovery of exemplary damages, the act causing the injury must be done with an evil intent, and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his right as evidences a wrongful motive. We find no testimony in the record that tends to show such a motive or purpose on the part of appellants, or any fact or circumstance attending the taking of the goods from which a wrongful motive may be inferred. The appellants questioned the validity of the sale of the goods to appellee, and sought to subject them, as the property of the Salida Mer-

cantile Company, to the satisfaction of a just claim held by the C. S. Morey Mercantile Company against it. The case therefore involved a bona fide dispute as to the title of the goods, and the mere seizure of the same by appellants, under these circumstances, even if they knew "the facts concerning the sale to Mulvaney," would not constitute a reckless disregard of plaintiff's rights, and, unless such seizure was attended by circumstances of aggravation, would not entitle appellee to recover exemplary damages. As was said in the case of *White v. Webb*, 15 Conn. 302: "In actions of trover and trespass for property taken and converted by the defendant, where there is no malicious motive on the part of the defendant, but he takes the property under a claim of right, and the real dispute is as to the title, the rule of damages is the value of the property at the time of the conversion or taking, and interest on that sum to the time of judgment." How far these objectionable elements of damage were considered by the jury, or entered into the amount of the verdict, we are unable to determine, and are therefore compelled to remand the cause for another trial. This conclusion renders it unnecessary for us to notice the other errors assigned that question the correctness of the rulings of the court below in the admission and rejection of testimony. For the foregoing reasons the judgment is reversed and the cause remanded. Reversed and remanded.

(6 Colo. App. 207)

SMITH v. ELLISON et al.

(Court of Appeals of Colorado. May 13, 1895.)

DEPOSITION—ANSWERS NOT RESPONSIVE—SUPPRESSION.

An order was made permitting plaintiff to take further testimony, by deposition, to contradict certain statements of a witness regarding the date and making of the note in suit, but prohibiting reopening the case for general proof on such question; and, in answer to one of the interrogatories, deponent attached a letter written by the maker of the note. The interrogatories gave no clue to an intention to produce such letter, and no opportunity was given to cross-examine in regard to it. *Held*, that such portion of the deposition was properly suppressed.

Error to district court, Arapahoe county.

Claim by Charles H. Smith against Smith & Curzons, insolvents. William P. Ellison and other creditors filed exceptions to the claim. From a judgment for contestants, claimant appeals. Affirmed.

Edward D. Upham (Talbot & Denison, of counsel), for appellant. Charles M. Campbell and Frank C. Goudy, for appellees.

BISSELL, J. Henry E. Curzons and Fallis H. Smith were copartners as Smith & Curzons, doing a merchandise tailoring business in Denver, in the year of 1891. Charles H. Smith, the father of Fallis, was a man of means, who lived in Ohio. The firm be-

came embarrassed in the fall of the year, and in November made a general assignment for the benefit of creditors. Charles H. claimed to be a creditor of the firm to the extent of \$5,283, of which \$3,783 was evidenced by a promissory note bearing date June 6, 1891, and \$1,500 was for money loaned in the following September. The schedule attached to the instrument of assignment included the disputed claim of \$3,783. In the course of the proceedings taken in the district court under the assignment, the other creditors filed exceptions to Smith's claim, and contested his right to share in the distribution of the assets. Under the original issue, as tendered by the exceptions, it was conceded that Smith was entitled to be treated as a creditor to the extent of \$1,500, which was averred to be included in the note, but the claim for \$1,500 loaned in September was disputed. Before the trial, Curzons had removed to California, but was present at the hearing of this controversy, and gave evidence touching these matters. It was established that \$1,500 was loaned to the firm in September, and was a valid charge against the firm estate. Counsel thereupon waived their contest respecting this sum, and shifted their contention to the general denial of any indebtedness by the firm to Smith on account of the note. Charles H. Smith was in Denver in June, and the record shows there were some negotiations between the members of the firm and Smith, looking to the advancement of capital for the benefit of the firm, to enable them to pay their bills as they accrued, and to obtain the discounts which were given to cash customers. Smith drew a draft on his home bank in Ohio for \$3,783, to the order of his son, Fallis, who deposited it to his personal credit in the Commercial National Bank of Denver, where he and the firm kept their bank accounts. In the following October the note, which was produced, was signed by Henry E. Curzons and Fallis H. Smith, promising to pay the sum named within six months, with 6 per cent. interest. There is considerable controversy between Curzons and the Smiths respecting the execution of the note. It was made in October, but dated as of June, when the draft was given to Fallis. Curzons insists that nothing whatever had been advanced to the firm, or received by it, out of the proceeds of the draft, when he signed the note, yet he wholly fails to explain the reason and occasion for his signing it. His testimony about the transaction is very indefinite, unsatisfactory, and leaves the matter in very grave doubt. Of course, under the issue, the principal question to be determined was the amount of money which Smith had loaned the firm, the time at which he advanced it, and the circumstances under which it was received. Under any construction of the issues,—whether as they stood before the admissions of counsel concerning the September loan, or

as they were made up by the claim filed, and the statements in the exceptions about it,—the essential facts to be established by the claimant were, did he make a loan to the firm, and what was the amount of it? It is very important to remember this circumstance, because the principal proposition urged upon the appeal is based on the action of the court in its order opening up the case for certain purposes. Before the hearing was concluded and judgment rendered, counsel for the claimant evidently learned of some correspondence between Curzons and Charles H. about this draft and loan. Finding their proof of the amount advanced somewhat unsatisfactory, they made an endeavor to strengthen their case by the introduction of further evidence on the subject. In pursuance of this attempt, an application was made to postpone the trial to procure additional proof. On the application the court made an order permitting them to introduce testimony contradicting sundry statements which Curzons had made about the date and the transaction of the making of the note, but it expressly prohibited the reopening of the main case for general proof on this topic. Acting under this order, a *dedimus* was sued out to further take the claimant's testimony. Divers interrogatories were propounded, and when the commission was returned a motion was made to suppress a part of the deposition because the answers were not responsive to the questions, and because Smith had attached, in his answer to one interrogatory, the letter which Curzons had written. This motion was sustained in part, and denied in part, and this is the principal ground on which the reversal is asked.

We are very greatly embarrassed in the disposition of this appeal. In the first place, we are confronted with the general rule which makes the conclusions of trial courts on matters of fact which have been determined on conflicting testimony binding on the appellate tribunal. Courts are sometimes astute enough to escape the obligatory force of this practice, when it is exceedingly clear the lower court has arrived at a conclusion which is manifestly against the weight of the general evidence in the case, and has resulted in a manifest failure of justice. To what extent the demonstration must go, to justify a departure, we need not determine, although it is very manifest to us that there is an extreme probability of a miscarriage of justice in this case. The trouble is, the claimant failed to prove the indispensable fact on which any judgment in his favor must rest. He did not establish the amount of money which he had loaned the firm, nor trace, in a definite and satisfactory way, any part of the proceeds of his draft into the hands of the firm of Smith & Curzons. There is a striking concurrence between the checks which Fallis drew on his personal account and the deposits which

were made at the same dates to the credit of Smith & Curzons, and to the amount of the bills which were owed at that time, and liquidated by these checks. Fallis' deposition was taken, but there was no attempt, in any way, either through him, or through the bank and the checks, to trace the money from the elder Smith's hands to Fallis, and through him and the bank account to the firm. The failure of the claimant in this matter of proof destroys any possibility to review the case on the matter of the weight of the evidence. In the next place, the court did not err in suppressing certain parts of Smith's deposition. The interrogatories which were addressed to him did not call for many of the responses which he made, and certainly furnished to those who filed the exceptions no sort of a clue to an intention to produce any letter of Curzons. No opportunity was offered to the other side to cross-examine the witness about this letter, and counsel cannot be permitted to complain now of the action of the court, which was entirely regular, and based upon the case as he had made it. These considerations render it unnecessary to consider some matters of practice which have been urged upon our attention, or discuss the basis which must be laid to entitle a party to relief because of surprise, or because of a failure to procure evidence important and material to the issue.

We do not perceive that the appellant has presented or argued any error on which we can reverse the judgment. We are not entirely clear as to the effect of the finding of the court below on any claim which Smith may have against Curzons on the note. We so strongly lean to the opinion that Curzons is probably liable to Smith, to some extent, on that paper; and the explanations which Curzons makes about it are so unsatisfactory that we expressly state we do not pass upon the question of Curzons' liability to Smith on the note. Our refusal may be of no weight, value, or influence in settling the question whether Curzons' liability is *res adjudicata* as between the parties, but it is our purpose to leave this question open, in so far as it shall be affected by this affirmance. Discovering no errors in the record, the judgment will be affirmed. Affirmed.

(6 Colo. App. 275)

BURLINGTON & M. R. R. CO. v. BUDIN.
(Court of Appeals of Colorado. May 13, 1895.)

INJURY TO EMPLOYE—NEGLIGENCE OF FELLOW
SERVANT—EVIDENCE.

1. An employer is not liable for an injury to an employé caused by a fellow servant dropping his end of a bar of iron which they were carrying together, because at the time he was overcome by the paralyzing effect of strong language used by the foreman in an altercation half an hour before with one of their fellow servants.

2. The unverified certificate of a physician as to the character and extent of an injury for which recovery is sought is inadmissible in evidence.

Appeal from Logan county court.

Action by James Budin against the Burlington & Missouri River Railroad Company in Nebraska. From a judgment for plaintiff, defendant appeals. Reversed.

Wolcott & Valle and W. D. Kelsey, for appellant

REED, P. J. Appellee (plaintiff below) brought suit before a justice of the peace for injuries received by him while employed by the corporation as a laborer. A trial was had, with judgment for the plaintiff; an appeal taken to the county court; trial had to a jury; verdict and judgment for the plaintiff for \$200, and an appeal prosecuted to this court. The plaintiff, with six or eight others, in charge of McDonald, the road master, were putting in a "switch" (and side track). Plaintiff and three others were told to carry a steel rail across the main track to the point where it was to be used. Two at each end of the rail took it up, and carried it across to the place where wanted; the parties at the other end from the plaintiff, either without giving notice or without the notice being heard by plaintiff, dropped their end of the rail, by reason of which the other end fell, striking the great toe of plaintiff, crushing it, and also inflicting some lesser injuries upon some of its fellows. Plaintiff was disabled for a time, and in care of a physician. In my view of the case, the extent of the injury, the amount of money expended, and length of time lost are unimportant. The only evidence attempted to establish negligence was that the road master, McDonald, was rather bolsterous, rushed or hurried the work, and some 20 minutes before the accident occurred had had a wordy altercation with an employé named Shinwall, in which both parties had used unbecoming and improper language, and the altercation had resulted in Shinwall quitting or being discharged. What the language was is not shown in evidence. That it was very bad is shown by the fact that the paralyzing effect lasted for nearly half an hour after the altercation ended. The mental effect remained, incapacitating even the hearers. Those carrying the rail were perturbed, mentally upset. To this fact the injury to the foot is attributed. Driscoll, the principal witness, by whose ingenuity the alleged cause was connected with the event, was one of the four engaged in carrying the rail. He testified: "I didn't keep track of anybody. Knew there was a jangle, and had to look out for myself. Q. Was it that jangle that caused you to drop that rail? A. I guess that was the particular cause, and probably in my not paying attention. Q. Was the jangle going on when you were carrying the rail? A. No; it had quieted down about twenty minutes, I think." I can find no case in the books where such facts are held to be such negligence as to

subject a corporation to judgment for damages. Another trouble is here presented. Both McDonald and Shinwall used improper language. How much of the mental irresponsibility resulted from the language of McDonald and how much from that of Shinwall is not shown. The mental disqualification may have resulted entirely from the language of Shinwall. If such were the fact it could not be the negligence of the defendant. If it was the joint result of both, it should have been apportioned, and defendant could only be held accountable for its contribution to the supposed negligence. The well-settled rule of law is that no recovery can be had unless the injury was the result of the negligence of the employer, or those having charge of the work. Such negligence must be the "proximate cause" of the injury, and must be established, like any other fact, by a preponderance of testimony. "Proximate cause" is defined to be "that cause which immediately precedes and directly produces an effect as distinguished from a remote, mediate, or predisposing cause." "Immediate; nearest; next in order." The maxim of the law is, "*Causa proxima, non remota spectatur.*" It is said and well settled that a party is not responsible "in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." Broom, Leg. Max. 386; Greenland v. Chaplin, 5 Exch. 248; Rigby v. Hewitt, Id. 243. "An act is the proximate cause of an event when, in the natural order of things, and under the particular circumstances surrounding it, such an act would necessarily produce that event." Shear. & R. Neg. 11. In negligence, all courts, both in England and America, construe "proximate cause" as a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. Railroad Co. v. Snyder, 18 Ohio St. 399; Bennett v. Lockwood, 20 Wend. 223; McGrew v. Stone, 33 Pa. St. 436. In this case the connection between cause and result is so attenuated as not to be easily seen. The result appears very remote; one that could not have been anticipated or foreseen, and apparently no more the result of the alleged cause than any other unforeseen accident. The court erred in admitting any evidence of the road master's altercation with Shinwall and its effect upon the employés. It could in no way afford a basis upon which negligence could be predicated. The court also erred in admitting the unsworn certificate of the attending physician, Hall, in regard to the character and extent of the injury sustained by the plaintiff. In a case where proof of damage is proper, the evidence of the physician is competent; but I know of no rule of evidence making a certificate, unverified and unsworn, as this was, competent. The court erred in refusing the motion for a nonsuit. There was no question of negli-

gence to be submitted to the jury, as far as the defendant was concerned. If the evidence had any tendency to establish negligence, it was either that of his fellows in dropping the rail prematurely, for which the employer could not be held responsible, or his own, in holding on after he should have let go. The case as made by the evidence is clearly one of accident, pure and simple, and in no way resulting from negligence. This court will, and all other courts should, hold corporations and employers strictly accountable for injuries to employes resulting from carelessness, but the law has been carried to its extreme limit in this direction, and employers cannot be held to be insurers against injuries purely accidental in character. The fourteen instructions given by the court to the jury were, many of them, good law, and would have been apt and proper in a case where a question of negligence was involved. In this case the only instruction that could have been properly given would have been to find for the defendant. The judgment will be reversed. Reversed.

(6 Colo. App. 231)

DOWNING v. HOWLETT.¹

(Court of Appeals of Colorado. May 13, 1895.)

TRESPASS—SUFFICIENCY OF EVIDENCE—APPEAL—HARMLESS ERROR—EVIDENCE—RECORD IN ANOTHER SUIT.

1. After an action for trespass was commenced, one of the defendants died. Plaintiff, on the trial, did not show, nor would the evidence offered by him show, that the survivor had trespassed, nor did it appear that he was in any way responsible for the trespasses proved against deceased. *Held*, that a nonsuit was properly granted.

2. One cannot complain of error in admitting or rejecting testimony where the record would not have supported a judgment in his favor if it had been entered.

3. The record in another suit is not evidence in a cause until produced and offered.

Error to district court, Jefferson county.

Action for trespass by Jacob Downing against Richard More and Thomas Howlett. More died during the pendency of the action. From a judgment of nonsuit as to Howlett, plaintiff brings error. Affirmed.

L. B. France, for plaintiff in error. C. P. Rutler and Willard Milligan, for defendant in error.

BISSELL, J. In May, 1889, the plaintiff in error brought a suit in the district court of Jefferson county against Richard More and Thomas Howlett, to recover damages for the alleged trespasses of the defendants. According to the complaint and the evidence which was received, Downing was the owner of certain lands in that county, and had run a ditch through a part of them, to irrigate some of his fields. By some proceedings which are not disclosed by the record, though

probably they were in the nature of condemnation proceedings, an entry was made on Downing's land, and a good deal of work done by somebody for the enlargement of the ditch which Downing had previously built. Downing set up what the defendants had done in this respect, and averred the destruction of divers headgates which he had put in to make the water available, and alleged other damage to his land. The plaintiff attempted to prove his case, but through an apparent misconception of the rights of the parties, though we are not able to speak definitely about it, the court undertook to limit the proof which the plaintiff could introduce to a particular trespass, committed, according to the pleading, on the 15th day of February, 1885. It is wholly unnecessary to enter into a discussion of the nature of the action which was brought, and to determine whether a trespass laid in the old form as on the 15th day of February, 1885, and on divers other days before the commencement of the action, permitted proof of all the various wrongs done by the defendants, because the judgment must be affirmed on another basis. After the plaintiff had made some proof, the inquiries of counsel were directed to divers matters which he claimed to be admissible under the pleading. Objection was made that the acts sought to be proven were not done on the 15th of February, and that the plaintiff could make no proof about them, and generally that the evidence was inadmissible. The plaintiff's counsel then made sundry offers of proof, many of which were legitimate and admissible under the issues. The court took a different view of the case, rejected the offers, and refused the proof, and thereupon the plaintiff rested. The only thing which it is necessary to state otherwise is in regard to the persons who were sought to be charged. The pleading avers the trespasses were committed by More and Howlett. More died, and the case was continued against Howlett. Of course, if the acts were trespasses, the survivor would be liable when the action was properly carried on against him. In the course of the proof, the plaintiff gave testimony showing that More had been guilty of some of the trespasses. He had never seen Howlett on the land or doing any act which the law would count a trespass. The plaintiff offered no other proof connecting Howlett with the wrong, nor did he attempt to show any connection whatever between Howlett and More in the commission of the trespasses of which More was shown to have been guilty. Under this condition of the proof, and on the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit, which was granted. This is assigned as error.

Manifestly, the nonsuit was inevitable. It has several times been decided in this state that, if there is not enough in the record to support a judgment if one had been entered for the plaintiff, he cannot complain of any

¹ Rehearing denied June 10, 1895.

error which the court committed, either in admitting or rejecting testimony. Mistakes of the trial court furnish no basis for an assignment of error unless, either on the testimony which has been introduced, or on this, and that which has been offered and rejected, and which is admissible, a case is made out for the complaining party. *Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258; *Nevitt v. Crow*, 1 Colo. App. 453, 29 Pac. 749; *People v. Drug Co.* (Colo. App.) 38 Pac. 334. Had the court admitted all the testimony which counsel tendered, and the plaintiff had then rested his case, he would not have been entitled to judgment, because he failed to prove acts of the defendant which would make him liable. There is some suggestion in the record that the trial court was referred to a case in the supreme court of the state which would throw some light on the controversy, and tend to show Howlett had been guilty of the acts complained of. While the decisions of that court are matters of which all tribunals in the state take notice, we do not understand that there is any rule of evidence or any rule of practice which would make the record in any other suit evidence in a cause without its production and offer. Nor do we understand how the record in any other suit can be resorted to by any court for the purposes of proof or the ascertainment of facts essential to charge the defendant with a liability, unless, in some one of the ways known to the law, the record is produced and legitimately brought to the court's attention. The court did not err in granting the nonsuit, and we do not discover any procedure on which the plaintiff's rights, if any, can be established and protected. The judgment of the trial court must be affirmed. Affirmed.

(27 Or. 522)

MILLER v. HIRSCHBERG.

(Supreme Court of Oregon. June 3, 1895.)

TROVER BY WAREHOUSEMAN — SUFFICIENCY OF COMPLAINT — DEFENSES — WRONGFUL ACT OF PLAINTIFF — DEFECTS IN PLEADING — AIDER BY VERDICT.

1. A recovery cannot be had on a complaint which alleges, in terms, a cause of action sounding in tort, by proof of the breach of a contract, express or implied.

2. A complaint alleged that plaintiff, as warehouseman, was the bailee of large quantities of wheat, and entitled to the possession thereof, and that defendant, with intent to defraud, falsely represented that he had purchased from the bailors a certain amount of wheat stored with plaintiff, whereupon the latter delivered the same to defendant, who wrongfully converted it to his own use, and refused to return it on plaintiff's demand. Held that, apart from the allegations of fraud, the complaint was sufficient, at least after verdict, to sustain an action for trover.

3. A defendant in an action for wrongful conversion cannot, as a matter of right, defend on the ground that plaintiff's own illegal act made such conversion possible, without pleading such illegality.

4. Where a bailee, by mistake, delivers to another wheat belonging to third persons, and,

upon the transferee's refusal to return the same, sues him for wrongful conversion, the court will not, on its own motion, dismiss the action on the ground that plaintiff violated Hill's Ann. Laws, § 1771, making it a crime for a warehouseman to remove from his custody any grain for which a receipt has been given, without the written consent of the owner, where defendant has failed to plead such violation of law.

5. Where defendant pleaded in bar a settlement between the parties, and the referee found that such settlement did not include the claim in controversy, the objection that the reply was defective, in not setting out facts to falsify the settlement, cannot be taken for the first time after verdict.

Appeal from circuit court, Polk county; George H. Burnett, Judge.

On rehearing. Former decision (37 Pac. 85) affirmed.

This is an action in trover originally commenced by L. Bentley against H. Hirschberg to recover the value of 10,211 bushels of wheat, which it is alleged, Hirschberg wrongfully converted to his own use. After the commencement of the action, Bentley made an assignment, and thereupon Miller, as assignee, was duly substituted as plaintiff, and the action thereafter proceeded in his name. The amended complaint alleges, substantially: That during the years 1887, 1888, 1889, and 1890, Bentley was engaged in a general warehouse and storage business, for hire, in the town of Independence, and during such time received from divers and sundry owners large quantities of wheat on storage, for which he issued receipts wherein it was stipulated that such wheat should be delivered, upon the order of the owner or owners thereof, on board the cars or boats. That during said years the defendant, with intent to defraud, represented to Bentley that he was the owner of, and had purchased, large quantities of wheat in storage as aforesaid, and, well knowing such representations to be false and fraudulent, ordered and directed the delivery and shipment of wheat to and for him at divers times, aggregating 84,000 bushels. That relying upon said false and fraudulent statements and representations, and being deceived and misled thereby, Bentley, as such warehouseman, shipped for and delivered to the defendant all of the 84,000 bushels of wheat so ordered; an itemized statement of the several shipments thereof being attached to, and made a part of, the complaint. That in truth and in fact, during said years, defendant was the owner and purchaser of not more than 73,000 bushels, but, being deceived and misled by his false and fraudulent representations, Bentley shipped for and delivered to him 10,211⁴⁰/₁₀₀ bushels of wheat, of the value of \$9,187.20, in excess of the amount owned by him, or of which he was entitled to the possession, which he converted to his own use, and neglects and refuses to account for or redeliver, although lawful demand therefor has been made. That, by reason of said wrongful conversion and wrongful acts of defendant,

Bentley was damaged in the sum of \$9,187.20, the value of the wheat so converted by him. The answer, after denying all the material allegations of the complaint, affirmatively alleges: That during the time set forth and mentioned in the complaint the defendant was the owner and purchaser of wheat on storage in the Bentley warehouse amounting in the aggregate to 99,299¹⁸/₁₀₀ bushels, of which an itemized statement is annexed, and made a part of the answer. That, at different times during the dates mentioned in the complaint, Bentley, at the request of defendant, shipped and delivered to divers persons 84,000 bushels. But at the same time this defendant had stored in the warehouse of one I. Claggett, at Independence, more than 13,692 bushels, and on or about the — day of —, 1888, at the request of said Bentley, and for his benefit, Claggett, with this defendant's consent, shipped for and delivered to him 9,896 bushels of wheat, and subsequently George Brey, who was then the owner or in possession of the Claggett warehouse, shipped and delivered to him 3,796 bushels then owned by defendant, and in said warehouse, amounting in the aggregate to 13,692 bushels; and it was then and there agreed and understood by and between Bentley and defendant that said wheat should be credited upon and deducted from the 84,000 bushels shipped by Bentley from his warehouse. For a further and separate defense, defendant alleged: That, at the close of the shipping season of each year, Bentley and defendant had a full, fair, and complete settlement and accounting of and concerning all accounts and matters of business between them up to the date of such accounting and settlement, including storage and shipping accounts, and finally, on the 1st day of April, 1891, they had such a settlement and accounting of and concerning all matters of business between them prior to that date; and it was then found that there was then due and owing from Bentley to defendant, on account of wheat still stored in his warehouse, owned by defendant, and not shipped, the sum of \$46.18, for which he then and there gave the defendant his promissory note. The reply denies the allegations of the answer, except that it alleges that they had a settlement of some items of their affairs on the 1st day of April, 1891, including a shipment of wheat to McMinnville and to Allen & Lewis, some accounts of storage, and some items of bank account, repairs on warehouse, and one item of oats, but that it did not, in any manner or form, include the claims upon which this action is instituted, or have any reference thereto, or any other matters of business between them.

The cause was referred to W. S. McFadden, Esq., to take the testimony, and report an accounting. Upon the coming in of his report, which was in favor of the plaintiff, and in accordance with the allegations of the com-

plaint, the plaintiff moved for a confirmation thereof, while the defendant moved for judgment notwithstanding the finding, and also to set aside the report. Upon the hearing of these motions the findings of the referee were modified in some particulars, and the facts, as finally found and confirmed by the trial court, are as follows: "First. That J. E. Miller is the assignee of the estate of L. Bentley, insolvent, and has been duly substituted for L. Bentley, plaintiff, and is the duly acting, constituted, and qualified assignee of the estate of L. Bentley, insolvent. Second. That during the years 1887, 1888, 1889, and 1890, the said L. Bentley was engaged in the warehouse and storage business, as a warehouseman, in the town of Independence, Polk county, Oregon, and, as such warehouseman, received for storage, from the owners thereof, large amounts of wheat, for which he charged and received, from each person storing with him, four cents per bushel for the first year, and one and one-tenth cents per bushel for each year thereafter, that such wheat was kept on storage; and the said L. Bentley issued to the owner of such wheat receipts for the amount thereof,—such wheat to be delivered by said Bentley, upon the order of the owner or owners of the same, on board of boat or cars; the purchaser thereof to pay for sacks containing such wheat,—and the said L. Bentley became and was the lawful bailee of such wheat. Third. That during said years, 1887, 1888, 1889, and 1890, the said defendant was engaged in business, and purchased wheat of a number of persons having wheat in storage with the plaintiff in his warehouse. Fourth. That during the years last aforesaid the defendant ordered, directed, and requested said L. Bentley, at divers times, to ship and deliver to him (the said defendant) sundry amounts of wheat, aggregating in all 84,007.10 bushels; and in pursuance of said order, request, and direction of the said defendant, the said L. Bentley did, during the said years, ship and deliver to the said defendant the said amount of 84,007.10 bushels of wheat, at the time and in the amounts as follows. [Here follows a statement of the dates and amounts of the respective shipments.] Fifth. There is no proof that the defendant made any false representation to the said L. Bentley, prior to the delivery of any of said wheat, as to the amount of wheat owned by the said defendant in the warehouse of said L. Bentley, and therefore the court finds that the allegations of fraud in the plaintiff's complaint are not sustained by the testimony. Sixth. That in truth and in fact, during said years, defendant was the purchaser and owner and entitled to the possession, of no larger or greater amount of such wheat in storage in the warehouse of the said L. Bentley than 73,795-²⁴/₁₀₀ bushels, which defendant well knew at the time and dates he received and shipped the said 84,007¹⁰/₁₀₀ bushels of wheat mentioned in finding of fact fifth. An itemized state-

ment of the said 73,795²⁴/₆₀ bushels of wheat is hereto attached and made a part of this finding. Seventh. That the said L. Bentley, in pursuance of the order, request, and direction of said defendant, delivered to the defendant, during the time aforesaid, 10,211⁴⁶/₆₀ bushels of wheat in excess of the amount owned by the defendant in charge of said L. Bentley; that 10,003⁵⁴/₆₀ bushels of said wheat was reasonably worth seventy-seven cents per bushel, and, in the aggregate, the sum of seven thousand seven hundred and three dollars (\$7,703); that 207⁵²/₆₀ bushels of said excess of wheat was of the reasonable value of eighty-six cents per bushel, or of the aggregate value of one hundred and seventy-eight dollars and seventy-five cents (\$178.75); that the total value of said excess of wheat, to wit, 10,211⁴⁶/₆₀ bushels, was and is seven thousand eight hundred and eighty-one dollars and seventy-five cents (\$7,881.75); and that the defendant has not paid the same, or any part thereof. Eighth. That the said L. Bentley, at all times since the storage of the wheat hereinbefore mentioned, and until the delivery thereof to the defendant, was lawfully entitled to the possession of the whole thereof. Ninth. That prior to the commencement of this action, to wit, on the — day of March, 1891, the said L. Bentley duly demanded said wheat of the defendant. Tenth. That it is not true that on or about the — day of —, 1888, the defendant had stored in the warehouse of I. Claggett, at Independence, Oregon, a large amount of wheat, or more than 13,692.03 bushels of wheat. That it is not true that at the request of said plaintiff, or for his benefit, the said Claggett, with the defendant's consent, shipped for or delivered to the plaintiff, on board cars at said place, 9,896³²/₆₀ bushels of wheat, or any wheat. That it is not true that the said 9,896³²/₆₀ bushels was shipped for or delivered to the said plaintiff about October, 1889, at said place. And the following allegations in defendant's answer: 'George Brey, who shipped and delivered to plaintiff, aboard cars at said place, 3,795²¹/₆₀ bushels of wheat then owned in said warehouse by this defendant, at the request and for the benefit of plaintiff, with this defendant's consent, said two several amounts of wheat so shipped amounting in the aggregate to 13,692³/₆₀ bushels of wheat; and it was then and there agreed and understood by and between plaintiff and defendant, the said 13,692³/₆₀ bushels of wheat so shipped from said Claggett or Brey warehouse should be credited upon and deducted from the said 84,007¹⁰/₆₀ bushels of wheat so shipped by plaintiff from his warehouse, leaving charged to this defendant, of said wheat so shipped, only 70,315⁷/₆₀ bushels of such wheat so shipped,—are not sustained by the evidence in this cause. Eleventh. That the plaintiff and defendant had settlements between them on December 28, 1888, on March 7, 1890, on April 15, 1890, and

on April 1, 1891, but that neither the said 10,003⁵⁴/₆₀ bushels of wheat, nor the said 207⁵²/₆₀ bushels of wheat, were included in either of said settlements, nor in any other settlement, under the testimony."

As conclusions of law, the court found that plaintiff is entitled to recover of and from the said defendant the sum of \$7,881.75, together with the costs and disbursements of this action to be taxed. Judgment was rendered in accordance with these findings, and defendant appeals.

Butler & Townsend, for respondent. R. S. Strahan, M. L. Pipes, and J. J. Daly, for appellant.

BEAN, C. J. (after stating the facts). In July, 1894, judgment was rendered in this court affirming the judgment of the court below. 37 Pac. 85. A rehearing was subsequently granted, and, in the light of an able reargument, we have again carefully considered the question by which the judgment was controlled, but still feel compelled to adhere to our former conclusion. We have, however, taken occasion to make some changes in the language of the opinion, with the view of more fully and clearly stating the reasons by which we are governed, and the present opinion will therefore be substituted for that formerly filed. We begin by saying that the findings of fact, which stand as the verdict of a jury, and, for the purposes of this appeal, must be regarded as true, show that the defendant received from Bentley, and appropriated to his own use, 10,211 bushels of wheat, of the value of \$7,881.75, which he knew at the time he did not own, and for which he refuses to account. Upon the merits, then, the judgment is right; and the principal question on this appeal is whether the findings of fact are sufficient, under the pleadings, to support the judgment.

The contention for the defendant is that, as the court found the allegation of fraud in the complaint to be untrue, the remaining facts, as found by it, only show a breach of an implied contract of sale, and therefore, under the well-settled rule that a recovery cannot be had on a complaint which, in terms, alleges a cause of action sounding in tort, by proof of the breach of a contract, express or implied, the judgment must be reversed. If the premises upon which this argument is based are conceded, the conclusion inevitably follows, for the rule referred to is too well settled to be questioned. After a careful consideration of the able reargument of this case, and a re-examination of the record, we concur with counsel that the complaint sounds in tort, and will not support an action on a contract, and the holding to the contrary in the former opinion is erroneous. The plaintiff must recover in tort, or not at all. He has so laid his cause of action, and must abide the result. But we are also satisfied

that there was an error in assuming, as the former opinion did, that the findings of fact show an implied contract of sale, and that the allegations of fraud in the complaint were essential to an action in trover. Without these allegations, the complaint still contains facts sufficient to constitute a cause of action for an unlawful conversion. Omitting the allegations of fraud and deceit, the complaint avers: "That plaintiff, during the years 1887, 1888, 1889, and 1890, was engaged in the warehouse and storage business in the town of Independence, county of Polk, and state of Oregon; that during said years plaintiff, as such warehouseman, received for storage, from the owners thereof, large amounts of wheat, for which plaintiff charged and received from each of said persons so storing wheat with him four cents per bushel for the first year, and one and one-tenth cents per bushel for each year thereafter; that such wheat was so kept in storage by plaintiff for the owners thereof; that plaintiff issued to all persons so storing wheat with him receipts for the full amount of such wheat so stored by each person. Such wheat was to be delivered by plaintiff, upon order of the owner or owners of such wheat, on board of boats or cars, the purchasers thereof to pay for sacks containing said wheat, and that plaintiff thereby became and was the lawful bailee of said wheat. That during said years said defendant was engaged in business, and purchased of and from the persons having wheat in storage with this plaintiff as aforesaid. That at divers times during said years said defendant, * * * representing to this plaintiff that he was the owner of, and had purchased, large quantities of wheat in storage with plaintiff as aforesaid, * * * ordered and directed this plaintiff, as such warehouseman, at divers times, to ship for and deliver to him large amounts of said wheat, aggregating 84,007.10 bushels of wheat. That, fully relying upon said * * * statements and representations of said defendant, * * * this plaintiff, as such warehouseman, did at such times ship for and deliver to said defendant quantities of such wheat aggregating the full amount of 84,007.10, as will more fully appear by the itemized statement of wheat delivered and shipped upon the order of defendant by plaintiff, hereunto attached, marked 'Exhibit A,' and hereby made a part of this complaint. That in truth and in fact, and plaintiff alleges, that said defendant during said years was the owner of wheat so in storage in the plaintiff's warehouse, in the aggregate of no more than 73,795.24 bushels of wheat, as will more fully appear by itemized statement of wheat owned and purchased by said defendant in the warehouse of plaintiff during the time aforesaid, hereto attached, marked 'Exhibit B,' and hereby made a part of this complaint. That this plaintiff, so being in the lawful posses-

ion of said wheat, as such warehouseman and bailee as aforesaid, * * * shipped for and delivered to defendant 10,211.46 bushels of wheat in excess of the amount owned by said defendant, or of which he (defendant) was entitled to the possession. That said defendant has, prior to the commencement of this action, wrongfully and unlawfully converted said wheat to his own use. That, although demand therefor has been duly made upon said defendant for the return of said 10,211.46 bushels of wheat, said defendant has wholly neglected and refused to account for or deliver said wheat to plaintiff, or any part thereof. That plaintiff was at all times since the storage of said 10,211.46 bushels of wheat with him, and is now, lawfully entitled to the possession of the same, and every part thereof, and the value thereof is \$9,187.20. That by reason of said wrongful and unlawful conversion of said wheat, and said wrongful acts aforesaid of said defendant, this plaintiff is damaged in the full sum of \$9,187.20, the value of said wheat so converted by said defendant. Wherefore, plaintiff demands judgment that defendant be adjudged to pay plaintiff damages to the sum of \$9,187.20, with interest thereon at the rate of eight per cent. per annum until paid, and for the costs and disbursements of this action."

It thus appears that the complaint is manifestly sufficient, at least after verdict, to sustain an action for trover, after eliminating therefrom all the allegations of fraud. The action of trover is founded upon the right of property, general or special, and right to the possession in plaintiff, and possession and an unlawful conversion by defendant. The material averments in an action of this character are ownership and right to the possession in plaintiff, and that the defendant wrongfully took and converted the property in question to his own use, or that, being lawfully in possession thereof, he so converted it. 26 Am. & Eng. Enc. Law, 801. Now, the complaint in this case contains these essential averments. It alleges that Bentley was the bailee, and as such entitled to the possession, of the wheat in question, and that it was delivered to the defendant at his request and upon his direction, and by him subsequently converted to his own use. The gist of the action is the unlawful conversion, not deceit, and 'he means used by the defendant to obtain possession are wholly immaterial. The title or right to the possession did not pass by the delivery, because, as defendant knew, Bentley had no title which he could dispose of, and he did not intend to surrender his right to the possession of any wheat, except such as belonged to the defendant. The complaint shows that he was not the owner, that he did not pretend to be, and that he did not purport to pass title to the defendant. On the contrary, he delivered the wheat because he thought defendant

owned it, and, when he discovered his mistake, demanded its return. There is no material difference between the findings of the court and the averments of the complaint, except the complaint alleges that Bentley was induced to part with the possession of the wheat by false and fraudulent representations of the defendant, which the court finds is not true. But, as we have said, disregarding the allegations of fraud, the complaint contains enough to show that defendant obtained from Bentley possession of a certain quantity of wheat which belonged to his bailors, and to the possession of which he was entitled, and which the said defendant subsequently converted to his own use. Whether the findings would support an action *ex contractu* is not material, because the question of election was with Bentley, and not the defendant. Under some circumstances a plaintiff may waive a tort, and sue in contract, but he is not compelled to do so. The defendant, having received, and wrongfully converted to his own use, property in which Bentley had both a right of property and right of possession, cannot insist that he shall waive the tort, and sue in assumpsit for its value. He was entitled to adopt the form of action which he preferred, and, having elected to proceed in tort, is entitled, after judgment, to have the findings of the court construed to support the judgment, if it can be done without violating well-settled rules of law. Unless, therefore, the findings show an express contract of sale, or facts from which the law will necessarily imply a sale or attempted sale, the judgment will be sustained. Every inference and intendment is in favor of the judgment of the court below. Now, it is not pretended that there was any express sale, nor do we think the findings necessarily show an implied sale or purchase. To constitute a sale, either express or implied, there must be an intention by the vendor to sell, and by the vendee to purchase, which does not appear in this case. Bentley did not own the property,—had no power or authority to sell it; and certainly the law will not imply a sale where an express one could not have been legally made. And, besides, there is nothing to indicate that he intended to sell, nor that defendant intended to purchase. It is but a fair inference from the record that Bentley supposed he was delivering to the defendant that which belonged to him, and the defendant, although he knew he was receiving wheat to which he had no title, did not intend to purchase. As appears from the complaint and the findings of the court, this is a case where one bailor has, by mistake of a common bailee, obtained possession from him, and wrongfully converted to his own use property belonging to another bailor, and which the bailee is seeking to recover in an action of trover. Bentley was simply a bailee for the defendant and the other

owners of wheat on storage with him, and accountable to each for the quantity belonging to him; and when, by mistake, he surrendered possession to the defendant of a greater quantity than he was entitled to, he was not bound to treat the transaction as a sale, nor did he estop himself from recovering possession of the excess, or its value in case of conversion, although no fraud or misrepresentation was used to induce the delivery. It is immaterial in this case what means were used by the defendant to gain possession, so long as there was no intention to pass the title. His possession, if not unlawful from the beginning, became so as soon as demand was made for the return of the wheat to which he was not entitled; and when he failed to return it, after such demand, he became a wrongdoer, and liable to the plaintiff in an action of trover. Although Bentley may have delivered the wheat voluntarily, it is but a fair inference that he was acting in good faith, on the supposition that it belonged to the defendant, and with no intention to deliver any wheat to him of which he was not the owner. When he discovered his mistake, he demanded its return, in order that he might carry out his contract of bailment with the true owners; and defendant, having refused to comply with this demand, is, in our opinion, liable in this form of action for the value of the wheat, and the findings are amply sufficient to support the judgment.

It is next contended that the delivery of the wheat to defendant being made in violation of section 1771 of Hill's Annotated Laws, which makes it a crime for any person operating a warehouse to sell, incumber, ship, transfer, or in any manner remove, or permit to be shipped, transferred, or removed, beyond his custody or control, any grain for which a receipt has been given, without the written consent of the owner, therefore the plaintiff cannot recover for its wrongful conversion. It may well be doubted whether the defendant could avail himself of the defense of illegality in this action; but, however that may be, no such defense is set up in the answer, and therefore he is not entitled to the benefit of it as a matter of right. *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Cardoze v. Swift*, 113 Mass. 250. To entitle a defendant to the defense of illegality, he must plead it, although a failure to do so will not compel the court to entertain the action when such illegality appears, but it may dismiss it *sua sponte*. The question then remains whether the court ought, upon grounds of public policy and good morals, to reverse this judgment, and dismiss the action, because there may have been a technical violation by Bentley of the statute, in delivering possession of the wheat to defendant. We certainly think not. The rule seems to be quite well settled that courts will refuse, on the grounds of public policy and good

morals, to enforce an illegal or immoral contract, or to sustain an action when its object is to enforce the provisions of an engagement prohibited by law, but this case is not strictly of that character. It is rather in disaffirmance of the illegal act of delivering the wheat to the defendant, and does not grow out of any contract or agreement in violation of the statute, but arises from the fact that defendant has received, through mistake, and converted to his own use, property which belonged to Bentley, as bailee. It is true, the violation of the statute made it possible for the defendant to convert the wheat, but there was no actual criminal or fraudulent intent on the part of Bentley, and therefore plaintiff ought not to be summarily turned out of court, and the defendant thereby escape liability, because Bentley may have been technically guilty of a crime in putting it within his power to appropriate the wheat. Having received it from Bentley without any lawful right thereto, and converted it to his own use, it seems to us the court ought not, of its own motion, to interpose in his behalf on the ground of a violation of the statute, and thus allow him to reap the benefit of his own wrongful act. If he intended to rely upon such a defense, he should have set it up in his answer, and, not having done so, the court will not make it for him.

It is further contended that the settlement pleaded in the answer is a bar to this action, because the reply does not contain appropriate allegations upon which evidence to surcharge or falsify it could be admitted. No objection was made to the sufficiency of the reply, by demurrer or otherwise, and we think it comes too late when made for the first time by motion for judgment notwithstanding the findings of the referee. It avers that the settlements alleged in the answer did not include the claim upon which this action is founded, or any part thereof, or have any reference thereto; and while it may have been defective in not setting forth fully the fraud, error, or mistake relied upon to surcharge or falsify the settlement, we are not trying the question on demurrer, but considering the sufficiency of the pleading after verdict. In such case it is entitled to the benefit of every reasonable inference and intentment in support of the judgment, and will not be held insufficient for a mere defective statement. *Gschwander v. Cort*, 19 Or. 513, 26 Pac. 621; *State v. Smith*, 15 Or. 133, 14 Pac. 814, and 15 Pac. 137, 386; *Andros v. Childers*, 14 Or. 447, 13 Pac. 65; *Aiken v. Coolidge*, 12 Or. 244, 6 Pac. 712. From the pleadings and findings of the referee and court, it appears that the claim upon which this action is based was not included in any settlement had between the parties; and this is sufficient after verdict, although the reply may have been vulnerable to a demurrer. It follows from these views that the judg-

ment of affirmance is right, and will be adhered to.

WOLVERTON, J., having been of counsel, did not participate in this decision.

(27 Or. 232)

WHITE v. JOHNSON.

(Supreme Court of Oregon. June 3, 1895.)

DEATH OF DEFENDANT—SUBSTITUTION OF ADMINISTRATOR—JURISDICTION—SUMMONS—ATTACHMENT.

1. Defendant having died after the issue of the summons, but before the same was served on him, an order was made substituting his executrix, and continuing the action in her name; and thereafter the summons, entitled in the original action, and directed to deceased, was served on the executrix, together with a copy of the original complaint and of the order requiring her to appear and plead within 10 days. *Held*, that under Hill's Ann. Laws, § 52, providing that "the summons shall contain * * * the names of the parties to the action, and the title thereof," and shall be "directed to the defendant," such service gave the court no jurisdiction to render a judgment by default against the executrix in her representative capacity.

2. Under Hill's Ann. Laws, § 144, providing that the plaintiff, at the time of issuing the summons, or any time afterwards, may have defendant's property attached, an attachment issued previous to the issuance of the summons is void.

3. Hill's Ann. Laws, § 62, provides that the court shall have jurisdiction in all proceedings from the time the summons is served, "or the allowance of a provisional remedy." *Held*, that a writ of attachment, void because issued before the summons, gives the court no jurisdiction to make substitution and continue the action against the personal representative of a deceased defendant.

4. The indorsement of the sheriff, showing the date of a delivery of the summons to him, while unimpeached and not set aside by any adequate proceedings therefor, imports absolute verity as against an affidavit of plaintiff in a subsequent proceeding in the same case to procure an order of substitution and continuance of the action in the name of the defendant's executrix.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Isam White against Cordella Johnson, executrix of A. H. Johnson, deceased, substituted for A. H. Johnson. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action to recover of A. H. Johnson upon two promissory notes. The complaint was filed April 16, 1894, and on the same day a writ of attachment was issued, which, as shown by the return of the sheriff, was received and served by him on that day by attaching certain real estate, the property of A. H. Johnson, situate in Multnomah county, Or. A summons was also issued, and placed in the hands of the sheriff, who made the following indorsement thereon: "Received April 17, 1894. Penumbra Kelly, by C. H. Chance, Deputy. Recorded April 17, 1894. Penumbra Kelly, Sheriff, by P. A. Marquam, Deputy." This summons was not served upon A. H. Johnson. On May 29, 1894, plaintiff filed a motion for an order al-

lowing the action to be continued against said Cordella Johnson, executrix, based upon his affidavit, which, omitting formalities, is in substance as follows: "I, Isam White, being first duly sworn, do say that I am the plaintiff in the above-entitled action; that on the 16th day of April, 1894, I commenced an action in the circuit court of the state of Oregon for Multnomah county, against one A. H. Johnson, to recover of said A. H. Johnson a sum of money due me from said Johnson on certain promissory notes, which debt had not been secured by mortgage or pledge of real or personal property, and on said day made and caused to be filed with the clerk of this court a complaint in writing, and duly subscribed and verified; that, immediately after said complaint was filed, I caused a summons to be duly issued in said action, and the same, together with the copy of said complaint, to be placed in the hands of the sheriff of Multnomah county, Oregon, for service on the defendant, A. H. Johnson; that thereafter, and on April 16, 1894, I made in said action an affidavit for a writ of attachment in due form of law, and caused the same to be filed with the clerk of this court, and also made an undertaking for an attachment in due form of law, and caused the same to be filed with said clerk, and thereupon the writ of attachment was in said action duly issued by said clerk under the hand and the seal of said court, directed to the sheriff of Multnomah county, Oregon, and the same was placed in the hands of the sheriff for execution, and was on the 16th day of April, 1894, duly executed by said sheriff at 3 o'clock in the afternoon by attaching lot 7, etc. [here follows a description of the property attached, and the manner of serving the writ]; that thereafter, on the — day of April, 1894, the defendant, A. H. Johnson, died, leaving a will, in which his widow, Cordella Johnson, is named as executrix; that said will was thereafter admitted to probate by order of the county court of the state of Oregon for Multnomah county, and said Cordella Johnson was by said last-mentioned court duly appointed the executrix of said estate, and has since qualified as such executrix, and is now acting as the executrix of the estate of said A. H. Johnson, deceased; that said action has not been dismissed, and no appearance has been entered herein by the defendant or by any one on his behalf,"—signed Isam White. On May 31st the court made an order allowing the motion, which, omitting the recital of facts, is as follows: "It is therefore considered, ordered, and adjudged that this action be, and the same is hereby, continued against Cordella Johnson, as the executrix of A. H. Johnson, deceased; and it is further considered, ordered, and adjudged that a copy of this order and a copy of the complaint in this action be served upon the defendant, Cordella Johnson, and that she have

ten days after such service is made within which to plead to the complaint." This order was served upon Cordella Johnson on June 2, 1894, and filed on that day. The original summons, entitled "Isam White, Plaintiff, v. A. H. Johnson, Defendant," directed "to A. H. Johnson, defendant," with proof of service, was also filed on the same day. The proof of service was afterwards, on the 27th day of June, 1894, by leave of the court previously had and obtained, amended so as to read as follows: "State of Oregon, County of Multnomah—ss.: I, Penumbra Kelly, do hereby certify that on the 2d day of June, 1894, I served the within summons and the complaint in this action and the annexed order of the court upon Cordella Johnson, the executrix of A. H. Johnson, deceased, by delivering a true copy of the summons, certified to by me as sheriff, together with a copy of said order, certified by Henry E. Reed, clerk of the circuit court of the state of Oregon for Multnomah county, and with a true copy of the complaint, certified by J. N. Teal, one of the attorneys for the plaintiff, to said Cordella Johnson in person, at Portland, in Multnomah county, Oregon, on the 2d day of June, 1894. P. Kelly, Sheriff of Multnomah County, by A. Salmon, Deputy." On June 12, 1894, Cordella Johnson, as such executrix, filed the following motion: "Comes now Cordella Johnson, as the executrix of the last will and testament of the defendant above named, by R. and E. B. Williams, appearing as her attorneys for the purpose of this motion only, and moves the court to set aside the service of summons in this action and the order of this court continuing this action against the said Cordella Johnson, as the executrix of A. H. Johnson, deceased, and directing a copy of said order, together with a copy of the complaint in this action, to be served upon the said Cordella Johnson, and requiring her to plead to the complaint within ten days from the service of said order, for the reason that the service of summons is illegal, and that the court had no jurisdiction to make the said order." On June 19, 1894, this motion was overruled by the court, and, the executrix refusing to appear or plead further in said action, a judgment was entered against her, as executrix of the will of A. H. Johnson, deceased, on the 27th day of June, 1894, and the attached property ordered sold to satisfy the same. From this judgment Cordella Johnson appeals, assigning the following grounds of error: "First. The court erred in making and entering its order continuing the above-entitled action against her, as executrix of A. H. Johnson, deceased. Second. The court erred in overruling her motion to set aside the service of the summons in said action and the order of the court continuing the action against her as executrix, and directing a copy of the order, together with a copy of the complaint, to be served upon her, and

requiring her to plead, upon the ground that the service of the summons was illegal, and the court was without jurisdiction to make the order. Third. The court erred in entering default against her as such executrix. Fourth. The court erred in giving and entering judgment against her as such executrix, and in favor of the said Isam White."

E. B. Williams, for appellant. Wirt Minor, for respondent.

WOLVERTON, J. (after stating the facts). The judgment herein was given and entered against the defendant, Cordelia Johnson, as executrix of the last will and testament of A. H. Johnson, deceased, for want of an answer. Her appearance in the action was special only, and for the purpose of having the service of the summons upon her and the order continuing the action set aside and vacated. This she could do without giving the court jurisdiction to render a personal judgment against her. *Kinkade v. Myers*, 17 Or. 470, 21 Pac. 557. A judgment by default can only be taken when it appears that the defendant has been duly served with the summons, and has failed to answer the complaint. *Hill's Ann. Laws Or.* § 249. "Being duly served with summons implies that the defendant has been served with summons in the manner directed by law, in every particular, requiring him to appear in the court of the county where the judgment is taken." *Trullinger v. Todd*, 5 Or. 38. Has the defendant, Cordelia Johnson, as such executrix, been duly served with the summons in the action, so as to put her in default, she failing to appear generally or to plead to the complaint? In other words, was her substitution and the continuance of the action in her name by the court, and the subsequent service of the summons upon her, entitled in the original action, and directed to A. H. Johnson, together with a copy of the complaint and a copy of the order of the court showing her substitution for the defendant and requiring her to appear and answer, or otherwise plead to the complaint, sufficient in law to require her to appear at the peril of suffering a judgment by default to be entered against her? It is contended by counsel for respondent that the court has jurisdiction to make the order of substitution, basing their contention upon section 62, *Hill's Ann. Laws Or.*, which provides: "From the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings,"—and claiming that the issuance of the attachment was an allowance of a provisional remedy, and warranted the court in assuming jurisdiction to make the order. Granting, for the purpose of the examination of this question, that the writ was duly and properly issued, such issuance cannot be so construed as to invest

the court with power to control all the subsequent proceedings in the action, as in case of the service of a summons. The jurisdiction acquired by the allowance of a provisional remedy, such as the issuance of a writ of attachment, is limited and qualified, and in many respects conditional. *Kelly v. Countryman*, 15 Hun, 97; *Waffle v. Goble*, 53 Barb. 517; *McCarthy v. McCarthy*, 13 Hun, 579. The writ being process, the court may exercise control over it, and prevent its abuse and perversion for the purpose of oppression. *Morgan v. Avery*, 7 Barb. 659. The court may also, upon condition that the writ is served and property attached under it, direct the publication of a summons against a defendant, nonresident, or absent from the state, or in concealment to prevent a personal service. *Pennoyer v. Neff*, 95 U. S. 727. And a final subjection of the property attached to the payment of a demand is always dependent and conditional upon a valid judgment subsequently obtained upon the service of a summons upon the defendant, either personally or constructively, or upon his appearance in the action.

Under a statute in Minnesota (*Gen. St.* 1878, c. 66, § 69; *Gen. St.* 1894, § 5209) providing that, "from the time of the service of a summons in a civil action, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings," it has been held that where the defendant dies after the publication of the summons in an action against him had been commenced, but before it had been published the full six weeks required by statute, the court had no jurisdiction to make an order of substitution continuing the action against his executrix. *Auerbach v. Maynard*, 26 Minn. 421, 4 N. W. 816. In that case *Berry, J.*, says: "Then, under section 69 [chapter 66, *Gen. St.* 1878; section 5209, *Gen. St.* 1894], from the time when the service is thus complete, 'the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings.' If the party upon whom the service is being made dies before it is complete,—that is, before the required publications have been made,—the service cannot be completed, there being no person in being upon whom to make it; and whatever has been done, short of complete service, is of no avail, and the court acquires no jurisdiction through it." Thus it appears that the court is without power or authority to take any action looking to the rendition of a personal judgment merely without first obtaining jurisdiction through the service of a summons upon the defendant. Aliter from the time of the service of summons the court has control of all subsequent proceedings. The statute of Minnesota stops short of the provisions of section 62 under consideration; but the judicial interpretation thereof in *Auerbach v. Maynard*, *supra*, serves as a guide to the interpretation and construction of section 62 to

the extent that it is in harmony with the Minnesota statute. Section 62 further provides that the court shall be deemed to have acquired jurisdiction, and shall have control of all subsequent proceedings from the time of the allowance of a provisional remedy. The language employed in conferring jurisdiction is the same in either case, whether by the service of a summons or the allowance of a provisional remedy; but it is very evident that the powers acquired thereby are not the same, and hence not coequal nor coextensive. The purpose of a provisional remedy, as understood and employed by the Code, is to give the plaintiff temporary security pending the action, which must abide the determination thereof. An attachment in this state, as elsewhere, is regarded as a quasi proceeding in rem, and is known under the statute as a "provisional remedy," the express purpose of which is to acquire a lien upon the property of the debtor, temporary in its nature, to await the final judgment of the court touching the action, in connection with which the proceeding is brought into requisition. The court is empowered, through the allowance of a provisional remedy thereafter, to take whatever action may seem necessary and proper looking to the acquirement, preservation, and perfection of the lien. The proceeding is simply auxiliary to the main case. The service of the summons confers jurisdiction of the person, and the allowance of the provisional remedy of the subject-matter, of the auxiliary proceedings; and each particular kind of jurisdiction confers upon the court its peculiar powers, and none other. So it has been held that the court acquires by the allowance of a provisional remedy jurisdiction to make substitution, and to order the action continued in the name of the personal representatives of a deceased party, upon the ground that such action of the court is necessary and proper to put the suit in such a condition as that plaintiff could enforce his provisional lien. *More v. Thayer*, 10 Barb. 259. And this is probably the correct doctrine.

But a question of much greater complication is as to whether the defendant, Cordelia Johnson, has been properly served with a summons or with process of the court, so as to give it jurisdiction to render judgment against her by default. And herein is involved the proper practice of the court in making substitution, and bringing the substituted party before it. The procedure for bringing in new parties after the court has made the order to that effect appears to be to amend the complaint by inserting therein such allegations as are necessary to make the persons omitted parties to the action, and insert their names in the summons; and, if they do not enter an appearance, to serve them with the amended summons and complaint, giving them the usual time allowed by statute to original parties in which to an-

swer. *Fitnam*, Trial Proc. § 351; *Penfield v. Wheeler*, 27 Minn. 358, 7 N. W. 364. Bringing in a new party is somewhat analogous to bringing a personal representative of a deceased party before the court where the deceased was not served with the summons in the action. Section 38, Hill's Ann. Laws Or., provides that "no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest." It has been held in New York and California, under statutes similar to this, that all that is necessary to put the case in condition to proceed is to obtain an order upon proper notice directing that the action be continued against those who had succeeded to the interest of the deceased party. *Gordon v. Sterling*, 13 How. Pr. 405; *Coon v. Knapp*, Id. 175; *Allen v. Walter*, 10 Abb. Pr. 379; *Emeric v. Alvarado* (Cal.) 2 Pac. 462; *Lyles v. Haskell* (S. C.) 14 S. E. 832; *Judson v. Love*, 35 Cal. 469. But in none of these cases had the original defendant in the action died previous to a service of summons upon him or his appearance of record. By the order of substitution in the case at bar, the action was continued against Cordelia Johnson, the personal representative of the deceased defendant, upon whom the summons had not been served; so that, assuming that she had notice of the order of substitution, and that the same was regularly entered, she would simply step in the shoes of A. H. Johnson, who had not had his day in court, and it was just as essential that she should have her day in court as that A. H. Johnson should have had his in the first instance. We take it, therefore, that before a valid judgment can be entered against her, whether as executrix or to be of binding force and effect to the extent only of the property attached, she must be served with notice in the manner provided by law, as she refuses to voluntarily submit to the jurisdiction of the court. The statute has prescribed but one form of notice through which the court may acquire jurisdiction of the person, and that is by summons, which, although not process, has the force and effect thereof, and, if not obeyed, will put the party in default. Section 52, Hill's Ann. Laws Or., provides: "The summons shall contain the name of the court in which the complaint is filed, the names of the parties to the action and the title thereof. It shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to appear and answer the complaint, as in this section provided, or judgment for want thereof will be taken against him." These requirements are mandatory, and not directory merely. *Lyman v.*

Milton, 44 Cal. 630. Section 55 provides that the service shall be by delivering a copy thereof, together with a copy of the complaint. Now, the summons served upon Cordelia Johnson in form filled the requirements of the statute; but Mrs. Johnson's name was not contained in the title, nor was it directed to her. So far as appears from the summons itself, it contained nothing which could or would inform her that she must appear in obedience to its mandate. So with the copy of the complaint with which she was served; she is nowhere mentioned as a party litigant either in her individual or representative capacity. She was informed by the order served with the summons and complaint that the action had been ordered continued against her, as the executrix of A. H. Johnson, deceased; and she was advised thereby that she would have 10 days after service within which to plead to the complaint. Is all this sufficient to put the administratrix in default after the lapse of 10 days from service, and to invest the court with jurisdiction to enter judgment against her in her representative capacity? Can it be said that she was served with the summons in the action, substantially such as the law directs? Had A. H. Johnson lived, and the court had simply made an order after the allowance of the writ that he have 10 days after service of a copy of the order and complaint to plead thereto, and service had been made as required by the order, it must be conceded that the proceeding would not be equivalent to the issuance and service of a proper summons upon him. A noncompliance with the order would not put him in default. The order of the court in the present case, including its service with a copy of the complaint, could scarcely have a different or more vital effect, and the fact that she was served with a copy of the summons in which her name was nowhere mentioned could not add to the force of the proceeding. If Johnson had been served with the summons, and substitution made thereafter, the case would be different, as the representative, having due notice of the substitution, would take the case up at the point where and in the condition in which the predecessor left it. Judge Rumsey, in his work entitled *Rumsey's Practice* (volume 1, p. 666), says: "Where the action is revived, the issue and proceedings are taken up at the point where the death of the party as to whom the change is made left them. The new or substituted party takes the place of the prior one, and the case is revived and proceeds in all respects as if the new party had been in the case from the beginning."

In *Reilly v. Hart*, 130 N. Y. 625, 29 N. E. 1099, the court had under consideration a foreclosure proceeding wherein the plaintiff died pending the service of summons upon two of the defendants by publication, and before the expiration of six weeks' publication thereof, as required by statute. Bradley, J.,

speaking for the court, said: "But it is not seen how four weeks' publication of summons before the death, and the two weeks following, could be treated as an effectual service upon these nonresident defendants. During the latter period there was no plaintiff, and in practical effect no action to support any proceedings within that time. The prior publication of the summons was then an unaccomplished attempt to serve it." Plaintiff's executrix was substituted, and it was held that what had been accomplished while there was a plaintiff remained effectual; and, when substitution had been made, progress in the action could properly be made from the point in the proceedings where the suspension had left them, and the substitution had no effect other than to continue the cause in the name of the successor as such. Such being the law, and as no summons was served upon A. H. Johnson, we think that his personal representative, Mrs. Cordelia Johnson, should be served with a proper summons before she could be put in default; otherwise the taking of property in the action or as a result of it would not be by due process of law. The statute provides that the court may at any time within one year after the death of a party on motion allow the action to be continued against the personal representative, but no provision is made in a case of this kind as to the manner of bringing in the substituted party. The court could therefore adopt any reasonable procedure that may seem proper, but the service of a valid summons could not be dispensed with. Probably the better practice would have been for the lower court to have required the plaintiff to file a supplemental complaint in the action showing the death of defendant and the appointment of the executrix, and thereupon to issue an alias summons containing the title of the action after substitution made, and have the same directed to the said Cordelia Johnson. A service of such a summons, together with a copy of the complaints, would undoubtedly suffice to require her appearance, in default of which judgment might have been entered against her. Such a practice and procedure seems reasonable, and well calculated to effect the desired result in an orderly manner.

This perhaps disposes of the questions which are properly here upon the motion to set aside the service of the summons upon Cordelia Johnson as the executrix of A. H. Johnson, deceased, and has the effect to vacate the judgment, including the order for the sale of attached property. All this is, however, amendable, providing the writ of attachment was properly issued; and, as the case would in all probability come here again for an adjudication upon the regularity and legality of the issuance of the writ, it is thought proper to indicate our opinion at this time upon the question suggested, and dispose of the case accordingly. The question is, was the writ of attachment properly issued?

sued? And this depends upon whether a summons was issued at the time plaintiff had the property of A. H. Johnson attached. The statute (Hill's Ann. Laws Or. § 144) provides: "The plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered." Attachment proceedings are purely statutory, and were unknown at common law, and a strict compliance with the provisions of the statute is necessary to the acquirement of a valid attachment. Without a valid writ there can be no levy under it; hence no attachment. So it has been held, and statutes similar to the above have been so construed as to require the issuance of a summons in the action at the time of or prior to the issuance of the writ of attachment; otherwise the attachment is without validity or force. *Low v. Henry*, 9 Cal. 538, 552; *Mills v. Corbett*, 8 How. Pr. 500; *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477. The issuance of the writ being the allowance of a provisional remedy, unless properly and legally issued, the court acquired no jurisdiction to make the order of substitution requiring the cause to be continued in the name of Cordella Johnson as executrix. A summons may be said to have issued in an action commenced in the circuit or county courts of this state when it is made out and signed by the plaintiff or his attorney, and placed in the hands of the sheriff, with the intention that it be served upon the defendant. It is difficult to see how anything less than this would constitute an issuance of a summons. The statute requires that the summons shall be served by the sheriff, and, without a delivery to him for service, such instrument is not yet endowed with vitality for any purpose. *Insurance Co. v. Schroeder*, 9 Ill. App. 472; *Ross v. Luther*, 4 Cow. 158; and *Mills v. Corbett*, supra. The sheriff is required to indorse upon the summons the date of the delivery to him, and an important legislative purpose of which is to establish, fix, and preserve the date of its issue; so that other proceedings dependent upon the fact of its issuance should not be rendered precarious and uncertain, as would be the case if left to be established by proof aliunde the record. The indorsement being required by statute, it becomes an official duty, which the officer must observe and perform; and, when performed, the record thus made imports like verity with his returns of process and the like, if, indeed, it is not a part of the return required of him to be made. The record in the case at bar shows a variance as between the sheriff's indorsement showing the date of the delivery of the summons to him and the affidavit of plaintiff as to the date of its issuance. The sheriff shows that it was delivered to him April 17, 1894; and the affidavit of plaintiff, by strong implication, shows that it was delivered on the day previous. Evidently,

the affidavit was not intended to impeach the record of the sheriff, but its effect is to contradict it, to say the least. The court below made the order continuing the action in the name of the executrix upon the affidavit alone. The summons showing the date of the receipt was not before the court, as it had not been returned. Apparently, the indorsement was not considered material either by the counsel or the court, but the view we take of the case renders it highly important. The question whether the court had the power, to make the substitution hinges upon the further question as to which of these records imports the truth as to the date of the issuance of the summons. As a general proposition, as against parties to the record or their privies, the sheriff's return imports absolute verity, and it cannot be impeached except by some direct attack (22 Am. & Eng. Enc. Law, 193); but here no effort is made to get clear of or set aside the sheriff's indorsement, and, treating it as of no vitality, the court is asked to disregard it, and proceed with the case as if none had been made. To thus treat it would be to say the indorsement was an absolute nullity for any purpose and in any proceeding, whether collateral or direct. We think that while the indorsement of the sheriff showing the date of a delivery of the summons to him stands unimpeached, and not set aside or otherwise vacated by any adequate proceeding for that purpose, it must be taken as true and to import absolute verity as against an affidavit of the plaintiff in the action contradicting it in a subsequent proceeding in the same case to procure an order of substitution and continuance of the action in the name of the executrix. For these reasons, and looking to the record in the case made at the instance of the plaintiff and by the sheriff, an officer of the court, and in the line of his duties as prescribed by the statute, all of which remaining unassailed and unimpeached, we conclude that the summons had not issued at the time of the issuance of the writ of attachment, nor was it issued until the day subsequent to the issuance of the writ. Therefore, the allowance of the provisional remedy was without authority of law, and void, and it was error in the court below to grant the order allowing the action to be continued against Cordella Johnson, the executrix.

The judgment of the court below is reversed, and the cause remanded, for such other proceedings as may be deemed advisable, not inconsistent with this opinion.

BEAN, C. J., expressed no opinion.

(22 Nov. 368)

THOMPSON v. BECK. (No. 1,428.)

(Supreme Court of Nevada. June 19, 1895.)

PARTNERSHIP—ADVANCEMENTS BY PARTNER—REPAYMENT.

Where the amount of advances made by a partner to the firm is paid him out of firm

1 R. bearing pending.

funds, the debt is satisfied; the contention that, because he was entitled to one-half of the firm funds, he only received from the firm one-half of the debt, being untenable.

Appeal from district court, Washoe county; A. E. Cheney, Judge.

Action by H. H. Beck against William Thompson for an accounting. Judgment was rendered for plaintiff, and defendant appeals. Judgment modified.

For former report, see 36 Pac. 562.

Torreyson & Summerfield, for appellant. Clarke & Jones, for respondent.

BONNIFIELD, J. The material facts and the several transactions involved in this case were reviewed on the former appeal by this court, and are set forth in the case of Beck v. Thompson, 36 Pac. 562, 22 Nev. —, and need not be repeated here, except in part in considering the questions raised on this appeal. The second trial resulted in a judgment in favor of the plaintiff for the sum of \$1,424.64, with certain interest. From this judgment and the order of the court denying his motion for new trial, the defendant appeals. The law of the case was settled on the former hearing by this court, and the basis upon which the second trial should be had was pointed out.

One of the grounds specified in the notice of motion for new trial is "insufficiency of the evidence to justify the decision and judgment," and is one of the assignments of error. Counsel for appellant claim that sums of money were not credited to Lake, Thompson's predecessor in interest, which he should have been credited with, and that erroneous charges for wages were allowed.

1. Our attention is called to the \$30,000 transaction, including the promissory note executed by the firm of Lake & Beck to Lake. At a certain date Lake had advanced to the firm of Lake & Beck \$30,000 more than Beck, which were used in carrying on the business of the concern, and in acquiring property for the firm. Lake being desirous of drawing out a part of his advances, the firm borrowed \$20,000 of Paxton, for which a promissory note was executed by and in the firm's name to Paxton, and a mortgage given on the property of the firm. This note and mortgage were subsequently paid out of money belonging to the firm of Lake & Beck. Lake received to his individual use the \$20,000 borrowed. There still remained in the concern \$10,000 of Lake's advances. For this sum, and to adjust the capital account between M. C. Lake and H. H. Beck, Lake received the promissory note of the firm of Lake & Beck. This note was paid out of the firm's money. It is strenuously contended by counsel that Lake was a creditor to the amount of \$30,000, and, like any other creditor, should have received the \$30,000 advanced; that the \$20,000 borrowed from Paxton and the \$10,000 note given to Lake having been paid out of part-

nership funds, one-half of which belonged to Lake, the two transactions resulted in Lake receiving only \$15,000 of the \$30,000 advanced; and that, to correct this error, Thompson, who succeeded to Lake's interest, should be credited with \$15,000. The fallacy of this contention is apparent. When one of two partners advances a sum of money to the partnership concern, and the sum is paid back to him out of the moneys of the firm, the debt is canceled, and he has no further claim against the partnership or against his partner with respect to the matter; and we know of no rule of law governing transactions between partners, and no rule in common arithmetic or in common philosophy, that would give a different result.

2. Counsel claim that the evidence does not sustain the conclusions of the court as to the rent of the mill property; that Lake & Beck should have been credited with \$400 per month from the 1st day of May, 1881, the date H. H. Beck & Co. entered under the lease. In this we think counsel are mistaken. We find from the record that Bole paid Lake as rent \$100 per month from May 1 to October 10, 1881, when the mill was destroyed by fire. On June 1, 1882, Lake & Beck received a credit, for rent, the sum of \$1,466.66, and from that date, including June, they received a credit of \$400 per month. It appears from the entries in the company's books that no rent was charged by Lake & Beck to H. H. Beck & Co. for the period between the date of the destruction of the mill, October 10, 1881, and the date of the completion of the new mill, in March or April, 1882. We therefore find no error in the rent account as settled by the court.

3. Appellant's counsel object to the allowance of the sum of \$1,000 to Beck for services rendered to Lake & Beck from February 14, 1885, the date Beck, as surviving partner, rendered his account to the administrator of Lake's estate, up to the 8th of October, 1888, the date of the distribution of the estate, when Thompson succeeded to the interest of the estate in the concern of Lake & Beck and of H. H. Beck & Co. They object, on the ground that Beck rendered no services to Lake & Beck of material value. The evidence fully establishes the value of the services in a sum greater than the court allowed; but on the former appeal this court held that Beck was entitled to no compensation for such services after the formation of the partnership of H. H. Beck & Co. In this respect the judgment is erroneous. From the formation of the firm of Lake & Beck up to the organization of H. H. Beck & Co., Beck received \$100 per month salary, as manager of the business of the concern, by agreement of the parties. After the firm of H. H. Beck & Co. was organized, he received the same monthly salary as its managing agent, up to the dissolution of the co-partnership; and Bole, as bookkeeper of the concern, received a monthly salary of \$100

up to the time he withdrew from the firm. The work in conducting the business of the new firm was partly divided between Beck and Bole. After Thompson became a member of the firm, he took considerable part in carrying on the business. It seems to us, as was said when this case was here before, "that, after the formation of the firm of H. H. Beck & Co., the old firm of Lake & Beck ceased to exist, and consequently we have but the affairs of one partnership to settle. After that, Lake & Beck were simply tenants in common of the mill property, for the use of which they were to receive a certain compensation over and above the profits of the business (of H. H. Beck & Co.), the same as Beck and Bole were to receive extra compensation for their services; and the firm name of Lake & Beck was simply used by the bookkeepers of the former firm for convenience of keeping the accounts of the mill." The trial court allowed \$1,000 in gross for services rendered to Lake & Beck, including the Arcadome transaction. We take it that the court considered the value of the services rendered in and about the Arcadome business as being but a small portion of the sum allowed for services.

Under all the facts and circumstances of this case, and in the absence of any express or implied agreement appearing to the contrary, we are of opinion that Beck is not entitled to compensation for services rendered to Lake & Beck after May 1, 1881, when the new firm, H. H. Beck & Co., entered into business, and that the judgment should be corrected accordingly. From Beck's credit of \$7,908.74, the district court will deduct the sum of \$4,247.10, in place of \$3,247.10. With this correction, and the necessary corresponding corrections in the decision, findings, and judgment to be made by the court below, the judgment is affirmed. Each party will pay his own costs on this appeal.

BIGELOW, C. J., and BELKNAP, J., concur.

(5 Wyo. 376)

BRYANT v. STATE.

(Supreme Court of Wyoming. June 10, 1895.)

FELONIOUS ASSAULT WITH PISTOL—EVIDENCE—CRIMINAL NEGLIGENCE—VERDICT.

1. Evidence that, while at a dance, defendant said he was looking for trouble, and that he had two pistols with him; that he made insulting remarks to a certain person, and, in the altercation which followed, defendant drew a pistol from his clothing, whereupon a struggle ensued, and in the course of the affray the pistol was discharged; and that defendant immediately afterwards said that he did not want to shoot any one but his opponent,—will sustain a conviction of assault with intent to murder.

2. To commit felonious assault with a pistol, the pistol need not be discharged, if there is intent to kill.

3. The intent to kill necessary to sustain a charge of felonious assault with a pistol cannot be presumed from the fact that the pistol was discharged with criminal negligence.

4. A verdict finding defendant guilty of felonious assault, as charged in the information, is sufficient, where the information charged assault with intent to commit murder, though "felonious assault" is not a statutory crime.

Error to district court, Fremont county; Jesse Knight, Judge.

Frank Bryant was charged by information, in appropriate language, with the crime of assault with intent to commit murder, and was found guilty of a felonious assault, as charged in the information, and was sentenced by the court to a term of three years' imprisonment in the penitentiary. Reversed.

Melville C. Brown, for plaintiff in error.
B. F. Fowler, Atty. Gen., for the State.

CONAWAY, J. There are a considerable number of assignments of error in this cause, only four of which we have deemed it necessary to discuss.

It is assigned as error that the verdict is not sustained by sufficient evidence. The occurrences upon which the charge is founded took place in the early morning of the 5th of July, 1893, in a hall where a ball was in progress. Plaintiff in error was there, with a revolver in his possession. During an altercation which occurred between him and Chrisman, he drew the revolver from his clothing; and a struggle for the possession of the revolver occurred, during which the revolver was discharged,—whether intentionally, by plaintiff in error, or accidentally, may not be entirely clear. Why he took a revolver to the ballroom,—the only revolver seen there,—is a question upon which there is some testimony. John Carmoody testifies to a conversation plaintiff had with him in front of the hall, and before the trouble occurred when the pistol was discharged. Carmoody relates this conversation as follows: "I just got through dancing, and was a little warm, and stepped out on the sidewalk. Bryant was there, and we passed the evening, and Frank asked me if I heard that Mrs. Lee and Mrs. Bryant were going to be put out of the hall. I told him I heard Mrs. Lee was, but I didn't think there was anything in it. We talked about it a few minutes. He said, 'Well, I told Rody if they put her out I would help him.' Then he started talking about his wife. He said she was his wife, and she had not treated him right, but he didn't care particularly about that, if she would treat the child right. I started to move away, and then he spoke again about putting the women out. He said: 'Well, I am looking for trouble. I am fixed for it. I have one gun of my own, and Fiser just gave me another.' I said, 'Trouble is a good thing to leave alone.' We talked a few words, and then separated." On cross-examination this witness says further of this conversation: "He said he had been talking to Rody about it, and told him he would stay with him. He said Mrs. Bryant was his wife, and he did not propose to

see her put out. He said she had not treated him right, but he was dissatisfied with the way she treated the child, and went on talking that way." The person designated as "Rody" was the escort of Mrs. Lee, and not of Mrs. Bryant. There was no attempt to exclude any one from the ballroom, but later in the evening plaintiff in error found the "trouble" which is the occasion of this prosecution in a different way. He appeared upon the floor of the ballroom while a waltz was going on, and remarked repeatedly in the hearing of several of the dancers,—and, among others, of Chester D. Chrisman and Mrs. Bryant,—that he thought all of certain classes of persons, whom he characterized by very vile terms, indicating both males and females, had been ordered out of the house. None of these facts, so far as stated, are denied by plaintiff in error, who testified as a witness in his own behalf. On his cross-examination he is asked, "Did you make a remark to the effect that the whores and pimps were to be kept out of the hall?" He says he might have made this remark to Tway; don't know as he made the remark to keep them out of the hall, but out of town; that he "didn't refer to any one for certain at the time, and didn't know where Mrs. Bryant and Chrisman were at the time." His further explanation of what occurred just prior to the scuffle in which the pistol was discharged appears in the following questions and answers: "Q. Did you make this remark to which I have referred at any time during that evening, in the ballroom, except twice, when your wife and Chrisman were passing close to you in the waltz? A. I don't remember making it. At the time I made this remark I didn't know where they were at. Q. To what question was it you applied it,—what remark you applied it;—when you said to Chrisman, 'Take it as you like, Chet.' A. When he spoke to me the first time, I didn't understand what he said. Q. Why did you say, 'Take it as you like'? A. He said, 'Did you mean it for me?' Q. Was that the only remark, up to the time, that you had understood? A. It was the only remark Chrisman made to me. Q. How did you know what he was referring to when he asked if you meant him? A. That is what I told him,—he could take it as he liked. I didn't know what he was referring to. That was the reason I told him he could take it as he liked." This explanation can hardly be said to explain. It calls to mind the Hibernian's two defenses to an action for damage done by a breachy bull: First, he had no bull; second, his bull was not breachy. As to the remark in question, plaintiff in error says: First, he don't remember making the remark; and, second, at the time he made the remark he didn't know where Chrisman and Mrs. Bryant were. This may sometimes be permissible in pleading, but it is hardly appropriate in sworn testimony. Plaintiff in error testifies

further that Chrisman had raised his hand to strike him before he reached for his revolver, and that Chrisman struck him, and seized the revolver before he succeeded in getting it out. This is contradicted by Chrisman and by the witness Signor. Signor says: "I saw Bryant start to draw his gun, and, as he started to draw the gun, Chet hit him. Q. At the time, was the gun out? A. Yes; he grabbed the gun and hit him at the same time." And, in answer to a question on cross-examination, Signor says, "The pistol was out of Bryant's clothing when Chrisman grabbed it." Gustin testifies that plaintiff in error found fault with him for interfering in the fight, and that, on Gustin's replying that any American citizen had a right to interfere when a man's life was in danger, plaintiff in error replied that he did not intend to shoot any one except Chrisman. This is corroborated by the positive testimony of Dougherty to the same effect. There is an attempt to show by Brower that plaintiff in error did not make such a statement at the time and place fixed by Gustin and Dougherty; but Brower came in after they had been talking several minutes, and did not hear what was said before he came in. It is true, Dougherty testified that plaintiff in error made the statement that he intended to kill him, not naming the person, but in a conversation in which Chrisman's name was mentioned repeatedly, and referring only to Chrisman, after Brower came in. Brower says he did not hear the statement, and certainly would have heard it if it had been made while he was there. Brower's opinion that he would be certain to hear anything said in a room in which there were a number of men doing more or less talking is not sufficient to offset Dougherty's positive testimony, or to justify an imputation of perjury on Dougherty's part. We are of opinion that the evidence is sufficient to sustain a conviction.

Another assignment of error is based upon the refusal of the court to give the following instruction: "Before the jury can find the defendant guilty of felonious assault, as charged in the information, they must find, beyond all reasonable doubt, that the defendant not only discharged the pistol or firearm referred to by witnesses, but that he did it with felonious intent to kill the man, Chrisman, with whom he was having an altercation. And, if the prosecution has failed to satisfy the jury beyond all reasonable doubt upon that point, then you will find the defendant not guilty." This instruction was properly refused. If plaintiff in error intended to kill Chrisman, or any other human being, not in self-defense, under the circumstances disclosed by the evidence, his offense was complete before the pistol was discharged. The discharge of the pistol was not necessary to the commission of the felonious assault. If the intent of plaintiff in error was to unlawfully kill any human be-

ing, the drawing of the revolver, or the attempt to draw it, with such intent, was sufficient.

Another assignment of error is based upon the following instruction given by the court: "The jury are instructed that the natural and probable consequences of every act deliberately done by a person of sound mind are presumed to be intended by the author of such act, and if the jury believe from the evidence in the case, beyond a reasonable doubt, that the defendant, Frank Bryant, did shoot at, towards, or against the said Chester D. Chrisman, as charged in the information, and that the natural and ordinary consequences of such shooting would be the death of the said Chester D. Chrisman, then the presumption of law is that the said Bryant did shoot at, towards, or against Chester D. Chrisman with intent to kill him; and if the shooting was done purposely, and with premeditated malice or cruelty, or with criminal negligence, the jury should find the defendant guilty of felonious assault, as charged in the information." It seems that if the discharge of the pistol was the result of negligence, although the negligence were criminal, it was not discharged purposely or intentionally, and that no intent, criminal or otherwise, can be coupled with or inferred from mere negligence. If the pistol was discharged "with criminal negligence," and death had resulted, it is evident that the crime of plaintiff in error could have been no greater than involuntary manslaughter, in which there is no element of intent to kill. The instruction, in so far as it charges that an intent to kill is a presumption of law arising from a shooting done with criminal negligence, does not, in our opinion, state the law correctly. The intent to kill is an important and necessary element in the offense of which plaintiff in error was convicted. We cannot say that the jury would have found plaintiff in error guilty of a felonious assault if they had not been instructed that criminal negligence in the discharge of the revolver would authorize such finding.

The jury found plaintiff in error guilty of a felonious assault as charged in the information. It is claimed that this verdict is insufficient to sustain the judgment and sentence. The argument is that this language does not sufficiently indicate any felony known to our law, and can be effective, at most, only as a conviction of a simple assault. It is true, the words "felonious assault" are not used in any of our statutes as a definition of any crime. But a felonious assault is charged in the information, to wit, an assault with intent to commit murder. Plaintiff in error is found guilty of a felonious assault as charged in the information. We are of the opinion that this is sufficient. Verdicts are not required to be of any particular form, or to use technical language. The meaning of this verdict is not doubtful.

See *Cook v. Territory*, 3 Wyo. 110, 4 Pac. 887. For error in the instruction in regard to criminal negligence, the judgment is vacated and set aside, and the cause is remanded for a new trial.

GROESBECK, C. J., and POTTER, J., concur.

(5 Wyo. 329)

In re BOULTER.

(Supreme Court of Wyoming. May 29, 1895.)
GRAND JURY — CHANGE OF SYSTEM — CONSTITUTIONAL LAW — PROCEDURE BY INFORMATION — DUE PROCESS OF LAW.

1. A judgment of conviction cannot be attacked, as having been obtained without "due process of law," because the procedure was by information instead of by indictment.

2. Under Const. art. 1, § 9, authorizing the legislature to "change, regulate, or abolish" the grand-jury system, the grand-jury system may be continued in use concurrently with the information method of procedure.

3. Const. art. 1, § 34, providing that "all laws of a general nature shall have a uniform operation," does not invalidate Sess. Laws 1890-91, c. 59, providing for the prosecution of felonies by information after a preliminary hearing, and prohibiting the use of the grand-jury system, except when called into use at the discretion of a court of superior jurisdiction.

4. Sess. Laws 1890-91, c. 59, changing and regulating the grand-jury system by reducing the number of grand jurors, and by providing that a grand jury shall be summoned only when ordered by court, and also providing for prosecution by information and the procedure thereunder, is not unconstitutional, as containing more than one subject.

5. As the legislature may enact new laws covering the same subjects without reference specially to existing laws, the fact that Sess. Laws 1890-91, c. 59, changing the number of grand jurors, and providing for the prosecution of felonies by information, provides that the provisions relating to indictments, writs, process, etc., and all other proceedings in cases of indictments, shall be applicable to informations and proceedings thereunder as "near as may be," does not render the act unconstitutional, as amending provisions of prior laws by implication without re-enacting them at length.

6. A conviction on an information, verified by the district attorney merely on information and belief, is not in derogation of defendant's constitutional guaranty that no warrant shall issue but on "probable cause, supported by affidavit," where the prosecution was in fact predicated on an affidavit filed before a magistrate and the action of that officer in holding defendant for trial.

Application by Collingwood Boulter, otherwise called Charles Boulter, for a writ of habeas corpus. Petitioner's demurrer to the answer of the sheriff overruled, and petitioner remanded to the custody of that officer.

R. E. Esteb, for petitioner. Benjamin F. Fowler, Atty. Gen., and John C. Baird, Pros. Atty., for respondent Laramie County.

GROESBECK, C. J. The petitioner seeks a discharge from the custody of the sheriff of Laramie county, by whom he is held under and by virtue of a mittimus of the district court for that county, having been convicted of the crime of manslaughter in said court,

and sentenced under said conviction. The former proceeding in this court under writ of habeas corpus was to secure the admission of the petitioner to bail pending the proceedings in error in this court, which he was about to institute, and his application was refused. *In re Boulter*, 39 Pac. 875. The illegality of the imprisonment of the petitioner is alleged in his petition to be that he was placed on trial and convicted upon an information charging him with the crime of murder in the second degree, which was verified only upon information and belief, and not upon oath or affirmation, as required by article 1, § 14, of the constitution of this state, and the fourth amendment to the federal constitution: that he has been therefore deprived of his liberty without due process of law; that the statute under which the information against him was filed is violative of the constitution of the state; and that such trial as he has had under such information is not "due process of law," within the meaning of the federal and state constitutions. The sheriff charged with his detention made answer, reciting that the petitioner is held by virtue of the commitment of the district court, and further states that petitioner was on the 23d day of November, A. D. 1894, duly charged, upon the affidavit of Josiah A. Van Orsdel, with the crime of murder in the first degree, before a justice of the peace for Laramie county, and that upon said affidavit a warrant was issued by said justice of the peace for the arrest and detention of the petitioner upon said charge, and that he was arrested and detained thereon until a preliminary examination was held upon the affidavit, and on November 26, 1894, the said justice found that there was probable cause to believe that said Boulter was guilty of murder in the second degree, and that, therefore, "he be held to answer the said charge to the district court for Laramie county forthwith at the present term of the district court in the penal sum of \$5,000." It is further alleged in the answer that the petitioner was charged with the crime of murder in the second degree in the district court, the information being based upon and made upon the affidavit filed before the justice of the peace, and also upon a transcript of the proceedings had before the justice, which was filed in the office of the clerk of the district court for Laramie county. It further appears from this pleading that Boulter pleaded not guilty to the information, and did not except to the verification of the information by a motion to quash, nor by plea in abatement, by demurrer, nor by pleading in bar. This answer is demurred to, and upon the demurrer the proceedings were submitted to the court for final determination.

1. It is now too late to challenge procedure by information as not "due process of law," under the constitutional provisions relating thereto. The matter has been before this court, and our decision sustaining such a procedure is upheld by an overwhelming weight of au-

thority, if not by all of the precedents. *In re Wright*, 3 Wyo. 473, 27 Pac. 585; *Rowan v. State*, 30 Wis. 129; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292.

2. We have before us a question never directly decided, and that is the validity of chapter 59 of the Session Laws of 1890-91. The act provides for the prosecution of all offenses either by indictment or by information; for the procedure in cases of information; that all provisions of the Criminal Code relating to indictments shall apply, as near as may be, to informations and all prosecutions and proceedings thereon; and further directs that no grand jury shall be summoned or required to attend any of the sessions of the district courts, unless ordered by the court or judge thereof in vacation or recess. When so summoned and ordered, the grand jury is to consist of 12 men, possessing the qualifications of petit jurors in the district court, 9 of whom shall concur in the finding of an indictment, and that the findings of the district court on all matters connected with the ordering or summoning of a grand jury shall be final and conclusive, and not subject to review by any court or judge. The authority for this law is found in the declaration of rights in our state constitution (article 1, § 13), which declares: "Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger"; and in section 9 of the same article, which reads: "The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the legislature may change, regulate or abolish the grand jury system."

It is insisted that the legislature, under these constitutional provisions, had no right to retain the grand-jury system and procedure by information, but must provide for one or the other of these methods of accusation, and that the authority conferred by the constitution upon the legislature to change, regulate, and abolish the grand-jury system does not confer the authority to keep that system alive, concurrently with the information method of procedure. In this connection the learned counsel for petitioner urges that the constitutional provision "that all laws of a general nature shall have a uniform operation" (article 1, § 34, Const. Wyo.) must be applied, and that it is unjust and unconstitutional to subject one man to an accusation by means of an information, and another by an indictment found and returned by a grand jury, at the caprice of the prosecuting officer. There is something to sustain this view in the case of *In re Lowrie*, 8 Colo. 511, 9 Pac. 480, where an act, under a constitu-

tional provision word for word like ours, was denounced as unconstitutional because, in the creation of certain criminal courts, it was provided that in such courts there should be a procedure by information, while in other counties in Colorado, where the district courts alone had jurisdiction of criminal causes, and where criminal courts were not established, the method of accusation remained as before,—by indictment of a grand jury. On this point the learned judge delivering the opinion of the court, referring to the address of the delegates to the convention that framed the constitution of Colorado, and as their understanding of the import of that instrument upon the question involved in the case, says: "Concerning the grand jury, the address stated, under the title 'Bill of Rights,' as follows: 'The grand-jury system has been so modified as to make a grand jury consist of twelve men instead of twenty-three, any nine of whom concurring may find a bill; and the question whether it may not be abolished altogether is left to the legislature.' This portion of the address to the people, coupled with the language of the instrument itself, shows the understanding of the framers of the constitution, and, inferentially, the understanding of the people, that it was the expression of their will, at that time, that the grand jury should be retained, subject to the power of the legislature to abolish it. But the people conferred on that body no power to abolish the institution as to one man, leaving it in force as to another; no power to abolish it as to one county, and not as to all the counties; and certainly no power to enact a law which would, to any extent, leave it to the discretion of district attorneys or examining magistrates whether an individual should have the advantage of an investigation by a grand jury, or be put to a public trial without such an investigation." In this opinion, evidently, too much importance is attached to the method of accusation of crime, particularly as our law provides, by means of a preliminary examination, that there should be an investigation by a judicial officer (a justice of the peace) of the accusation, where the accused may face his accusers, and have an opportunity to establish his defense if he sees fit to do so,—an opportunity never afforded by the much-vaunted grand-jury system, where the proceedings are in secret, and where the accused or his witnesses have no rightful place. The grand-jury system had its origin in the darkest period of British history, and no witnesses were sworn, but the indictment was returned upon common report. The accused, if acquitted by a petit jury, was compelled to abjure the realm, and the alternative was punishment if found guilty, and banishment if innocent. Mr. Justice Matthews, in the celebrated case of *Hurtado v. California*, 110 U. S., at page 530, 4 Sup. Ct. 111, 292, well says "that it is better not to go too far back into antiquity for

the best securities for our 'ancient liberties,' " and that the liberties of the people have been preserved and developed by a progressive growth and wise adaptation of new circumstances and situations, rather than by concessions wrung from reluctant rulers. He quotes from the Commentaries of Sir William Blackstone (4 Bl. Comm. 310) to show that the information system is as ancient as the common law itself, and adds these words of that great jurist: "And as to those offenses in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's court of the king's bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, and the same judgment was given by the same judges, as if the prosecution had originally been by indictment." True, informations were restricted to misdemeanors, and that was at a time when a crime was a felony as a rule, and misdemeanors the exception, and when many felonies were punished capitally. However, both of these methods of accusation traveled together in those bloody days, and have ever since even in the federal courts, where, for offenses less than infamous, informations have been used, under congressional enactment. Wherever the information system has been adopted,—and it is a favorite in many states,—the grand-jury system is still retained, but under restrictions. There may be occasions when a secret investigation may be absolutely necessary for the protection of the citizen and society, and we see no objection to its retention when directed by a judge of a court of boundless jurisdiction like our district courts, and when it may be presumed that public interests require it. The law is uniform, or was at the time of the preliminary investigation of this case, and at the time of filing the information in the district court, because it required a judicial preliminary investigation, either by a grand jury upon sworn testimony or by a magistrate upon evidence publicly given and in the presence of the accused, with a right on his part to cross-examination and to produce witnesses in his own behalf. The other method of accusation known to the English law—a presentation of a coroner's jury, "super visum corpore," which was a sufficient accusation—is not retained. But we have substantially the British method of indictment and information; the latter method more enlarged, but better guarded, and more advantageous to the accused.

The record of this case discloses that the petitioner had a preliminary examination upon the charge of murder in the first degree, and that he was held to answer to the district court for the crime of murder in the second degree, and admitted to bail. It was

held by this court that, under the statutes then in force, a preliminary examination was necessary, and that no information could be filed against the petitioner other than that for which he was held for trial by the magistrate, or for a lower grade of the same offense (*State v. Boulter*, 39 Pac. 884); and the question arose in the various proceedings which culminated in the conviction of petitioner of the crime of manslaughter. It does not lie in his mouth to say that he has not been accused of crime under every safeguard that modern criminal statutes have invented for the protection of the accused. He has been examined under the more humane system, and under one more advantageous to him, and he is in no situation to complain. It seems clear to us that the legislature had the right to retain the grand-jury system, and to provide for accusation by information as well as by indictment, under the authority given by constitutional permission to "change, regulate, or abolish the grand-jury system." The change or regulation made is restricting its operation, and providing for its use at the direction of a court of superior jurisdiction, and it is held in abeyance until called into action. Some other system may be devised to be used until it is employed, and the legislature has invented or rather restored the ancient one of process by information with an enlarged sphere of action, and under important regulations that protect the rights of the accused. The provision for the dual system of accusation is not fatal to the act.

3. The statute is further challenged on the ground that it contains more than one subject, both in the title and in the body of the bill. The constitution provides that "no bill, except general appropriation bills for the codification and revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject is embraced in any act, which is not expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Const. Wyo. art. 3, § 24. The title to the act is as follows: "An act to change and regulate the grand jury system by reducing the number of grand jurors, providing that a grand jury shall be summoned only when ordered by the court, and providing for prosecution by information and the procedure thereunder." The act very faithfully carries out the matters indicated in the title, and nothing is embraced in the act but what is clearly expressed in the title. Nothing is "crouched in the jungle" of the bill, nor "coiled up in its folds," to mislead the legislator or the citizen. The title is a true index to the act, and discloses the objects of legislation. The only objection that may be urged to the act is the duality of subjects of legislation embraced therein,—one to regulate the grand-jury system by reducing the number of grand jurors, and by calling it into operation only when ordered by the court; and the other to provide procedure

by information. Are not these subjects of legislation but subordinate to the main purpose of the statute,—the accusation of persons accused of crime? Two methods are provided for,—one by indictment, and one by information,—both of which are time-honored, and both of which are continued; the latter with a larger field than the former, but the former still to be used when a court or judge shall call it into operation. Because there are redundant expressions or needless details of the objects of the act or of the subjects of legislation, the act is not invalidated thereby, so long as the subjects of legislation are congruous, cognate, or germane, and in furtherance of the general subject of the enactment, even though the act may authorize many things of a diverse nature to be done. The constitutional provision must be reasonably construed, for a narrow construction would impede legislation to such a degree that none but a precisian could successfully draft a valid enactment. If the unities of legislation are preserved, and the distinct provisions are but parts of a whole and essential to the whole, the constitutional requirement is met, as the integers of statutory law are not enumerated by the constitution, and therefore the legislature is at liberty to make such divisions of the general subject of legislation as it thinks proper, if it confines each statute to a single subject, and the subordinate subjects are restricted to the legitimate offspring of the main subject. In *Missouri* it was held, under a constitutional provision akin to ours, that the definition of crimes and the procedure against persons accused of committing them might very properly be embraced in one bill. *State v. Brassfield*, 81 Mo. 151. In the state of Washington a section of an act like the one under our consideration was assailed as void, because it dispensed with grand juries unless ordered by the court; and this subject was asserted not to be within the title of the act, which only related to proceedings by information, and was a separate and distinct subject not mentioned in the title; and the constitutional provision like ours was invoked in support of this view, but the unanimous opinion of the court was that the section of the act referred to was within the title, as, in providing for proceedings by information, the necessity for a grand jury was dispensed with when such proceedings were employed, and that the same act consequently could very well provide that grand jurors should not be summoned except in the contingency therein mentioned. The court further held that the section providing for a grand jury conditionally did not bring another subject in the act in the sense contemplated by the constitutional provision permitting but one subject to be embraced in an act, as it was not within the spirit or reason of the prohibition, and, the subject of the act relating to prosecutions for crimes, the matters therein legislated upon were all properly

included within the act. In *re Rafferty* (Wash.) 25 Pac. 466. This case is directly in point, and goes further than we are compelled to go in this case. Here the provisions relating to the summoning of a grand jury are incorporated in the title, while in Washington the title contained no reference to such provisions, and the court held that the omission was not fatal. Indeed, the question is not one of first impressions in this court, but was extensively treated of in the case of *In re Board of Com'rs of Johnson Co.*, 32 Pac. 850, where the act was held not to fall within the constitutional ban. *Suth. St. Const.* § 76 et seq.; 23 Am. & Eng. Enc. Law, 229. The action of the legislature recently in separating the subjects embodied in the act under consideration is not of any weight, as such action may have been taken through caution; and it is the duty of the courts, and not of the legislature, to construe an act, and to consider its constitutionality, although a legislative construction is sometimes entitled to great attention and respect. The late acts contain some new provisions, and the original statute under consideration is continued in force by each of the later statutes in pending cases, and as to all offenses committed prior to the time it takes effect; and so it seems that the act amended was continued in force in this respect by those separating its provisions into new and independent acts. *Sess. Laws 1895*, cc. 114, 123.

The further objections to the act challenged by this proceeding need but passing notice. It is asserted that it amends provisions of prior laws by implication without re-enacting them at length, but the legislature is not compelled to resort to the amendment of prior laws, but may enact new legislation covering the same subjects without reference specifically to existing laws. The provisions of the Criminal Code relating to indictments, writs, process, issuance and service thereof, motions, pleadings, trials, and punishments, and all other proceedings in cases of indictment, are applied to informations and prosecutions and proceedings thereunder, "as near as may be." The legislature certainly had the right to mold past legislation to conform to the changes in the system of prosecutions, and to enact new regulations regarding the number of a grand jury to be summoned when ordered, and the number of that body required to find a true bill, without particular reference to prior statutes containing provisions relating to the same subjects, in the exercise of its right to legislate independently of antecedent legislation.

4. The information charging murder in the second degree, upon the trial under which the petitioner was convicted of manslaughter, was verified upon the information and belief of the prosecuting attorney, which was allowed by the statute, and this proceeding is claimed to be in violation of petitioner's rights. The constitutional guaranty that no warrant shall issue but upon probable cause,

supported by affidavit particularly describing the person to be seized, is held to annul the information in this case, verified upon information and belief, which it is claimed does not support the warrant and is not probable cause. But the answer, with the accompanying records, discloses that there was probable cause for the information filed in the district court, as it was predicated upon the affidavit filed before the magistrate, the inquiry before that officer, and the action of the magistrate holding the petitioner for trial for murder in the second degree,—for a lesser offense than was charged in the information before the magistrate. The case falls within the ruling of the supreme court of Colorado in the case of *Brown v. People*, 36 Pac. 1040, under a statute similar to ours in this respect. The defendant attacked an information verified upon information and belief, and it was held that he must show or it must affirmatively appear that no preliminary examination was had before he could challenge the informal verification of the information, as it was not necessary to disclose in the information that a preliminary examination was had. *Washburn v. People*, 10 Mich. 372. The verification by the prosecuting officer upon information and belief was held sufficient where a preliminary examination was had, since the arrest of the party charged must have been made upon warrant issued upon the requisite affidavit before the examining officer, which were required to be delivered to the clerk of the court having jurisdiction of the offense; and, in the absence of proof to the contrary, a preliminary inquiry would be presumed to have been instituted. In this case before us, the showing of the proper initial affidavit before the magistrate, verified positively, and the preliminary inquiry and holding for trial upon the charge informed against to the district court, affirmatively appear; and there was "probable cause, supported by affidavit," within the meaning of our constitution. The knowledge of the prosecuting attorney was not founded on information and belief alone, but was based upon an affidavit charging the offense in positive language, and not upon information and belief, and upon the judicial inquiry by the examining magistrate resulting in the holding of the petitioner to answer for the offense with which he was charged by the information in the district court, and upon which he was there tried. The verification to the information filed in the district court, although made by the public prosecutor upon information and belief, was based upon the preliminary examination, and embodied the result of that judicial inquiry, and this was sufficient.

The points raised in this proceeding have been patiently considered by this court, although they might all have been raised in proceedings in error without resorting to habeas corpus. Where the writ of habeas corpus has issued from this court, the petitioner

has at times been brought before it in cases arising in the county of this state where the court has been held, but it must not be understood that this case and others that have preceded it, where the petitioner has been brought into court, must be followed as precedents. No objection has been raised to such action, and this court has not considered it. The practice is not one to be commended, and it is doubtful if this court is required to have the prisoner before it at a hearing upon habeas corpus.

The demurrer to the answer of the sheriff of Laramie county is overruled, and the petitioner is remanded to the custody of that officer.

CONAWAY and POTTER, JJ., concur.

(5 Wyo. 343)

O'KEEFE v. FOSTER et al.

(Supreme Court of Wyoming. May 29, 1895.)

MODIFICATION OF JUDGMENT—FORECLOSURE OF MORTGAGE OF DECEDENT.

1. A judgment against an administrator may be vacated or modified, at the instance of a general creditor of the estate, on the ground of illegality in proceedings prior to the judgment, or in the judgment itself.

2. A motion to modify a judgment, with due notice thereof, filed during the term at which the judgment is rendered, may be heard at the ensuing term.

3. Where an administrator appears in a suit against him for foreclosure of a mortgage, the petition in which does not aver presentation of the claim in suit, nor waive recourse against the estate, judgment by default against him for a deficiency and for attorney's fees is erroneous, under Sess. Laws 1890-91, c. 70, subc. 14, § 9, requiring presentation of a claim against a decedent to the personal representative before action brought, except where the action is to enforce a mortgage, and the petition expressly waives all recourse against the property of the estate, and providing that no counsel fees shall be recovered unless the claim has been so presented.

Error to district court, Laramie county; Richard H. Scott, Judge.

Action by Julia O'Keefe against Joel Ware Foster, receiver, and Colin Hunter, administrator, for reformation of note and mortgage executed by decedent in his lifetime, for foreclosure of mortgage, and for judgment for attorney's fees and deficiency. No defense was interposed by administrator, although the petition did not aver presentation of claim, or waive recourse against estate of decedent. Judgment as prayed in petition, but modified at a subsequent term, upon motion of Foster, representing creditors of decedent, supported by affidavit showing nonpresentation to administrator, filed during term at which judgment was rendered upon notice to plaintiff. Affirmed.

Walter R. Stoll, for plaintiff in error. Baird & Churchill and B. F. Fowler, for defendant in error Foster. R. W. Breckons, for defendant in error the administrator.

GROESBECK, C. J. The original action was instituted in the district court for Laramie county by the plaintiff in error against Hunter, as administrator of the estate, and certain other defendants as heirs at law, of George L. Beard, deceased, for the reformation of a certain promissory note, and the mortgage of certain realty, securing it, executed by said Beard in his lifetime, for a foreclosure of the mortgage when reformed, and for judgment for attorney's fees and for any deficiency arising upon the sale of the mortgaged property. Judgment and decree in default was for the plaintiff in error, and the mortgaged property was ordered sold to satisfy the debt. Upon the incoming of the report of the sale, and the confirmation thereof, it appeared that the proceeds of the mortgaged property were insufficient to meet the amount of the note; and judgment was rendered for the deficiency against the administrator, the amount thereof to be paid in due course of administration. At the same term of court at which these proceedings were had, the defendant in error Foster, as receiver of the Cheyenne National Bank, a creditor, to a large amount, of the estate of the decedent,—filed a motion, supported by affidavits, upon due notice to the plaintiff and judgment creditor, to modify the judgment and decree by striking out the judgment of \$100 for attorney's fees, and for the deficiency, on the ground that the claim had never been presented to the administrator of the estate for allowance or rejection. At a subsequent term of the court this motion was sustained, and the judgment modified by striking out the judgment for attorney's fees and for the deficiency, as prayed for in the motion; and proceedings in error were instituted in this court against Foster, as receiver of the bank, the moving party in the court below, to reverse the modification of the judgment ordered and entered by the district court. It was intimated in open court, after the submission of the cause, that the administrator of the estate was a necessary party, as he must be in court in order to be bound by any judgment that should be rendered by this court; and subsequently the administrator appeared by his attorney, and asked to be made a party defendant in the proceedings in error in this cause. This motion was granted, and there is no necessity for reviewing the question as to whether or not there is such a defect in parties here as would preclude us from deciding the cause on its merits, as the appearance of the administrator is tantamount to his being brought into court by service of a summons in error. *Hammond v. Hammond*, 21 Ohio St. 620.

The petition does not aver the presentation of the claim to the administrator, nor is recourse against the estate of the decedent waived therein. No objection was taken to this omission by the administrator, and judgment was rendered by default against him, after the sale of the mortgaged premises for

the deficiency, including the amount of \$100 for an attorney's fee, to be paid in due course of administration. The statute provides that: "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against the property of the estate [is] expressly waived in the complaint [petition], but no counsel fees shall be recovered in such action unless such claim be so presented." Sess. Laws 1890-91, pp. 271, 272, c. 70, subc. 14, § 9. The statute further provides for the publication of a notice to the creditors of the decedent by the administrator or executor of a decedent's estate within 30 days after letters granted, stating that letters testamentary or of administration have been granted, the date, and requiring all persons having claims against the estate to exhibit them for allowance within a specified time. All claims against the estate arising upon contracts, whether due, not due, or contingent, must be presented within the time limited in the notice,—six months and one year,—or they are barred forever; the only exception being that of a claimant who had no notice, by reason of being absent from the state, in which case the claim may be presented before a decree of distribution is entered. *Id.* §§ 2, 3. If the executor or administrator refuse or neglect to indorse on a claim his allowance or rejection, with the day and date thereof, such neglect or refusal is deemed to be a rejection on the tenth day after the claim is presented to him. *Id.* § 5. These provisions of the Probate Code are the ones applicable to the case at bar, and are the usual statutory provisions for the presentation of claims, and the penalty for nonpresentation within the required time. Three points arise in the case, and they will be considered separately:

1. Had Foster the right to question the judgment, he being a stranger to the original action, and in no wise interested, save as a representative of a creditor of the estate of the decedent? We think his interest as a creditor is sufficient, and that he, with the other creditors, had the right to inquire into the legality of the judgment, inasmuch as the judgment for the deficiency arising upon the sale must, of necessity, swell the liabilities of the estate, and leave a smaller amount to be distributed. While it is true, as a general rule, that a judgment will not be set aside or vacated at the motion of a third person, not a party to the action, as such parties would probably have the right to impeach a judgment collaterally whenever it comes in conflict with their rights, if it was founded on fraud or collusion, there are cases where adequate protection would not be afforded by these means, and creditors have the right to proceed directly for the

vacation or modification of a judgment which fraudulently abridges their own rights and remedies. An invalid judgment by confession was set aside at the instance of a junior judgment creditor, upon notice to the plaintiff. *Bernard v. Douglas*, 10 Iowa, 370. A judgment against an administrator may be vacated at the instance of the heirs, where the conduct of the former is so negligent as to leave the latter no other remedy, and there is a good defense not presented by the defendant. *Smith v. Schwed*, 9 Fed. 483. See 1 Black, Judgm. § 317. So it would seem that any lienor or judgment creditor, or any general creditor, of an estate of a decedent, has sufficient interest in a judgment rendered against an administrator, to be paid in due course of administration, to inquire into the legality of the proceedings leading up to the judgment, and the judgment itself, as such a general creditor is directly interested in the distribution of the assets of the estate.

2. Under the facts of this case, could the judgment of the court be modified at a subsequent term to that at which it was rendered? It is the rule of the common law, adhered to generally in most of the states, that after the expiration of the term the court loses control of its judgments rendered during that term, and when the term expires they become final, and the court has no longer any power to vacate or modify them. But this rule is subject to a number of exceptions, as in the case of void judgments, for the misprision of the clerk, or irregularity in obtaining the judgment or order. The latter grounds—of clerical misprision and irregularity in obtaining the judgment—may be by motion, under our statute, while for fraud or erroneous proceedings a new action must be brought. Rev. St. §§ 2701-2705. A judgment may be carried over the term by a motion to vacate or modify it, filed upon notice at the term at which it was rendered. Such is the case here, as the motion to modify, with due notice thereof, was filed during the term, although not granted until a subsequent term, and this is sufficient to warrant the court to grant the relief at the ensuing term. Black, Judgm. § 310; *Goddard v. Ordway*, 101 U. S. 745; *Smith v. Best*, 42 Mo. 185. As the motion to modify the judgment in the case at bar, with the supporting affidavits, was filed upon due notice to the plaintiff below, at the term at which the judgment assailed was rendered, the motion by adjournment was carried over the term, and the action of the district court at its following term, in passing upon the motion, must be sustained.

3. Was the action of the court below in granting the motion to modify erroneous? The petition did not aver the presentation of the claim, and did not expressly waive recourse against the estate. If the attention of the court below had been called to the matter by the administrator, by demurrer or oth-

er proper pleading, the petition would have been held insufficient. The terms of the statute are imperative, that "no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator"; and the only exception is in the case of the foreclosure of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against the other property of the estate is expressly waived in the petition, but no counsel fees can be recovered in such an action without presentation of the claim. The validity of the judgment foreclosing the mortgage is not attacked, and no objection is taken as to that, but merely to the judgment for the deficiency and for attorney fees. The administrator made no objection to the pleading, and it may be claimed that as he waived the nonpresentation of the claim the question cannot be raised now. It is true, as a general rule, that the administrator may waive a general statute of limitations, and thus satisfy the conscience of the testator or decedent, but that in the matter of the presentation of the claim he cannot waive the statute requiring its presentation, and in such a case a judgment would be considered as against him personally, and the estate would not be bound. Wood, Lim. Act. §§ 188-199; 7 Am. & Eng. Enc. Law, 282, and cases cited. Contra: Pepper v. Sidwell, 38 Ohio St. 454. There are cases to the contrary, but they do not contain a citation of authorities, and are evidently ill considered. Our statute, however, would seem to operate to prevent the administrator from waiving the general statute of limitations, for "no claim shall be allowed by the executor or administrator which is debarred by the statute of limitations." Sess. Laws 1890-91, c. 70, subc. 14, § 8. The statutory rule requiring the presentation of claims is a wise one, founded on enlightened experience. It shuts out doubtful or stale claims, secures a definite knowledge of the liabilities of an estate, for the benefit of heirs and creditors, and subjects all of the claims to the scrutiny of one officer or trustee, charged with the duty of administration, and who gains a comprehensive knowledge of the entire affairs of the decedent,—a valuable aid in detecting spurious claims. Without such a provision to ascertain speedily and accurately the resources and liabilities of an estate of a decedent, the distribution of property would be attended by tedious delays, and the interest of creditors and distributees postponed to suit the caprice of claimants. Even judgments against the decedent for the recovery of money must be presented to the executor or administrator, like any other claim, under our statutes. A presentation of the claim, and its disallowance, or a delay in allowing it equivalent to its rejection, is then a necessary allegation in a suit against an executor or administrator, under the Probate Code,

as the right to sue such a trustee or fiduciary depends solely upon the disallowance of the claim. Where a judgment is rendered, it can only be paid in due course of administration, and it only establishes the claim in the same manner as if allowed by the administrator. In order to maintain an action against an administrator, except to enforce a lien against specific property subject to it, there must be an allegation to the effect that the claim has been presented and rejected, or that it is considered rejected upon failure to allow it within the statutory period. In an action to enforce a lien or mortgage, recourse alone must be had to the property covered by the lien, unless the claim is first presented. As the presentation of the claim was neither pleaded nor proved, and as the administrator had no right to waive the statute requiring the claim to be presented, the judgment was erroneous for counsel fee and deficiency arising upon the sale of the mortgaged realty; and the court having, upon a motion timely interposed, corrected the error by modifying the judgment to conform to the law and the facts, there is no reason for disturbing its action. The judgment of the district court modifying the judgment and decree is affirmed.

CONAWAY and POTTER, JJ., concur.

(5 Wyo. 355)

IBA v. CENTRAL ASS'N OF WYOMING.¹

(Supreme Court of Wyoming. May 29, 1895.)

PLEADING—REPLICATION — WHEN NOT NECESSARY
—JUDGMENT ON PLEADINGS—HOW VACATED.

1. In proceedings under Rev. St. U. S. § 2326, to determine an adverse claim to a mineral location, defendant denied plaintiff's possession or right to it, or his compliance with the federal statutes, local laws, and rules of miners, as alleged in the petition, and, in a so-called "cross petition," alleged title in itself by compliance with such laws and regulations, and asked that its title be quieted. *Held* that, since under Rev. St. § 2988, the allegations of the "cross petition" could have been pleaded as a defense under the general denial, no new matter was set up, and a reply was not necessary.

2. Where judgment was rendered for defendant on the pleadings for want of a replication, a motion to set aside the judgment is the proper remedy, and no motion for new trial is necessary.

Error to district court, Laramie county; Richard H. Scott, Judge.

Action by Cy Iba against the Central Association of Wyoming to determine adverse claims to a mineral location. From a judgment for defendant on the pleadings, plaintiff brings error. Reversed.

E. W. Mann, for plaintiff in error. Baird & Churchill, for defendant in error.

GROESBECK, C. J. This action was brought in the district court for Natrona county, and was removed upon change of

¹ Rehearing pending.

venue to the district court for Laramie county. The amended petition of the plaintiff below, who is plaintiff in error here, alleges the citizenship of plaintiff; that defendant is a domestic corporation; that the plaintiff, except against the paramount title of the United States, is the legal owner of the S. W. $\frac{1}{4}$ of section 13 of township 40 N., of range 79 W., in Natrona county, in the state of Wyoming, and under and by virtue of a compliance on his part with the laws of the United States and of the state of Wyoming, and the rules and regulations of the Casper Mountain mining district, within the limits of which the premises are located, in relation to mineral lands of the United States, the plaintiff is entitled to the possession thereof, and that he was such owner on the 1st day of February, 1892, and had been for a long time prior thereto and has ever since been entitled to the free and full possession thereof; that, on or about the date last aforesaid, the defendant, by its agents and employes, entered upon and took possession of said premises, wrongfully and without the consent of plaintiff, and wrongfully and unlawfully interferes with the possession of the plaintiff, and prevents his free and full possession thereof, and wrongfully withheld and still withholds the possession thereof from the plaintiff, to his damage in the sum of \$1,000; that on or about the 1st day of February, 1892, the defendant herein filed his application for a patent for said above-described premises, calling the same the "Jackass Oil Placer Mining Claim," in the United States land office at Douglas, Wyo.; that afterwards, within the period of publication as required by law, the plaintiff filed in said land office his protest and adverse claim against the issuing of a patent to said premises to the defendant, and brings the action to support said adverse claim; that plaintiff has necessarily disbursed in support of his adverse claim certain specific sums for the expense of preparing it. He therefore prays judgment against the defendant for the recovery of the full and free possession of said premises, for the sum of \$1,000 damages, and for the sum of \$87, expended in support of said adverse claim, and for costs of suit. The answer of the defendant admits its corporate existence, denies the allegation of citizenship for lack of sufficient knowledge to form a belief as to the truth or falsity of such allegation, and specifically denies each of the remaining allegations of the petition; admitting, however, the filing of the application for a patent for the oil placer mining claim, and the filing of the protest in the land office against the issuance of a patent to defendant, and denying for lack of sufficient knowledge thereof the alleged disbursements of plaintiff in the matter of making his protest and adverse claim. For a second defense and cross petition, defendant alleges its title, except as to the paramount right of the gov-

ernment to the premises, by virtue of its compliance with the acts of congress and state and local regulations, and its ownership and possession of the land, and prays judgment against the plaintiff, that its title to said realty be freed and cleared of any and all claims of the plaintiff, and for costs. As required by our statute, both of these pleadings are verified. No reply or answer to the defense or cross petition was filed by the plaintiff. The cause was continued, and leave was given to plaintiff to take depositions in term time. Plaintiff asked for permission to file a reply to the answer after the time had expired therefor, which was denied by the court, and, upon motion of the defendant, judgment was rendered upon the pleadings in favor of the defendant, and certain findings of fact based upon the answer or cross petition of defendant were made by the court, over the objections of plaintiff. A motion was made to set aside the order for judgment upon the pleadings upon a number of grounds, most of which are waived as not insisted upon in the petition in error, and the sole contention is upon the action of the court in rendering judgment upon the pleadings.

The proceedings were instituted under the provisions of section 2326 of the Revised Statutes of the United States, requiring the party filing the adverse claim in the land office to commence proceedings in a court of competent jurisdiction within 30 days after filing his adverse claim, and to prosecute the same with reasonable diligence. It has been held that ejectment is the proper form of proceeding in such actions (*Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906), and that the suit is one at law and not in equity (*Burke v. McDonald* [Idaho] 13 Pac. 351), and that the parties have the right of trial by jury (*Manning v. Strehlow*, 11 Colo. 451, 18 Pac. 625). It is provided that if in any action brought pursuant to section 2326, Rev. St. U. S., title to the ground in controversy shall not be established, the jury shall so find, and judgment shall be entered according to the verdict; and in such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title. 21 Stat. 505. Under this act the rulings are that each party is practically a plaintiff, and must show his title; that there can be no nonsuit, but that, if neither shows title, the verdict must be special, and the title, of course, remains in the United States, so far, at least, as the litigating parties are concerned. *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301; *Rosenthal v. Ives* (Idaho) 12 Pac. 904. Under the section cited, upon the filing of the adverse claim all proceedings in the land office are suspended until the determination of a court of competent jurisdiction is reached, or until it is shown that the adverse claimant has not brought suit

upon his adverse claim within the time fixed by law. It has been held that where a defense is interposed setting up the claim of ownership or title in the defendant, a replication must be filed, or the defendant will be entitled to judgment on the pleadings. *Newman v. Newton*, 14 Fed. 634. In this case it was sought to vacate a judgment for the defendants for want of a replication, in an action of ejectment to recover a certain mining claim, which was refused, and the reason for the decision appears in the opinion of Judge Hallett to be based upon the peculiar provisions of the Colorado Code of Civil Procedure; and, in ejectment for a mining claim, where defendant sets up title in himself, the plaintiff must reply. These provisions quoted from in the opinion are that the defendant may deny the allegations of the complaint or disclaim any interest in the premises, and that "the answer may also state generally, as in the complaint, the character of the estate in the premises, or any part thereof, which the defendant claims, or any right or possession or occupancy he claims." Our Code is entirely different in this respect. It provides that, in actions to recover realty, "It shall be sufficient, if the defendant in his answer deny generally the title alleged in the petition, or that he withholds possession; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted." Rev. St. § 2988. In Ohio, where provisions of the Civil Code of Procedure identical with those of our Code are quoted, it was held that in an action under the Code for the recovery of real estate, whereof the legal title is in the plaintiff, a defense grounded on an equitable title and right of possession under it in the defendant can be set up and must be pleaded, and that a general denial of the plaintiff's title merely would not let in testimony of such equitable estate. *Powers v. Armstrong*, 36 Ohio St. 357. But where the answer in such actions denies the title alleged in the petition, other defenses in the answer setting up title in the defendant are not material, as the questions thus sought to be presented properly arise on the trial under the general denial of the title of the plaintiff. *Rhodes v. Gunn*, 35 Ohio St. 387; *Kyser v. Cannon*, 29 Ohio St. 359; *Mehurin v. Stone*, 37 Ohio St. 49; *Wintermute v. Montgomery*, 11 Ohio St. 442. It has been held otherwise (*Davis v. Clark*, 2 Mont. 310; *Newman v. Newton*, supra), but these adverse decisions are probably based on peculiar statutory provisions. In Kansas, where the Code provision is similar to that of Ohio and ours, under a general denial, defendant may prove a paramount title in himself, where such title carries with it a right of possession, whether it is legal or equitable. *Clayton v. School Dist.*, 20 Kan. 256. If the legal effect of the allegations in an answer is a mere denial of the averments in the petition, or where they could have been shown under a general denial, a reply is not necessary. In-

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surance Co. v. Kelly, 24 Ohio St. 345; *Corry v. Campbell*, 25 Ohio St. 134; *Ferguson v. Tutt*, 8 Kan. 370; *Bliss*, Code Pl. 396, and cases cited. It is apparent that like a general denial in replevin, under the Code, a general denial in an action for the recovery of realty thereunder is sufficient to let in any legal defense, such as paramount title in the defendant or in a third person. It has been a matter of some contention that an action in the nature of one in ejectment would permit a plaintiff to enforce an equitable right or estate. It is sufficient for him, under our Code, to state in his petition that he has a legal estate in the premises, and is entitled to the possession thereof, and it may be asserted that in a suit like the one at bar, the paramount title being in the United States, and so admitted in the pleadings, the prevailing litigant has nothing more than an equitable estate, or the right to the legal title, upon his compliance with the local rules of miners and the national and state statutes relating to the location of working and obtaining title from the government to the mining claim. The "legal estate" which the plaintiff may allege that he has may comprehend any estate known to the law, and it seems that the early cases have decided that a plaintiff may recover upon his possessory title alone where no better is set up by the defendant. *Ludlow v. Barr*, 3 Ohio St. 407; *Abram v. Will*, 6 Ohio St. 164; *Devacht v. Newsam*, 3 Ohio St. 57. But the act of congress must govern the final disposition of the case in order that the land officials may proceed as directed by that statute. The judgment of the court must be filed in the land office, and until that is done, or a showing is made that the adverse claimant has not brought his suit within the time limited by statute or has not prosecuted the same with diligence, all proceedings are stayed in the land office. The act of congress of 1881 directs a finding by the jury in case title to the ground shall not be established by either party, and the claimant for the patent, the defendant in the action, cannot proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title. So, then, the ultimate result of a suit is a finding that the plaintiff has the exclusive right and title, save only as to the legal title of the government, or that the defendant has the same title, or that neither of them has it. When the relief is afforded by the courts of a state, the rules of pleadings and the methods of procedure of the state must be followed, yet the matters settled ought to be under the provisions of the federal statute, or the relief will be wholly inadequate, and nothing might be determined that would be of advantage to either litigant or the government. The ordinary rule in such actions that the plaintiff must recover upon the strength of his own title, and that otherwise the defendant is entitled to judgment, does not govern in

these actions, where application for patent to mining claims has been made, an adverse claim has been filed thereto, and the matter is transferred to a court of competent jurisdiction for determination, where not only the title of the parties to the controversy is to be settled, but the rights of the government as against either or both of the parties is to be determined; that is, that the plaintiff has the title, or that the defendant has it, or that neither of them has it. The term "title" is used, although it is assumed that the government holds the title until the patent issues, but the grant having been made to the locator of a mining claim, who perfects the location by performing the annual work thereon prescribed by law, the government in its statutes and by its practice considers such locator entitled as of right to a patent therefor upon proper proof of location, working, and the expenditure of labor and materials thereon, to a certain amount, where no contest arises over the location, and even then when his claim is established by suit.

The defendant must introduce evidence directly and affirmatively establishing his claim, and an instruction in such case that plaintiffs should prove their case by a fair preponderance of the evidence, and, if the evidence was equally balanced, the defendant must recover, was held erroneous. *Becker v. Pugh* (Colo. Sup.) 29 Pac. 173. The ordinary rule in ejectment under our statute, that the defendant may establish his paramount claim or title under a general denial or specific defense, is changed by the direction of the act of congress that he must do so. The reasons for these distinctions between this class of action and others are obvious. The whole proceeding in the government land office is stayed upon the filing of the adverse claim to the application for the patent, until the rights of the parties and those of the government are judicially determined. If one of the parties litigant establishes his claim, it must be so found; if neither, that finding must be made. Before the government passes its title, there must be an application for a patent, and this notice must be published in the newspaper nearest the claim for the statutory period, and the claim must be described accurately, according to its location and survey, so that the public may know what land is covered by the application, and in order that those having or claiming to have adverse rights may be protected, and enforce them, if they choose, by filing an adverse claim, and by seeking to enforce such a right in the courts. In this case the parties are compelled to institute proceedings in the state courts, as they are both considered as residents or citizens of this commonwealth, and, where the jurisdiction of the state court is not challenged, it should proceed to administer justice between the parties and the government, according to the national statutes. The petition in this case sets forth the fact of the

application for patent by defendant; that plaintiff contested this right by filing his adverse claim, and now seeks to enforce his right by proceeding in a court of competent jurisdiction. The defendant specifically denies his possession, or right to it, or his compliance with the federal statutes, local laws, and rules of miners; alleges such compliance on its part in order to perfect its claim; and it further seeks to quiet title by filing a so-called cross petition, wherein no new matter is pleaded, and where the relief sought would be unavailing, as it would not be decisive of his rights in the land office. Defendant insists that all the matter alleged in his so-called cross petition is "new," and, not being controverted by a reply or answer, must be taken as true, under familiar provisions of our Code. But the petition sets up the claim of the defendant and its attempt to secure a patent, and the contest of the application by filing an adverse claim by the plaintiff. If, under our Code, all of the allegations of the answer could have been pleaded as a defense, either as a distinct defense or under the general denial, it is difficult to see how this cross petition of the defendant can be considered as new matter, or anything further than a matter in bar of the plaintiff's recovery. We do not think that the answer required a reply, as it did not contain new matter. An attempt is made to quiet the title, but it is doubtful if the defense can be so considered. The title to the premises is not vested in the defendant or in the plaintiff, and the matter in controversy is the right to the exclusive possession, upon which the ultimate title—the patent from the government—depends.

It does not seem possible that where one party alleges the exclusive right of possession in certain realty in himself, and another in himself, that judgment can be rendered on the pleadings. Even in an action to determine the right of possession to a mining claim, the failure of the court to find as to the citizenship of the party for whom the judgment is rendered is error, although the citizenship of the party was admitted by the pleadings. *Rosenthal v. Ives*, 2 Idaho, 243, 12 Pac. 904. And it has been held in Ohio, where the Code is identical with ours, that in an action not founded on contract, express or implied, the verification of the petition does not prima facie embrace or determine the amount of recovery, and it is error to enter judgment thereon without evidence of amount or value; and this cause was for services rendered to a decedent during his lifetime by his daughter, the executor being sued. *Pollock v. Pollock*, 2 Ohio Cir. Ct. 143. The Code provides that every "material" allegation of new matter in the answer not controverted by the reply shall, for the purposes of the action, be taken as true, but the allegations of value or of amount of damage shall not be considered as true by failure to controvert them. A ma-

terial allegation in a pleading is one essential to the claim or defense which could not be stricken from the pleading without leaving it insufficient. Rev. St. Wyo. §§ 2468, 2449. The defense set up in the answer was not new matter requiring a reply, and although it is termed a cross petition, and seeks to eject an equitable defense for affirmative relief, it cannot be so considered. It is based evidently upon our Code provision permitting an action to be brought by one in possession, either by himself or tenant, of real property, against one who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest. A distinction is made between ordinary actions under such a provision and proceedings instituted under the act of congress to determine the right and title of the claimants for patent. *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. 289. The action to quiet title is allowed where the application for patent is not resisted, as in case of the location of a lode claim, within the limits of a placer claim, after an application for patent for the latter has been made, and the lode claim was not known to exist at the time of the application for the patent. *Dahl v. Raunheim*, 132 U. S. 260, 10 Sup. Ct. 74. But in such a proceeding as this, where the plaintiff seeks to establish a claim paramount to that of the defendant who has applied for a patent, it is doubtful if the right of the defendant could be asserted to have the title quieted, as the relief to be obtained in a suit at law is adequate, and the determination of the controversy settles the rights of either party or the rights of neither. The question is narrowed to the absolute right of either party to the premises in dispute, and nothing further ought to be permitted in the pleadings. A judgment on the pleadings ought to be sustained unless the pleadings are insufficient to sustain a different judgment notwithstanding any evidence which might be produced. *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720. A single material issue precludes a judgment on the pleadings. *Widmer v. Martin*, 87 Cal. 78, 25 Pac. 264; *Horsky v. Moran* (Mont.) 34 Pac. 360. The court below made findings of fact upon the allegations of the answer alone, but this was erroneous while the allegations of the plaintiff's petition were of as much force. *Miles v. McCallam*, 1 Ariz. 491, 3 Pac. 610. Such findings of fact should have been supported by evidence in a case of this character.

Some contention is made because the plaintiff in error filed a motion to set aside the judgment instead of for a new trial, but we think this was the proper course, as there was no examination of the question of fact at issue in the pleadings,—that the plaintiff was the owner,—the defendant denying this, and asserting its ownership. There was no trial on these issues, and no motion for a new trial was necessary.

The judgment of the district court for

Laramie county is reversed, and the cause is remanded for trial.

CONAWAY and POTTER, JJ., concur.

(107 Cal. 221)

PEOPLE ex rel. RICKS WATER CO. v.
ELK RIVER MILL & LUMBER
CO. (No. 15,907.)

(Supreme Court of California. May 2, 1895.)

NAVIGABLE STREAMS — WATER RIGHTS — PUBLIC
WATER COMPANIES — POLLUTION OF STREAM.
—INJUNCTION.

1. The south fork of Elk river was a small stream, insufficient to float saw logs, except during extreme winter freshets and with the aid of dams; and, though it was used at such times and in that way in early years, the use was abandoned as impracticable. *Held*, that the stream was not made navigable by Pol. Code, § 2349, declaring navigable all branches of Elk river which were at any time used for floating logs.

2. Const. art. 14, § 1, which makes the use of water for sale, rental, or distribution a public use, does not abridge the rights of an upper riparian owner on the stream from which a city water company distributes water.

3. Though the use of a stream by an upper riparian owner in the operation of a sawmill rendered the lower waters unfit for public consumption, it could not be enjoined at the instance of a city water company, which subsequently appropriated the lower waters to supply the public, on the ground that it was in violation of Pen. Code, § 374, prohibiting the pollution of streams from which the inhabitants of towns are supplied.

4. Where the lower riparian owners did not complain of such use, and most of them depended on the lumbering business and the operation of the mill for their support, the court would not, at the instance of the attorney general, who appeared for such owners to enable the making of a proper decree, suppress the use made by the upper owner.

Department 2. Cross appeals from superior court, Humboldt county; G. W. Hunter, Judge.

Action on the relation of the Ricks Water Company against the Elk River Mill & Lumber Company. From the decree rendered, both parties appeal. *Affirmed*.

Barclay Henley, J. N. Gillett, L. F. Puter, E. W. Wilson, and Atty. Gen. Hart, for plaintiff. F. A. Cutler and S. M. Buck, for defendant.

TEMPLE, J. This action was brought to restrain the defendant from polluting the waters of Elk river, from which the Ricks Water Company obtains water to sell to the inhabitants of the city of Eureka. The complaint charges defendant with polluting Elk river (1) by maintaining its barns, slaughterhouse, corral, and stables so near the stream that the water becomes polluted thereby; (2) by maintaining water-closets so that the drainage from them flows into the stream; (3) by allowing sawdust to find its way into the stream; (4) by discharging into the stream slops from its kitchen; and (5) by impounding a large number of redwood logs in the stream, from which logs a dark, juicy liquid escapes, and which logs are covered

with dust and other deleterious substances, by all of which the water is polluted and discolored, so as to be unfit for domestic use. The court declined to enjoin the defendant from impounding logs in the stream, or from dumping sawdust upon the banks, or from allowing the kitchen drainage to flow into the stream, or to abate the privies as nuisances. From that portion of the decree, and from a refusal to award a new trial, plaintiff takes this appeal. The court did enjoin the defendant from allowing the accumulation of manure and filth on the banks of the stream above its dam, and allowing the washings from the same and from the hog pen to escape into the stream. From that portion of the decree awarding the plaintiff this relief the defendant has appealed.

In a separate count the plaintiff also averred that Elk river is a navigable stream, and was made so by section 2349, Pol. Code; that in 1886 defendant wrongfully constructed, and has ever since maintained, a dam across said stream, whereby said stream has been and is wholly obstructed. Upon this issue the court found, in effect, that the south fork of Elk river is a small stream, insufficient to float single saw logs except during extreme winter freshets and with the aid of dams to increase the flow of the stream; that it is not navigable, and was not made so by section 2349, Pol. Code. By that section all streams emptying into Elk river are declared navigable "which are now or at any time have been used for the purpose of floating logs or timber." It is found that the south fork of Elk river had been so used in former years during extensive floods, and with the aid of dams, but that its use for that purpose was found impracticable, and had been abandoned. It is contended that this legislative declaration makes the river a navigable stream. I do not think so. In the first place, it will not be presumed that the language of the act refers to such a use as would not bring the river within the definition of a navigable stream. Conceding that the definition includes all streams floatable for logs, still it must be capable of being used to an extent that would make it of some value as a highway; or at least a stream that would be so used for some portions of the year. That it could be so used for a few days in the rainy season and by the aid of dams would not make the river navigable.

The court also found that the bed of the stream is private property. Perhaps this is only another finding that the river is non-navigable. If the stream is in fact non-navigable, it is not a public way, and the legislature cannot make it such by merely enacting a law declaring it navigable. Private property cannot be taken for a public use without compensation. The fact that a small stream trickles through land which the public proposes to take for a highway

does not authorize its being taken without compensation. On this point, see Gould, Waters, § 111, and authorities cited in the note. The finding upon the subject is fully supported by the law and the evidence. The dam is therefore not a purpresture.

The charge in the complaint in regard to putting sawdust into the stream is found untrue. It is found that the sawdust is burned, and that such care is taken that very little gets into the water, and that which does reach the stream has no appreciable effect upon the water. It was also found that the water is not essentially impaired by the waste water from the kitchen, or by the escape of oily substances or waste matter from the mill, or by the erection of privies or the escape of offal from the slaughterhouse. It cannot be denied that there was evidence tending to sustain all these findings. There was evidence which tended to show that the water was not polluted to such a degree by any or all the matters complained of as to render it unfit for use or unwholesome. Even the expert witnesses did not agree upon this proposition. But when the sources of pollution are suppressed which are enjoined by the decree, it cannot be said that, aside from the coloring matter which comes from the impounding of the logs, there is evidence that the water is materially polluted. The evidence shows that the offal from the slaughterhouse is not thrown into the stream, and does not get into the water; that only a portion of the drainage from the kitchen reaches the stream; that the privies are not over, or immediately upon, the banks of the stream. The people who are employed at defendant's mill themselves comprise a portion of the public. They have as much right to live on the south fork of Elk river as the inhabitants of Eureka have to live at Eureka. The one community cannot be suppressed for the benefit of the other. Since they have the right to live there, they have a right to maintain privies, taking all reasonable precautions against unnecessarily polluting the water. All natural streams to some extent operate as sewers. The surface of the land is drained by them, and all industries, as well as mere inhabitaney, tend to add to the impurities of the natural streams. The inhabitants and property owners upon these streams cannot be compelled to remove from them, or be expropriated for the benefit of urban communities. It is contended that the law of the case is changed by section 1, art. 14, of the state constitution, which makes the use of water for sale, rental, or distribution a public use. Certainly it was not intended by that provision to appropriate such water for the use of the public without compensation. The section recognizes the use as one in behalf of which the right of eminent domain may be invoked, and asserts the right of the state to regulate and control the sale, rental, and distribution of

the same. *People v. Stephens*, 62 Cal. 209; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264.

Nor do I see how the plaintiff's case is helped by section 374 of the Penal Code. I do not doubt the power of the legislature to make criminal the acts therein specified, when the direct effect of such acts is to pollute such waters. But there is nothing in the language of the section which makes it necessary to suppose that it was intended thereby to deprive riparian owners of property rights. It is not necessary to say that in the interest of public health the legislature cannot so restrict the rights of such owners as to materially interfere with the value of such rights. Such intent will not be presumed when the language leaves it doubtful. The section, if it can be construed as limiting riparian rights at all, only has that effect as to certain riparian owners. In this case the defendant had expended, as it is found, \$90,000 in his mill and other property connected with his business many years before water was taken from the stream for the supply of Eureka. The use it is making of the stream, as between itself and inferior riparian owners, may be a reasonable one. It was so found. After he had built his mill and had been for years engaged in manufacturing lumber, the relator built its works, and in defiance of law, which provides that it shall only supply the city with pure water, commenced taking the water from the stream, $4\frac{1}{2}$ miles below the mill, to sell to the inhabitants of Eureka. The water had been condemned by the board of health of the city of Eureka before it was taken by the relator. Apparently the relator is attempting through this proceeding to enable itself to perform its duty to sell pure, fresh water. Instead of taking pure water, as the court found it could have done, it will make this stream pure by destroying the property of the defendant. On the supposition made, the industry and the mode of conducting it were perfectly lawful before the relator constructed its works, and would have continued to be so but for the unlawful selection of this stream as the source from which relator would take its supply. It is not the law nor the act of the defendant alone which constitutes the nuisance. The selection of this stream by the relator renders the act unlawful which before was not. Perhaps such a thing may be done when it is absolutely necessary. The power of the legislature in this regard is very broad. But I do not think the legislature can, under the undefined and undefinable power called the "police power," take private property for public use without compensation, when such property can be condemned and paid for.

I have called attention to the fact that the law is not uniform in its operation, not only because it does not afford the same protection to rural and urban populations, but because it authorizes private persons in

charge of a public use to select certain riparian owners, and, if the construction contended for by appellant be correct, take without compensation, for the pecuniary advantage of private speculators, a valuable portion of their property. Conceding that the plant of defendant and its mode of conducting its work is lawful and proper as against inferior riparian owners, the relator had no right, under the law, to take water for the purpose of selling it to the inhabitants of Eureka, without first removing the causes of pollution. This it could do, so far as defendant's mill is concerned, by condemning and paying for it. It cannot in this proceeding, nor could the legislature in the exercise of the police power authorize it to, take the property without compensation. As was said by the supreme court of Massachusetts: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of the health or protection against a threatened nuisance, and when it appears that such is not the real object and purpose of the legislation the courts will interfere to protect the rights of citizens." *Watertown v. Mayo*, 100 Mass. 315. If this law, therefore, has any force as applied to this case, its sole effect must be to render criminal the specific acts mentioned in the statute. These were already unlawful, for they constitute nuisances. To declare them criminal is not to limit riparian rights.

The court found also that a considerable number of people reside upon the borders of the stream below the mill of defendant, who use the waters of said stream. They are inferior riparian owners, and the attorney general may present their grievances in this case.

The court found: "That during the greater part of the year defendant keeps in its dam large quantities of redwood, spruce, and pine logs. That a liquid containing some coloring matter is discharged by the redwood logs into the water, which to some extent discolors the water of said stream, and gives it a darkish appearance, and in a slight degree this discoloration remains in the water to the intake of the Ricks Water Company; but the quantity of liquid that escapes from said logs is comparatively small, and it does not render the waters of said stream offensive or repulsive to the senses, or greatly discolor, deteriorate, defile, or contaminate them, and it does not injure or essentially impair them for domestic and drinking purposes." That the logs are not covered with foul organic matter or other substance which contaminates the water. That prior to the erection of defendant's dam the waters of Elk river had a darkish appearance, owing to the falling of leaves into the stream, to juices from the roots of trees and fallen timber, and the condition of the water now in respect to color is very much as it has been for many years back.

It was also found that sawdust is not put into the stream nor allowed to decay on its banks, so that water percolating through it discolors or pollutes the stream; that all necessary precautions are taken to prevent the sawdust from getting into the river; that the same is burned upon the banks; and that the little that unavoidably gets into the river does not materially affect or discolor the waters of the stream. Upon the facts, so found, I do not think we can interfere with the decree in behalf of lower riparian owners. So far as they have appeared in the case,—which is only as witnesses,—they seem to be entirely satisfied with existing conditions. Apparently all—or nearly all—depend upon the lumbering industry for their means of subsistence, and most of them upon the business conducted by the defendant. It would be rather hard for them to have the industry suppressed by a proceeding in their behalf by the attorney general. I must confess that, to my mind, whether the impounding of logs in the river and the consequent discoloration and pollution of the water is not a nuisance of which lower riparian owners may complain, is a close question. But, under the circumstances of this case, I do not think the decree should be disturbed. The judgment and order are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

(107 Cal. 348)

LASSING v. JAMES. (No. 15,637.)¹

(Supreme Court of California. May 28, 1895.)

MISTAKE IN WRITTEN CONTRACT — PAROL EVIDENCE—SALE—PASSING OF TITLE—REMEDIES OF VENDOR.

1. Parol evidence is admissible to show that a contract for hay and pasture for cattle was prepared by their owner; that it provided for payment for all hay used by the cattle at a certain price; that the owner of the hay and pasture refused to sign it, insisting that all the hay should be taken, or none; that the owner of the cattle then erased from the contract the provision as to paying for the hay used, and added thereto a provision for taking all the hay, but, by an oversight, a provision of general similar import to the one erased was still retained in another part of the contract.

2. Civ. Code, §§ 1640, 1649, 1654, relating to the construction and interpretation of contracts, contemplate the introduction of parol evidence when a contract is ambiguous or uncertain, or fails to express the real intention of the parties through fraud, mistake, or accident.

3. Under Civ. Code, § 1140, providing that the title to personal property passes to the buyer when the parties agree upon a present transfer, and the thing itself is identified, a contract for the sale of all the hay in certain stacks passes the title when the hay is identified and the price per ton fixed, though the weight is to be ascertained at a future time.

4. When the title to the property sold has passed, the vendor may, on the vendee's refusal to comply with the contract, sue for the price due, and need not sell the property and bring an action for the resulting loss.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by J. F. Lassing against J. G. James on a contract to pasture and feed cattle. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

W. C. Graves, for appellant. Edward P. Cole and T. C. Law, for respondent.

GAROUTTE, J. The plaintiff, Lassing, was a farmer, and the owner of several fields of growing alfalfa. He was also the owner of nine stacks of hay, amounting to about 2,700 tons, which hay was situated in these various fields. Defendant, James, was the owner of a large number of cattle, and was desirous of securing both pasturage and hay upon which to feed them. Thereupon a written agreement was entered into between these two parties, which, among other things, contained the following covenants: "That the said party of the first part (Lassing), in consideration of the covenants, promises, and agreements on the part of the said party of the second part (James), hereinafter contained, hereby covenants, promises, and agrees to and with the said party of the second part that the said party of the first part will take onto his inclosed alfalfa fields cattle aggregating about 800 to 1,200 head, to be pastured at 90 cents per head per month. If any cattle should remain on said pasture any fractional part of any month, pasturage shall only be paid proportionately, and, when the pasturage becomes exhausted as not to fatten said steers, and some hay is fed, then the price is to be on the pasturage as the quantity of hay is fed, allowing 28 pounds of hay for a full 24 hours' feed for each head; for instance, if 14 pounds of hay is fed per day, then 45 cents per month per head is to be paid, and pro rata more or less in that proportion, as the case may be, until the cattle are entirely confined to the feeding pens, and \$5 per ton is to be paid for each and every ton of hay fed between this day and April 1, 1890. And the first party agrees to fence off around each bunch of stacks a sufficient number of large feeding pens, and sufficiently strong to hold the cattle without fear of them getting away; also, to furnish a good, comfortable, dry house for the use of the men engaged in feeding and caring for said stock; also, to furnish a good supply of water troughs in each pen, with pipes, etc., from the tanks, wells, and pumps, to be equipped and furnished in good order, and sufficient to plentifully water all of said cattle at all times, and, if it is found necessary to save hay while feeding, feeding racks are to be made around the fence. Cattle may be taken out and others put in at any time. And the said party of the second part, in consideration of the said covenants, promises, and agreements on the part of the said party of the first part hereinafter contained, covenant, promise, and agree to and with the party of the first part that the said party of the second part will, on turning cattle on said alfalfa fields, pay \$2,500 as the first pay-

¹ Rehearing denied.

ment on the hay, and at the end of each and every month pay the amount of all the pasturage used during the months just past. On or before November 1, 1889, both of the parties hereto is to cut off ten feet from the end of an average stack, and weigh it, and average the balance by that, and, as soon as the amount is found, one-half of all the money it comes to is to be paid, and seventy-five days thereafter one-half of the balance due is to be paid, and at the end of the time all is to be paid." In pursuance of the aforesaid agreement, James placed his cattle upon the fields of Lassing, where they remained about six weeks, when he removed them therefrom, and declined to be further bound by the terms of the contract. This action was brought by Lassing to recover the value of the hay at \$5 per ton, and also the price of the pasturage as agreed upon. The plaintiff credited defendant with the payment of \$2,500, made at the time the contract was entered into, and also allowed him the further sum of \$3,423, paid to plaintiff by an insurance company for a loss of a portion of the hay by fire, plaintiff having taken out a policy thereon after James removed his cattle from the premises. In addition to the denials of the answer, defendant set out a cross complaint, claiming damages to the amount of about \$6,000 for injury to the cattle by reason of plaintiff's breach of agreement in the manner in which he cared for them. The cross complaint was held to be unsupported in the evidence by the trial court, and judgment went for plaintiff. This is an appeal from such judgment and from the order denying a motion for a new trial.

There is no question raised by appellant, James, as to the amount allowed by the court for pasturage of the cattle, but the chief bone of contention appears to be as to the amount of hay that James really purchased; and that brings us to a construction of the agreement itself. It is contended, upon the one side, that James was only to pay for the hay used in feeding his cattle; while it is insisted, upon the other, that James bought the entire nine stacks of hay, and that his liability to pay therefor was incurred whether or not the hay was actually fed to the cattle. Upon the face of the contract there seems to be some inconsistency as to its provisions in this regard. In one part it is provided that "five dollars per ton is to be paid for each and every ton of hay fed between this date and April 1, 1890"; while the last clause provides in terms for the measuring of the entire nine stacks of hay for the purpose of determining the number of tons therein, and further provides for partial payments therefor, and the respective times when such payments are to be made, and also fixes the date of final payment of the balance due. The contract is inartificially drawn, and from all points indicates the handiwork of a layman. At the same time the inconsistency or repugnancy present in the two portions of the con-

tract cited is more seeming than real. These two provisions are certainly not directly conflicting. James, as indicated by the first clause quoted, agreed to pay for all the hay used prior to April 1, 1890. The second clause quoted is simply broader, and reaches further, for by that clause he agrees to pay for all the hay in the nine stacks. Section 1853 of the Code of Civil Procedure, in speaking as to the interpretation of contracts, provides that: "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all,"—and by virtue of this canon of construction we avoid a seeming contradiction in these two provisions, and allow them both to stand. There are also provisions of the Civil Code which, when applied to the facts here presented, overthrow appellant's position as to the true construction of this contract. Section 1649, provides: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." If James' promises of payment, when taken together, are ambiguous and uncertain, then, under the oral evidence of Lassing, there is no question but that both parties understood that James was buying all the hay at \$5 per ton. Lassing not only believed such to be the contract, but James, the promisor, believed Lassing, the promisee, so understood it. These conditions are conclusively shown by Lassing's testimony, and James, when upon the witness stand, in no way offered contradictory evidence. Section 1654 of the Civil Code, provides: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party. * * * " James is the promisor, and, by virtue of this section of the Code, he is presumed to be the party who caused the uncertainty; but, beyond this, he was the party who actually caused it, for he prepared the contract, and therefore it should be interpreted most strongly against him. Again, section 1640 provides: "When through fraud, mistake or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded." We think the provisions of this section may be properly invoked in behalf of respondent's contention. James prepared the written contract in San Francisco, and brought it to Lassing at his home for him to sign. At that time the contract did not contain the provision providing for the measurement of the hay, and the partial payments therefor according to the number of tons found to be in the stacks, but it contained a provision providing for the payment of all the hay used, at the rate of \$5 per ton. The contract thus presented to Lassing he refused to sign, in-

sisting that James should take all the hay, or none. Thereupon James, in compliance with Lassing's demands, erased from the contract as presented the provision as to paying for the hay used, and added thereto the provision as to taking all the hay. It now appears that a provision of general similar import to the one erased still remained in another portion of the contract; but the circumstances all show that it was an oversight upon the part of both parties in not also striking that provision from the contract, and it is evident that it was omitted to be done purely through mistake. It was not intended to be left there, and, tested by section 1640, should be disregarded in the interpretation thereof.

The facts and circumstances surrounding the making of this contract appear in the record by the uncontradicted evidence of the respondent, Lassing. Appellant, in his reply brief, strenuously attacks the rulings of the court in admitting this evidence. It is claimed that such parol evidence was inadmissible as tending to contradict, add to, and vary the terms of the written contract. But we are clear to the contrary. The contract has not been changed by Lassing's evidence. Nothing has been added thereto. No term has been nullified or even modified. The sections of the Code we have quoted relating to the construction and interpretation of contracts contemplate the introduction of parol evidence. For it is only upon the introduction of such evidence that it can be ascertained whether or not the principles of law embodied in those sections are pertinent and applicable to the facts of any particular case. We conclude that appellant agreed to take all the hay situated in the nine stacks. The clause of the contract as to the measurement of the hay and the payment therefor is as follows: "On or before November 1, 1889, both of the parties hereto is to cut off ten feet from the end of an average stack, and weigh it, and average the balance by that, and, as soon as the amount is found, one-half of all the money it comes to is to be paid, and seventy-five days thereafter one-half of the balance due is to be paid, and at the end of the time all is to be paid." Appellant contends that this clause, standing alone, is simply an executory agreement for the sale and purchase of all the hay in the nine stacks, and that, consequently, the title to the hay has never passed to James. It is insisted that the contract was executory in this, that the hay was never measured and the amount ascertained, as provided in the contract, and that the measurement and determination as to the amount were conditions precedent to the passing of the title. We are clear that the agreement to ascertain the number of tons of hay "at some future time by weight and measurement in no way affected the question as to the present passing of the title. All the hay in the nine stacks was purchased, at the rate of \$5 per

ton. The number of tons was immaterial as bearing upon the question of a valid transfer. The final determination as to the number of tons was only material as fixing the amount of money to be paid. The subsequent measurement and ascertainment of the exact number of tons could in no way furnish any grounds for the rejection or repudiation of the sale by either party. The hay was identified and the price per ton agreed upon at the date of the contract, and these only were the essentials necessary to constitute a valid sale, for the sale was made regardless of the amount of the hay, and thus necessarily became complete and perfect when the contract was entered into and part payment made thereunder. In *Blackwood v. Packing Co.*, 76 Cal. 212, 18 Pac. 248, a case involving the principle here discussed, this court said: "Some of the American cases are not in accord with the rule laid down by Mr. Benjamin in this, that, if the goods are identified, it does not matter that weighing or measuring is necessary to ascertain the price or the quantity, and this seems to be the law in California, for the Civil Code contains the following: 'Sec. 1140. The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.'" After James repudiated the contract, removed his cattle from the fields, and left the hay in the stacks, appellant contends that it was the duty of Lassing to sell the hay to the best advantage possible, and, if it failed to bring \$5 per ton, then the right accrued to recover from James the difference. In a case like the present, where the title to personal property has passed, there is no obligation resting upon the vendor to resell. In many cases he would have no right to resell, and possibly would be guilty of an act of conversion if he exercised any such dominion over the property; but upon the facts of this case, under any principle of law which appellant might advance, Lassing had the right to choose his remedy, as between suing for the entire purchase price or selling the property and bringing an action for the difference in case the sale resulted in a loss. *Hunter v. Wetsell*, 84 N. Y. 555; *Dustan v. McAndrew*, 44 N. Y. 72; *Van Horn v. Rucker*, 84 Am. Dec. 53.

It is insisted that Lassing so materially failed to carry out the covenants of the contract upon his part to be performed that James was justified in repudiating the contract and withdrawing from under its provisions. Of course, such conduct upon the part of James could only be justified upon the principle that the covenants to be performed by the respective parties were entirely mutual and dependent upon each other. And, in view of what we have already said as to the purchase of the hay, possibly James' only remedy for a breach of the contract would be an action of damages in the nature

of a recoupment; but we do not deem it necessary to enter into a discussion as to the mutuality and dependency of these respective covenants, for we think no material and substantial breach of the contract was ever committed by Lassing. By its terms he was to do various things, and in pursuance of his agreement it is conceded that he performed all of the things to be done by him, and at considerable labor and expense, except in a single respect. The contract, after requiring Lassing to furnish a plentiful supply of water for the cattle, continues: "And, if it is necessary to save hay while feeding, feeding racks are to be made around the fence." It is now claimed that Lassing failed to live up to his contract in this regard, and the alleged breach of this provision of the contract is relied upon to furnish material sufficient to demand a reversal of the judgment. Upon this issue the court made the following finding of fact: "That it was never found necessary on the 18th day of October, 1889, or at any time, to furnish feeding racks around the fence to save hay while feeding the cattle of defendant, nor was any necessity for feeding racks ever known to plaintiff, nor did plaintiff wholly or at all omit, fail, neglect, or refuse to furnish the same, nor was defendant compelled to, nor did he, remove any of his cattle from plaintiff's land or premises because of the failure of plaintiff to build said racks, nor did defendant, nor was he compelled to, remove any of his cattle by any act of plaintiff, nor did defendant suffer any loss, injury, or damage in any sum of money by any act of plaintiff, or by any absence of feeding racks, or at all." As to its indefiniteness, the foregoing covenant of the contract stands fully at par with the other provisions, but, conceding to it all the force and effect that appellant claims, and that the provision not only demanded that Lassing should furnish feeding racks when necessary, but that a mistake in judgment upon his part as to the time when that necessity arose would furnish grounds for a repudiation of the contract upon the part of James, however innocent Lassing might be in making such mistake, still the finding of fact which we have quoted stands as a bar to a favorable conclusion to appellant upon this contention. The finding in effect declares: (1) It was never necessary to furnish the feeding racks; (2) that appellant did not remove his cattle from plaintiff's lands because of the failure to furnish said feeding racks; (3) that appellant suffered no loss or damage by reason of the absence of such racks. This finding of fact, as we look upon it, in each of its particular branches is fatal to appellant's claims, if supported by the evidence; for, aside from that portion of the finding declaring in effect that racks were not necessary, it is found from the evidence that James deserted the premises and removed his cattle therefrom for other causes,—causes in no way attributable to Lassing,

and for which he was in no way responsible. If this portion of the finding be true, then James cannot now rely upon a breach of the contract as a ground for repudiation which in his mind at the time in no way formed an element entering into the attempted repudiation or rescission upon his part. Again, it is found that he suffered no loss or damage as to his cattle by reason of the failure of Lassing to furnish the racks. If this be so, James was not excused in law from carrying out all the covenants upon his part to be performed. If, in fact, he suffered no injury or damage by a breach of the contract, such breach was harmless, and gave him no cause of complaint. Certainly no action of damages could be based thereon by him; neither would it be such a substantial default as to afford grounds for a rescission or repudiation. While upon some of these questions there may be said to be a substantial conflict in the evidence, yet we think every branch of this finding of fact has substantial support in the evidence found in the record. It will be observed that feeding racks were to be furnished when it became necessary "to save hay." Hence, it is evident that a breach of this provision could only result in damage to James for a loss of hay. Yet he makes no claim in his complaint for that character, but attempts to recoup in damages for a loss of weight in the cattle by a lack of sufficient pasturage and hay. As to damages claimed in the nature of recoupment, it would almost seem conclusive against the claim to such that there is nothing whatever in the contract requiring Lassing to furnish sufficient feed to keep the stock in prime condition. When the contract was made, the feed was upon the ground, both pasturage and hay, and it was James' feed, regardless of quality or quantity, and was to be fed by him at such times and quantities as he saw fit. There is some claim that James subsequently, by parol, made Lassing his agent to take charge of the cattle and care for them. Conceding as much, a neglect of duty by Lassing under such contract, and damages resulting therefrom, would be a matter entirely foreign to any question of feeding racks. In addition to and beyond all this, the evidence fully supports the finding that the lack of feeding racks in no way was the cause of damage and loss to James, conceding such damage and loss to have occurred. Again, the finding of fact to the effect that the absence of feeding racks was not the cause of the removal of the cattle by James finds ample support in the evidence. Owing to the warm, copious, and unexpected rains of the months of September and October, the fields had become soft and miry, which fact interfered largely with the welfare of the cattle, and furnished a strong argument for James' action in removing them. And, as an additional cause for their removal, and probably the controlling one, these same warm rains had caused a growth of grass

upon James' own land fully sufficient for all his needs and purposes.

Conceding that an error of judgment upon Lassing's part as to the date when he was required to furnish the racks is fatal to his case, still, under the evidence, the finding of the court to this point has support. A mistake of judgment as to this particular time, entailing upon him the severe penalties here claimed, should not be held against him unless clearly apparent from the evidence. We think his conduct and acts in this regard should be liberally interpreted in his favor; and, so interpreted, we conclude the breach, if one occurred, was not a substantial one, but purely technical. Weeks before the cattle were removed Lassing had made arrangements with a dealer to have the lumber upon the ground to build the racks upon 24 hours' notice. He had fed the hay for two days only when James came upon the ground and ordered an immediate removal of the cattle. Under the written contract, it is clearly contemplated that James should feed the hay, and the inference naturally arises that Lassing would be notified when racks were required, but, under a subsequent parol agreement, Lassing was hired to feed the hay, and, as stated, he had only fed it two days when James came upon the ground and ordered an immediate removal of the cattle. It thus appears to have been left to Lassing alone to determine when hay should be fed, and for this reason the novel conditions arise that, if Lassing had decided not to feed hay during these few days, then the feeding racks would not have been required, and no breach would have occurred. Lassing states that he placed the hay upon the high and gravelly ground; that he did not think the time had arrived for the racks to be used; that neither James nor any of his men had requested or suggested to him to make and place them; that, immediately prior to the removal of the cattle, James neither demanded that he furnish the racks, nor notified him that he was removing the cattle for the reason that they were not furnished, and that he could and would have furnished them within a very few days if James had so requested. Upon such a state of facts we think this portion of the finding of the court should be upheld.

For the foregoing reasons we conclude the judgment and order should be affirmed, and it is so ordered.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

(107 Cal. 236)

PEOPLE ex rel. SWEET v. WARD. (L. A. 21.)

(Supreme Court of California. May 7, 1895.)
VACANCY IN COUNTY OFFICE—DEATH OF PERSON
ELECTED—POWERS OF COUNTY BOARD.

1. County Government Act 1891, § 60, provides that all elective county officers shall be

chosen in November, 1892, and every two years thereafter, and shall take office on the first Monday after the first day of the next January, and that all such officers shall hold office until their successors are elected or appointed and qualified. Pol. Code, § 879, provides that every officer shall discharge the duties of his office until his successor has qualified. *Held*, that when one elected in November to succeed defendant as a county officer died in the next December, after he had qualified, there was a vacancy in the office after the first Monday after the first day in January, and not before.

2. A county board has no power to fill a vacancy which will certainly arise at a future time, when a different board is in control of the county affairs.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

The people of the state of California, at the relation of A. H. Sweet, against M. L. Ward, to determine the claims of relator and defendant to an office. From a judgment for relator, defendant appeals. Affirmed.

C. H. Rippey, J. A. Gibson, Works & Works, N. J. Pillsbury, R. K. Nichols, J. L. Copeland, and A. Haines, for appellant. J. W. Hughes and W. T. McNealy, for respondent.

HENSHAW, J. Appeal from the judgment. The facts, about which there is no controversy, are as follows: Ward, the appellant, was duly elected district attorney of San Diego county for the term commencing January 2, 1893. He qualified and entered upon the discharge of the duties of the office. At the general election in November, 1894, and during Ward's term and incumbency, William Darby was elected to succeed him, pursuant to section 60 of the county government act of 1891. Darby duly qualified upon November 24th, and on December 15th of the same year died. Section 60 of the county government act of 1891 provided that "all elective county officers * * * shall be elected at the general election to be held in November, 1892, and every two years thereafter * * * and shall take office at twelve o'clock meridian of the first Monday after the first day of January next succeeding their election. * * * All officers elected under the provisions of this act shall hold office until their successors are elected or appointed and qualified." Section 879 of the Political Code provides: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified." Such was the law when Ward was elected and when the questions in litigation arose. After Darby's death, and on the 2d day of January, 1895, the board of supervisors, as then constituted, appointed Ward to fill the vacancy caused by the death of Darby, and to be district attorney "for the term of office to be taken at 12 m. on the 7th day of January, 1895"; and, upon the day of his appointment, Ward qualified in due form as the appointee to succeed Darby. At 3 o'clock p. m. of January 7, 1895, the personnel of the board having changed by the outgoing of

two old and the incoming of two new supervisors at noon of that day, the board, as then constituted, declared a vacancy to exist in the office of district attorney, and appointed the relator to fill the same during the term for which Darby had been elected; and Sweet in due course qualified. Sweet made demand upon Ward for the office upon January 10, 1895; and, upon Ward's refusal to surrender it, this action was brought to determine their conflicting claims. By appellant it is contended: First, that no vacancy in the office resulted from the death of Darby; second, that, if a vacancy did result, it occurred so instant upon the death of Darby, and it was then the right and duty of the board of supervisors to fill the vacancy, which they duly did by the appointment of himself. Under his first contention, he asserts a right to hold until his successor is elected or appointed and qualified. Under his second contention, the right is based upon the theory of a vacancy, and his appointment to serve out Darby's term.

1. It is not to be questioned but that if Darby had lived, and at noon of the 7th day of January, 1895, had demanded the office of Ward, he would have been entitled to enter it, and Ward's term would thus and then have ceased and determined. But was a demand by Darby necessary to determine Ward's tenure? The answer is found in the language of the statute. Ward, by section 60 of the act quoted, and by section 879 of the Political Code, was entitled to hold absolutely until noon of January 7th, and contingently after that date, if no successor had been elected or appointed and qualified. He had a fixed tenure and a contingent term. *People v. Edwards*, 93 Cal. 153, 28 Pac. 831. The election and qualification of Darby as Ward's successor (and not a demand by him for the office) ipso facto cut off Ward's contingent term, and limited him to the absolute period; that is, until noon of January 7th. *State v. Bemenderfer*, 96 Ind. 374; *State v. Seay*, 64 Mo. 89; *Com. v. Hanley*, 9 Pa. St. 513; *Gosman v. State*, 106 Ind. 206, 6 N. E. 349; *People v. Supervisor of Barnett Tp.*, 100 Ill. 332; *Mechem, Pub. Off.* § 401; *Throop, Pub. Off.* § 329. The word "successor" is used in our statutes, as in the books, in the twofold sense of the one entitled to succeed, and the one who has in fact succeeded. It is here employed in the former acceptance. It is a general rule, founded upon necessity to prevent vexatious embarrassment in the public service, that an officer will not be considered out of office merely by the limitation of his term. In the absence of a statute authorizing or requiring him to hold until the qualification of his successor, a vacancy arises upon the expiration of his term; but, notwithstanding, the law, for the public convenience, empowers him to continue to occupy his office. But one so holding over acquires no right to a new, fixed, and definite term. He is a makeshift merely,

locum tenens, temporarily filling a public office, which it is inexpedient to permit to stand without an incumbent. The legislature may provide that certain acts, happenings, or events shall create a vacancy in law, while its greatest wisdom cannot prevent the occurrence of vacancies in fact. The death of the incumbent creates a vacancy as a matter of course, and without any expression from the legislature upon the question. But, when the legislature declares that the office of a sheriff shall become vacant when he stands committed for 60 days for not paying over money received by him (Pol. Code, § 4186), such a vacancy may be described as a vacancy in law. So, here, the legislature having in effect provided that Ward's term upon the election and qualification of Darby came to an end at noon of January 7, 1895, a vacancy in law resulted when Darby's death prevented his succession. It is true the office would not be without an incumbent, since Ward, as locum tenens, could hold until the supervisors, by appropriate action, appointed to the vacancy; but, as has been said, Ward's incumbency gave him no right to a fixed and definite tenure. That such a vacancy did exist has before now been held by this court, under circumstances similar to but less strong than those of the present case, in *People v. Taylor*, 57 Cal. 622. The reasoning of the Taylor Case led to the conclusion that the officer elect, who had there failed to qualify, was an incumbent, under subdivision 9, § 906, of the Political Code. The incongruity of declaring a person an incumbent who has never taken possession or entered upon the discharge of the duties of an office, and who could not be chargeable with misfeasance or malfeasance, is apparent. But the learned justice who wrote the opinion in this case was constrained somewhat by the earlier decisions of the court, and by his own conviction afterwards expressed in *Rosborough v. Boardman*, 67 Cal. 116, 7 Pac. 261, that a vacancy could not exist unless it was one contemplated and declared by section 996 of the Political Code. The legitimate meaning of the word "incumbent" was therefore somewhat strained to meet the substantial ends of justice, the incongruity resulting from the failure of the legislature to discriminate in the use of descriptive terms. But giving full weight to *People v. Taylor*, and treating Darby as an incumbent, still, by its authority, the vacancy arose at the commencement of his term, and not during the term of Ward, his predecessor. But Darby was not, in the true meaning of the word, an "incumbent," and we need not predicate the existence of the vacancy upon section 996 of the Political Code.

As has been suggested, some of the earlier cases have held that to section 996, enumerating the causes of vacancy, is to be applied the doctrine of exclusion; but more lately the soundness of the rule has been questioned, and it may well be doubted. *People v. Ham-*

mond, 66 Cal. 656, 6 Pac. 741. And that it cannot be applied in strictness is clear from the fact that the section does not recite all of the causes and events which the legislature itself has declared shall create vacancies. An instance of this is found in section 4186 of the Political Code, and to that may be added section 88 of the county government act of 1891, and the provisions for forfeiture of office declared in the act to promote purity of elections.

Finally, it may be said that the vacancy here arising is not one occurring during the term of an incumbent, since it did not arise during Ward's term, and Darby was never in strictness an incumbent; so that section 906 of the Political Code, which deals exclusively with vacancies during the terms of office of incumbents, is inapplicable. *Miller v. Board*, 25 Cal. 94. This vacancy is rather an hiatus. It is in the nature of an interregnum. It arose when, upon noon of January 7, 1895, Darby, by death, was not able to take his office. *French v. County of Santa Clara*, 69 Cal. 519, 11 Pac. 30; *People v. Taylor*, 57 Cal. 622. The expiration of Ward's term alone did not create this vacancy. It was the election and qualification of his successor, and the expiration of the term, which worked the result. It is another instance of a vacancy contemplated by statute, but not expressed in section 906.

2. The vacancy which occurred having arisen at noon of January 7th, it remains to be considered whether the action of the board of supervisors upon January 2d was legal or illegal; and, as this is determined, so will the claim of appellant stand or fall. The board, then, undertook to fill, not an existing vacancy, but one soon to exist; not, however, a contingent or possible vacancy, but one which, in the nature of things, was certain to arise, though at a future date, and at a time when, in legal contemplation and in fact, a different board would be in control of the county's affairs. Briefly, the act of the board was to make an appointment to take effect, and to fill a vacancy to arise, in the term of its successor. We are not, therefore, here concerned with the question of the power to appoint to fill an anticipated vacancy by the person or body which, as constituted, is authorized to fill the vacancy when it occurs, but solely with the question of an appointment made to fill a prospective vacancy, which will arise at a time when there has been a change in the appointing power. Upon the election and qualification of Darby, his right to the office for the term commencing at noon of January 7th vested immediately, and Ward's contingent right to an additional term was cut off. Upon the divestiture of that right by death, it existed in no one, and there was no revivor of Ward's contingent right to an extended term. The power of the board of supervisors in dealing with such matters is drawn from subdivision 21, § 25, of the county gov-

ernment act of 1891, and it is limited to the filling of vacancies. That power could properly be exercised only upon an existing vacancy. The board could by its action neither create a vacancy, nor by anticipation fill one, which was to arise in futuro, during the term of its successor. Mechem lays down the rule in the following language, and, so far as our investigations have extended, its soundness is not opposed by any dissenting voice: "The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to offices expiring after their power to appoint has itself expired." Mechem, Pub. Off. §, 133. This is the language of *Ivy v. Lusk*, 11 La. Ann. 486, while to like effect are the cases of *Bownes v. Meehan*, 45 N. J. Law, 189, and *Haight v. Love*, 39 N. J. Law, 14.

We conclude, therefore: First, that a vacancy arose in the office of district attorney by reason of the election, qualification, and death of Darby; second, that this vacancy existed at and after noon of the 7th day of January, 1895, and not before; third, that the attempt of the first board of supervisors to fill the vacancy upon January 2d was in excess of its power, and void; fourth, that the vacancy was properly filled by the existing board at 3 o'clock p. m. of January 7, 1895. Wherefore, it follows that the judgment appealed from is affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

(107 Cal. 432)

SMITH v. LIVERPOOL & LONDON & GLOBE INS. CO. et al. (No. 15,707.)

(Supreme Court of California. June 4, 1895.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE—AGENCY—PROOF BY AGENT'S DECLARATIONS.

1. In an action for malicious prosecution, it is for the court to determine whether certain admitted or clearly proven facts constituted probable cause.

2. In an action for malicious prosecution for arson, it appeared that the estate of plaintiff's deceased wife, of which he was administrator, owned two vacant houses on the railroad line between O. and P., about two miles from P., where plaintiff's children lived, and that the buildings were insured; that the fire originated after dark Monday night, on the inside of the buildings, and that the persons discovering the fire found the outer doors locked, and smelled burning oil; that plaintiff worked at O., going to P. on Saturday evenings, and returning to O. on Sunday, but that at the time of the fire, he remained at P. over Monday, and had been seen peering about the buildings in a suspicious manner; that, shortly before the fire was discovered, a person well acquainted with plaintiff saw a person whom he thought to be plaintiff walking rapidly towards P.; that plaintiff was seen in a saloon that night looking warm and excited; that the property was mortgaged, plaintiff owing money besides on his own account, and that there was nothing to indicate a motive on the part of any other person to burn the buildings; that the facts were communicated to the district attorney, who advised plaintiff's prosecution for arson, and himself

made out the complaint. *Held*, to show probable cause and absence of malice.

3. Declarations of an alleged agent are inadmissible to bind the principal unless the fact of agency be first established.

Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by A. D. Smith against the Liverpool & London & Globe Insurance Company and others for malicious prosecution. From a judgment for plaintiff, defendants appeal. Reversed.

T. C. Van Ness and Van Ness & Redman, for appellants. Gibson & Wood and Welles Whitmore, for respondent.

VAN FLEET, J. This is an action for malicious prosecution, the complaint alleging that defendants, maliciously and without probable cause, procured plaintiff to be arrested and prosecuted upon a charge of arson before a justice of the peace; and, as a second count, charging that defendants in like manner, maliciously and without probable cause, procured and induced the district attorney of Contra Costa county to bring the same charge before the grand jury of said county with a view and purpose of having plaintiff indicted for said offense. Plaintiff had a verdict, and from the judgment entered thereon and an order denying their motion for a new trial defendants appeal. A number of errors are assigned as grounds for reversal.

1. It is urged that the evidence is wholly insufficient to sustain the verdict, in that (1) it does not tend to show that the prosecution of the plaintiff, either before the committing magistrate or the grand jury, was by or at the instigation or procurement of defendants, or any of them; and (2) that it does not appear that the prosecution, by whomsoever instigated, was either malicious or without probable cause.

We will first consider the second ground upon which this contention rests, since the first can be more conveniently disposed of in connection with another point. It appears without substantial conflict—in fact largely from the evidence adduced by plaintiff on his affirmative case—that the circumstances upon which the prosecution of plaintiff was based, both before the magistrate and the grand jury, were substantially these: The estate of plaintiff's deceased wife, of which plaintiff was the administrator, was the owner of two connecting houses in the town of Crockett, in Contra Costa county, a small village situate on the line of the railroad between Port Costa and Oakland, and about two miles distant from Port Costa, upon which there was insurance in the sum of \$1,700 in the defendant companies. On the night of Monday, May 25, 1891, between 9 and 10 o'clock, the insured property was destroyed by fire, under circumstances strongly indicative that the fire was of incendiary origin. The buildings were and had been

for some time vacant. The fire originated after dark on the inside of the houses, and, upon the arrival of persons who had observed the smoke, it was found that the outer doors were locked, and the escaping smoke was laden with a strong odor of burning oil or "dope." The plaintiff was a carpenter, and for some little time had been working in Oakland; but his children still remained in Port Costa, and plaintiff was in the habit of coming up to see them Saturday evenings, and returning to Oakland on Sunday. On this occasion he did not return Sunday, remaining instead in Port Costa over Monday. He had been seen on the day before the fire by Mr. Cavanaugh, the next-door neighbor, peering about the houses in what the latter considered a peculiar and suspicious manner. To such an extent, in fact, were the suspicions of Cavanaugh aroused that when the fire occurred, which also burned the residence of the latter, and the manner in which the fire started became known, he immediately suspected that plaintiff had set the houses on fire. About 20 minutes before the fire was discovered, a witness living in Crockett, who was well acquainted with plaintiff, saw a man at the east end of the town, on the county road, walking pretty fast towards Port Costa, whom he took at the time to be the plaintiff. Between half-past 9 and 10 o'clock, one Bartlett, living in Port Costa, whose wife had just called his attention to the fire, came out of his door, and met plaintiff on the street in Port Costa. He told plaintiff of the fire, and said: "I am going right down there. That is your building. Let us go right down." Plaintiff answered that it was not much use hurrying. On the way over, Bartlett hurried, but plaintiff lagged behind, and did not go all the way to the burning houses, but left Bartlett at the foot of some stairs leading up the side of the hill at the east end of the town, and the latter did not see him again that night. Another witness saw plaintiff in a saloon in Port Costa the night of the fire. He appeared warm and excited or scared, and was sweating. C. W. Rodgers, the sheriff of the county, asked plaintiff, two or three days after the fire, how it occurred. Plaintiff told him it started in some straw in an alleyway between the buildings. The sheriff asked him if he had any insurance, and he said "about \$600 or \$700." There was a matured and unpaid mortgage upon the property for some \$350, and a demand against the estate for some \$265, borrowed by the wife of plaintiff in her lifetime. Besides these amounts, plaintiff was owing money on his own account. The appraised value of the burned premises, as returned in the estate, was \$1,800. There was nothing to indicate a motive on the part of any one other than plaintiff to burn the buildings; and, when the circumstances of the fire became known, not only the sheriff of the county, but a considerable number of the resi-

dents of Crockett and Port Costa, believed and expressed the opinion that plaintiff had fired the buildings; and the prosecuting witness so believed when he swore to the complaint. It further appeared that before the prosecution was commenced, all the circumstances of the case were fully and fairly laid before the district attorney of the county; that the district attorney advised that it was a proper case for a prosecution, and himself drafted a complaint against plaintiff charging him with arson, and directed the prosecuting witness to go before the justice, and swear to the complaint, and have plaintiff arrested; that, in pursuance of such advice, the complaint was sworn to and the prosecution of plaintiff had. It also appeared that, after the discharge of the plaintiff by the magistrate, the district attorney, of his own motion, took the matter before the grand jury for their investigation.

No principle is better established than that in actions for malicious prosecution the plaintiff must, in order to recover, establish not only malice, but want of probable cause. These two elements are essential, and they must concur or the action will not lie. *Potter v. Seale*, 8 Cal. 220; *Anderson v. Coleman*, 53 Cal. 188. "The primary question to be considered in this class of cases, as was said in *Grant v. Moore*, 29 Cal. 644, is the want of probable cause for the prosecution complained of, and this must be established before plaintiff can recover; and the burden of proof is upon the plaintiff." *Jones v. Jones*, 71 Cal. 91, 11 Pac. 817. Reasonable or probable cause has been defined to be: "A suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." *Potter v. Seale*, supra, and cases there cited. In view of these principles, and applying them to the foregoing facts, we are at a loss to understand upon what theory the learned judge of the court below denied defendants' motion for a nonsuit. We cannot readily conceive of a state of facts better calculated to arouse in the mind of any reasonable man a strong suspicion of guilt than was furnished in this case. It cannot be doubted that if, upon these acts, the plaintiff had been tried and convicted of arson in the burning of the buildings destroyed, it would be impossible to say that there was not evidence to sustain such conviction. They not only disclose a case of probable cause, but, in our judgment, they wholly negative the idea of malice. See *Jones v. Jones*, supra. Upon such a state of facts, the plaintiff should not have been permitted to go to the jury. "Probable cause is a mixed question of law and fact. Whether the alleged circumstances existed or not is simply a question of fact; and, conceding their existence, whether or not they constituted probable cause is a question of law. Where the circumstances are admitted, or clearly proved by uncontradicted testimony, it is the

province of the court to determine the question of probable cause, and the court may order a nonsuit." *Potter v. Seale*, supra.

2. The court admitted, over defendants' objection, evidence as to the declarations of one McCarthy, a detective, to the effect that he was in the employment of defendants for the purpose of working up the case against plaintiff, and having him prosecuted for burning the houses. This was clearly erroneous. No other evidence was offered by plaintiff aside from these declarations to establish McCarthy's employment by or agency for defendants in the premises, and the very purpose of introducing such declarations would seem to have been to prove such agency. The declarations were inadmissible for such purpose. It was incumbent upon the plaintiff to first establish the fact of agency before the declarations of the agent became admissible to bind his principal. *Grisby v. Waterworks Co.*, 40 Cal. 396; *Loan Soc. v. Gerichten*, 64 Cal. 521, 2 Pac. 405. The defendants denied any responsibility for or connection with the prosecution of plaintiff, or that McCarthy was their agent or employé for any such purpose; and, inasmuch as the evidence of such declarations was the only evidence tending directly to connect defendants with the prosecution, its admission was prejudicial error.

3. The action of the court in giving certain instructions and refusing others requested is complained of. The questions involved in the instructions given and refused are covered by what has been said above on other features of the case; and wherein the court erred in these particulars is, we think, made sufficiently manifest without further or special consideration.

4. The objection that the damages are excessive need not be considered at this time, as the question may not arise upon another trial.

The judgment and order are reversed, and the cause remanded.

We concur: GAROUTTE, J.; HARRISON, J.

(107 Cal. 447)

PACIFIC FRUIT CO. v. COON. (No. 15,708.)

(Supreme Court of California. June 10, 1895.)

CORPORATE STOCK—ASSESSMENT—CANCELLATION.

1. A subscription for capital stock of a corporation cannot be canceled, except for fraud or mistake, without the consent of all the stockholders.

2. The issuance of a certificate of corporate stock is not a necessary preliminary to the ownership or assessability of such stock.

3. Though the cancellation of a subscription for corporate stock may be shown by circumstantial evidence, the mere recitals in the minutes of the stockholders' meetings that so many shares of stock were represented "out of 5,000 issued" is insufficient, when 10,000 shares were originally subscribed, and not enough was repre-

sented to constitute a lawful meeting, unless that alleged to have been canceled, or a large amount of other stock, had in fact been canceled.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Pacific Fruit Company against F. H. Coon to recover an assessment on corporate stock. From a judgment for defendant, plaintiff appeals. Affirmed.

John H. Dickinson, for appellant. Estee & Miller, for respondent.

VANCLIEF, C. The plaintiff is a private corporation, organized in this state for commercial and manufacturing purposes, whose principal place of business "is San Francisco, California," and brought this action to recover from the defendant an assessment of five dollars per share on his stock (100 shares) in the corporation. The judgment of the court was in favor of the defendant, and the plaintiff appeals therefrom, and from an order denying his motion for a new trial. It is alleged in the complaint, among other things: "That on the 11th day of May, 1891, said corporation, plaintiff herein, in accordance with the laws of the state of California, levied an assessment upon the capital stock of said corporation, for the purpose of paying the indebtedness of said corporation, being assessment No. six (6), of five dollars (\$5) upon each and every of the shares of the capital stock of said corporation. That said assessment, so as aforesaid levied, did not exceed ten per cent. of the amount of the capital stock named in the articles of incorporation." The answer of the defendant specifically denies each of these allegations. The court found that the whole capital stock named in the articles of incorporation is \$250,000, divided into 10,000 shares, of the par value of \$25 per share, and that all said shares were subscribed at the time of the organization of the corporation as follows: By N. K. Masten, 1,000 shares, \$25,000; by W. C. Blackwood, 1,000 shares, \$25,000; by W. W. Cozzens, 1,000 shares, \$25,000; by Clifford Saville, 1,000 shares, \$25,000; by A. W. Bryant, 1,000 shares, \$25,000; by W. K. Masten, 5,000 shares, \$125,000. This subscription is certified in the articles of incorporation, acknowledged on June 13, 1883, and is not disputed. The court further found that a part of said stock, not exceeding 1,705 shares, had been sold for assessments and purchased by the corporation prior to the levy of the assessment in question, leaving outstanding and subject to assessment, on May 11, 1891, not less than 8,295 shares; and further found that the total indebtedness of the corporation on May 11, 1891, did not exceed \$15,000; that said assessment exceeded 10 per cent. of the whole capital stock named in the articles of incorporation, and greatly exceeded the indebtedness of the corporation; and further found, as a conclu-

sion from the foregoing facts, "that said pretended assessment was not levied in accordance with the laws of the state of California," and therefore was void.

The appellant contends that the finding that the number of shares of stock liable to assessment on May 11, 1891, was not less than 8,295 is not justified by the evidence. If this finding is justified by the evidence, the judgment and order should be affirmed, since an assessment of \$5 per share on 8,295 shares amounts to \$41,475, which exceeds 10 per cent. of the whole capital stock named in the articles of incorporation by \$16,475, contrary to section 332 of the Civil Code, which provides: "No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows: (1) If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities, or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or, if a less amount is sufficient, then it may be for such a percentage as will raise that amount." The second and third exceptions apply only to railroad and insurance corporations, and the first cannot be applied to the plaintiff corporation, for the reason that there is no evidence tending to prove that its subscribed capital stock had not been fully paid. Under the pleadings, the burden of proving a valid assessment was on the plaintiff. Besides, appellant claims nothing under any of these exceptions, except as a deduction from a misconstruction of the opinion of the court; his principal contention being that the subscription of W. K. Masten for 5,000 shares had been rescinded or canceled, and that 1,610 of the other 5,000 shares subscribed had been bought in by the corporation for delinquent assessments long before the levying of the assessment in question; so that only 3,390 of the shares originally subscribed remained outstanding and assessable at the date of the assessment in question, which it is claimed was levied upon only 3,390 shares. By conceding the purchase of 1,610 shares by the corporation, as claimed by appellant, the controversy under this head is reduced to the question whether or not the evidence, without substantial conflict, is sufficient to prove the alleged rescission of W. K. Masten's subscription for 5,000 shares. If not, the assessment greatly exceeded 10 per cent. on the capital stock named in the articles of incorporation, and for this reason alone the judgment and order should be affirmed. The only evidence offered for the purpose of proving the rescission or cancellation of W. K. Masten's subscription consisted of the "certificate book" and the "minute book." The first contained printed blank forms of certificates of stock attached to stubs from which the certificates, when filled up and issued, were detached,

leaving the stubs showing the number and date of each certificate issued, the number of shares for which it was issued, and the name of the person to whom issued. The only matter found in this certificate book relating to the stock of W. K. Masten is set forth in the statement on motion for new trial, as follows: "Certificate No. 6, for 5,000 shares, dated August 4, 1883, by capital stock, in favor of N. K. Masten, Tr., is marked across the stub 'Not issued,' and across the face of the certificate 'Canceled,' the name of the president being obliterated." No doubt, the initial "N" in the name is a clerical error, whether it occurred in the original entry in the certificate book or in transcribing; otherwise the entry in the book does not relate to W. K. Masten's stock at all. N. K. Masten subscribed for only 1,000 shares, and not as "trustee." It will hardly be contended that the mere act of canceling an unissued certificate of stock effected a cancellation of the subscription for such stock. It surely tends to prove nothing more than that, for some reason satisfactory to the person or persons who canceled the certificate, it was thought unnecessary or improper to issue that certificate at that time, for it does not appear who filled the blanks, who wrote the word "Canceled," at what time, nor for what reason or purpose, nor is there any explanation of the matter in the evidence. There may have been various good reasons for canceling that particular certificate without any intention to cancel Masten's subscription. Conceding, however, that the certificate was canceled by order of the board of directors, with intent thereby to cancel Masten's subscription, yet the intended effect could not have followed without the unanimous consent of all the stockholders, of which there is no evidence. Indeed, there is no evidence that W. K. Masten, or any other stockholders, ever consented to a cancellation of his subscription. That a subscription for capital stock of a corporation cannot be rescinded or canceled, except for fraud or mistake, without the unanimous consent of all the stockholders, is too firmly settled to admit of controversy (*Cook, Stock, Stockh. & Corp. Law* [3d Ed.] §§ 166-169, inclusive, and notes to same); and it is quite as well settled that the issuance of a certificate of corporate stock is not a necessary preliminary to the ownership or assessability of such stock (*Mitchell v. Beckman*, 64 Cal. 121, 28 Pac. 110; *Hotel Co. v. Callender*, 94 Cal. 127, 29 Pac. 859).

W. H. Robinson, the only witness produced by the plaintiff, testified that he first became secretary of the plaintiff corporation in April, 1888 (about five years after its organization), and was secretary on May 11, 1891, when the assessment in question was levied; that the only means he had by which to estimate or determine the amount of assessable stock was the certificate book above described, which was the only book kept by the corpo-

ration containing any of the requisite contents of the "stock and transfer book" required by section 378 of the Civil Code; yet that he could and did correctly estimate the amount of the outstanding assessable stock on May 11, 1891, from the contents of the certificate book; and that he found the amount of such stock on May 11, 1891, to have been only 3,390 shares. That this was a gross error was made manifest to the court by the book itself, which was in evidence, and which contained no account of stock for which no certificate had been issued. The error in the estimate by the witness must have resulted from his assumption either that subscribed stock was not assessable until after a certificate therefor had been issued, or that the subscription for 5,000 shares by W. K. Masten had been canceled by the cancellation of the unissued certificate therefor, as above shown. In either case his error was an error in law which the court properly corrected, since he expressly based his estimate upon the book alone.

Counsel for appellant contends that the "minute book" contains circumstantial evidence of the cancellation of W. K. Masten's subscription. But W. K. Masten's stock is not mentioned in the minutes of any meeting of the stockholders or directors. It is claimed, however, that some of the resolutions of the board of directors were illegal unless W. K. Masten's subscription for 5,000 shares had been canceled. For example, the first two assessments were levied upon "five thousand shares of subscribed stock," when there must have been much more than that number of subscribed shares if Masten's subscription had not been canceled. But I think it quite apparent from the minutes that this and all other apparently illegal acts of the board of directors are to be accounted for on the ground that the directors understood that no stock was assessable for which a certificate had not been issued. But, however this may be, no act of the board of directors, legal or illegal, could have had the effect to cancel W. K. Masten's subscription. The only thing found in the minutes of the stockholders' meetings said to have any bearing on the question is that it is recited that so many shares of stock were represented "out of five thousand issued," when not enough stock was represented to constitute a lawful meeting, unless W. K. Masten's stock or a large amount of other stock had been canceled. This, too, is explainable on the ground that it was probably understood that stock not "issued" need not be represented. These recitals would have been more nearly in point for appellant if they had stated that so many shares out of 5,000 subscribed were represented. While it is true, as contended by counsel for appellant, that the cancellation or rescission of a subscription for corporate stock may be proved by circumstantial evidence, it seems unaccountable that not a stockholder or director was called

as a witness to prove that any stockholder ever understood that W. K. Masten's subscription had been canceled. The only witness called by plaintiff was the last secretary, who was appointed in 1888, five years after the organization of the corporation, and who knew nothing of the transactions in question except what he learned from the books. Why was no former secretary called? The plaintiff proved, by the articles of incorporation, that W. K. Masten was an original subscriber for 5,000 shares, and as to that there is no dispute. It then devolved upon it to prove that Masten's subscription had been rescinded, and I think the court properly found that it failed to sustain the burden; and therefore the order and judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

(107 Cal. 386)

TOWN OF HAYWARDS v. PIMENTEL,
Judge. (No. 15,812.)

(Supreme Court of California. June 1, 1895.)

JUDGMENT FOR LICENSE TAX — COLLATERAL ATTACK—SUFFICIENCY OF COMPLAINT—ISSUE OF EXECUTION—MANDAMUS.

1. A complaint showing that plaintiff had passed an ordinance imposing a license tax, and that defendant was liable for the tax and had failed to pay, is sufficient to sustain a judgment for the tax as against collateral attack, even though rendered by a court of limited jurisdiction.

2. Errors in a judgment for a license tax cannot be reviewed upon a motion to quash the execution under the judgment.

3. A recorder may be compelled by mandamus to issue an execution under a judgment rendered by him.

4. A hearing and a submission of an application for a writ of mandamus on the pleadings sufficiently complies with Code Civ. Proc. § 1088, which provides that the writ cannot be granted by default, but the case must be heard whether or not the adverse party appear.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Application to the superior court by the town of Haywards for a writ of mandamus against Joseph Pimentel, judge of the recorder's court, to compel the defendant to issue an execution. From a judgment granting the writ, defendant appeals. Affirmed.

G. S. Langan and C. C. Hamilton, for appellant. D. M. Conner, for respondent.

BRITT, C. The respondent, the town of Haywards, in Alameda county, is a municipal corporation of the sixth class, and the appellant is the judge of the recorder's court of said town. That court is provided for in section 882 of the municipal corporation act of 1883. An ordinance of the town imposed

a license tax upon persons engaged in certain classes of business. One Freeman carried on business within the purview of the ordinance, and refused to pay the tax. Thereupon an action was commenced by the town of Haywards in said recorder's court against said Freeman for the recovery of the amount of such tax then due, together with certain incidental fees and damages. The complaint in such action was filed August 1, 1893; summons was issued, and regularly served. Freeman made default, and on August 12, 1893, after a hearing had and evidence taken upon the allegations of the complaint, judgment was entered by the appellant here, in said recorder's court, in favor of the town and against said Freeman, for the amount claimed and costs, making a total of \$30.05. A writ of execution was issued for the enforcement of the judgment, but, before any levy thereunder, the defendant, said Freeman, moved the recorder's court to recall and quash said execution, "on the ground that the complaint in said action did not state facts sufficient to constitute a cause of action, and that the judgment therein entered was null and void." On September 11, 1893, such motion was sustained by the appellant here, and the town marshal, who held the writ, was ordered to return the same "without service, and to stay all further proceedings in the matter"; which order he obeyed. On September 22, 1893, the respondent, by its attorney, demanded of appellant that he issue another execution in that action, but he refused to do so. This proceeding was then instituted in the superior court to obtain a writ of mandate to compel compliance with such demand. Appellant, in response to the complaint or affidavit on which respondent founded its application for a mandamus, filed an answer wherein he set up the circumstances of said motion to quash the writ of execution, and that he had "fully heard all and singular the evidence and argument offered by the respective parties upon such motion in the said action, and as such recorder and as such recorder's court," after full consideration, determined said motion, and ordered that the writ of execution be quashed. He made no other defense. The superior court sustained a demurrer to the answer, and at the same time rendered judgment directing that the writ of mandate issue as prayed for.

The sole ground upon which the appellant justifies his course is that the complaint in the case of Town of Hayward v. Freeman did not state facts sufficient to constitute a cause of action. The defect in the complaint which, as argued by appellant, invalidated the subsequent judgment, was its omission to exhibit the provisions of the ordinance otherwise than by reference to its title and date of passage. The pleading in this regard was much like the complaint held bad in City of Sacramento v. National Gold Bank, 51 Cal. 504. Appellant does not question the

validity of the ordinance, nor claim that the recorder's court had not jurisdiction either of the subject of the action or of the person of the defendant. Granting that the complaint was demurrable, and that the judgment founded upon it was for that reason erroneous, it by no means follows that it could be reviewed or its error corrected in the manner attempted by the appellant. The complaint does not by direct averment state a cause of action, but by recitals and necessary inference from them it does. It shows that the town of Haywards had passed an ordinance imposing a license tax; that defendant was liable for the tax, and had failed to pay. These facts, formally stated, would constitute a cause of action. After judgment, they are sufficient to sustain the same as against a collateral attack, even though the judgment be that of a court of inferior and limited jurisdiction. "An irregular or erroneous judgment will, as long as it remains in force, support an execution." 1 Freem. Ex'ns, § 73. "A motion to quash an execution is not an appropriate or admissible mode of bringing under review the errors or irregularities that may exist in the judgment upon which the execution is issued, unless the judgment be utterly void." *Schultze v. State*, 43 Md. 305. In this instance the judgment entered by the recorder was not void; being rendered by a court which had jurisdiction of the parties and of the defectively stated cause of action, it was valid and operative until appealed from or reversed. *Aucker v. McCoy*, 56 Cal. 526. Mandamus was the proper remedy. The fact that appellant, in excess of his lawful authority, directed a return of one execution unsatisfied, and that his order was complied with, does not relieve him from the obligation to issue another. Section 832 of the Municipal Corporation Act of 1883, and section 903 of the Code of Civil Procedure. The duty of the recorder to issue the execution is purely ministerial. He has no discretion in the matter, and the respondent is entitled to the writ to enforce performance of such duty. *Avery v. Superior Court*, 57 Cal. 247; *Hamilton v. Tutt*, 65 Cal. 57, 2 Pac. 878; *Hogue v. Fanning*, 73 Cal. 54, 14 Pac. 560.

"The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not." Code Civ. Proc. § 1088. Appellant contends that in virtue of this provision of the statute the court should have had some other or further hearing before allowing the mandamus against him. But the answer of the defendant stated nothing inconsistent with the allegations of the complaint or affidavit on which respondent prayed the issuance of the writ. It thus raised "only questions of law," and therefore the court was required to "proceed to hear or fix a day for hearing the argument of the case." Code Civ. Proc. § 1094. The section last quoted evidently contem-

plates that there may as well be a hearing and a submission of the cause on the pleadings of the parties in a proceeding for mandamus as in any other. In this case the order sustaining the demurrer to the answer recited that the matter had been previously "submitted to the court for consideration and decision." And the judgment recited that the "cause came on regularly for hearing on the 21st day of May, 1894, to which day the same had been duly and regularly continued, on the demurrer of said relator to the answer of said respondent." The demurrer was unnecessary, but was not an inappropriate means of raising an issue on the "questions of law" presented by the answer. And it sufficiently appears from the recitals referred to that there was a hearing and a submission, not merely of the demurrer, but of the cause on the pleadings. If this were not so, appellant should have shown the incorrectness of the recitals by a bill of exceptions, or otherwise; which he has not done. Such a hearing was a sufficient compliance with the requirements of said section 1088, Code Civ. Proc. It is true that the judgment further recites that the appellant did not appear on said 21st day of May, but, as the hearing of the cause was regularly continued to that day, he could not divest the court of the power to complete the same by absenting himself. The judgment should be affirmed.

We concur: VANCLIEF, C; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(107 Cal. 423)

OAKLAND BANK OF SAVINGS v. SULLIVAN et al. (No. 15,687.)

(Supreme Court of California. June 4, 1895.)

STREET IMPROVEMENTS — PRIOR POSTING OF NOTICE—ENFORCEMENT OF LIEN—PROCEEDING BY CONTRACTOR—PLEADING AND EVIDENCE.

1. Under St. 1885, pp. 148, 149, requiring 15 days to expire "after the posting" of notice before the council can order street work to be done, the council may make such order after 15 days from the first posting of the notice.

2. A complaint by a contractor seeking to establish a lien for street improvements made under St. 1885, p. 147, alleged the delivery to the landowner of a warrant, assessment, and diagram, describing them sufficiently to show that they were made in conformity with the statute, and also alleged the making and return of an affidavit of demand and nonpayment. The act provides that such documents shall be "prima facie evidence of the regularity and correctness of the assessment" and "of the right of plaintiff to recover." Held that, the averments of the complaint not being denied, it was unnecessary to produce in evidence the documents described.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Oakland Bank of Savings against Daniel T. Sullivan and others to foreclose a

mortgage. Defendants Alameda Macadamizing Company and Bannister & Lewis filed cross complaints, claiming liens for street improvements. From a judgment for plaintiff and cross complainants, defendant Sullivan appeals. Affirmed.

D. T. Sullivan, in pro. per. John Yule, J. C. Martin, and J. B. Richardson, for respondents.

BRITT, C. The plaintiff, Oakland Bank of Savings, brought this action to foreclose a mortgage to it executed by defendant D. T. Sullivan on certain land in Alameda county. The Alameda Macadamizing Company, a corporation, and Bannister & Lewis, copartners, were joined as parties defendant with the mortgagor, because of their claim of interest in the mortgaged premises. Such premises abut upon both Broadway street and San Jose avenue in the city of Alameda. Said macadamizing company had performed work in the grading, paving, etc., of said San Jose avenue, and Bannister & Lewis had done similar work on Broadway street. Such improvements were made in virtue of contracts for that purpose entered into by said macadamizing company and Bannister & Lewis, respectively, with the superintendent of streets of said city, under the act to provide for work upon streets, etc. St. 1885, p. 147. Said macadamizing company filed a cross complaint, wherein it set up the proceedings taken, which, as claimed, established a lien in its favor on the land of Sullivan to secure payment of the sum assessed against the same for the improvement of said San Jose avenue, and prayed the enforcement of said lien. Similarly, Bannister & Lewis sought the enforcement of their lien for the work done on Broadway street. The court below rendered judgment directing that said contractors, as well as the plaintiff, be paid out of the proceeds of the sale of the premises. Defendant Sullivan appeals.

1. It is said that the board of trustees of the city (exercising the duties of the city council mentioned in the statute) passed its resolution ordering the improvement of San Jose avenue before it acquired jurisdiction so to do under the provision of section 3 of the act referred to (St. 1885, pp. 148, 149), and this is the only ground on which the judgment in favor of the macadamizing company is assailed. The facts appear to be that the resolution of intention to grade and otherwise improve said avenue was passed by the board on September 16th; that notices of the passage thereof were posted along the line of the contemplated work on September 20th, "and kept posted for fifteen days thereafter"; that a similar notice was published in a newspaper for a period of five days, commencing on said September 20th; and that on October 14th following the board passed its resolution ordering the work to be done. Appellant's point is that on October

14th, 15 days had not elapsed after the notices of the passage of the resolution of intention were posted; that because the notices were kept posted for 15 days from September 20th, and because the statute (section 3 of the act of 1885) requires the expiration of 15 days "after the posting" before the council could order the work to be done, therefore the resolution of October 14th was premature, and could not have been lawfully passed before October 20th. This argument is neither specious nor sound. The plain effect of the statute is that when a period of 15 days after the first posting of the notices (as well as 10 days after the full period of newspaper publication) had elapsed, the board then had jurisdiction to order the work; not that such period must have intervened after the notices were taken down, if they were taken down at all.

2. The record shows that at the trial the respondents Bannister & Lewis "offered testimony showing that they had performed the work stated in their cross complaint herein to have been done by them, and also offered in evidence the diagram of such work, and the assessment attached to such diagram, both made by the superintendent of streets of the city of Alameda, as alleged in their cross complaint; and further proved that the amount claimed by them in said cross complaint had not been paid, and then rested their case." Appellant then moved for judgment of nonsuit against Bannister & Lewis on various grounds of insufficiency of evidence, which motion was denied, and such denial is now assigned as error. The court did not err in refusing to grant such motion, though the evidence offered may have been insufficient to make out a case for the plaintiffs in that cross complaint had it been incumbent upon them to offer any proof at all. The act (St. 1885, p. 157) provides that the "warrant, assessment and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment * * * and of the right of the plaintiff to recover in the action." Here the cross complaint of Bannister & Lewis averred the delivery to them of such warrant, assessment, and diagram, and exhibited the character of the same with sufficient particularity to show that they were made in conformity with sections 8 and 9 of the act. It also alleged the making and return by their agent of the affidavit of demand and nonpayment as required by the succeeding section 10. None of such averments were denied in appellant's answer. They were material allegations (*Himmelman v. Danos*, 35 Cal. 441), and, being undenied, stand as established facts in the case. It was therefore unnecessary to produce in evidence the documents thus alleged and described, and the prima facie effect imputed to them by the statute operated to cast upon appellant the burden of proof. He might, if he could

have disproved any statement of the cross complaint put in issue by him, but it seems he made no attempt to do so. We do not overlook the ruling in the case cited (35 Cal. 441) that the presumption declared by the statute is one of evidence, and not of pleading. The ruling is no doubt correct. And its effect is to require the statement in the complaint in cases of this character of the matters necessary to show the contractor's right to recover, laying the presumption out of sight. But it does not compel formal proof of matters which, being alleged, are admitted either expressly or impliedly. Such cases are subject to the general rules of procedure prescribed by the Code (Paving Co. v. Bolton, 97 Cal. 9, 31 Pac. 625), among which is that every material allegation of the complaint not controverted by the answer filed must, for the purposes of the action, be taken as true (Code Civ. Proc. § 462). See *City of Stockton v. Dahl*, 68 Cal. 377, 5 Pac. 682. The judgment should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(5 Cal. Unrep. 41)

SPENCER v. DUNCAN. (No. 15,700.)

(Supreme Court of California. June 4, 1895.)

LIMITATION OF ACTIONS—DENIAL OF TRUST—SUFFICIENCY.

Where, in an action to compel defendant to account for money belonging to plaintiff, placed in his hands, and invested by him in a lot without authority, the evidence was that, when plaintiff went to defendant for a settlement, he began to talk about the lot, but, on plaintiff telling him she did not come to talk about the lot, but for a settlement, defendant began to talk about the imprisonment of his brother, whereupon plaintiff left his office, there was not shown a sufficient denial of the trust by defendant to put in operation the statute of limitations against plaintiff's claim.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by John C. Spencer, administrator of Rebecca Spencer, deceased, against William L. Duncan, to compel defendant to account for money held by him in trust for decedent. Judgment was rendered for plaintiff, and from an order denying a motion for a new trial defendant appeals. Affirmed.

W. C. Burnett and Estee & Miller, for appellant. Geo. M. Spencer and Bull & Cleary, for respondent.

SEARLS, C. This is an action to compel the defendant to account for and pay to plaintiff funds alleged to be held by him in trust for the plaintiff, Rebecca Spencer, who departed this life during the pendency of

the action, whereupon John C. Spencer, administrator of her estate, was substituted as plaintiff herein. Plaintiff had judgment for \$1,071.85 and interest from May 1, 1870, amounting in the aggregate to \$2,678.73 and costs. This appeal is from an order denying defendant's motion for a new trial. There is a separate appeal in the same case from the final judgment. The theory of Rebecca Spencer, the then plaintiff in the case, as delineated by testimony at the trial, was: That she was a school teacher at Callistoga, of the age of 69 years. About March 24, 1869, she had \$2,200 in the Bank of California, which she drew with a view of taking it with her the next morning to Napa county, where she expected to loan it temporarily. Being dissuaded from carrying so much money with her, she went in the evening to the home of Dr. Lucky, an old friend, and also a teacher; and, the doctor being absent, she left \$2,100 of the money with his wife, to be by the doctor deposited in a savings bank, and the certificate to be sent to her at Callistoga, where she went early next morning. On or about April 20, 1869, she received a letter from Dr. Lucky, dated April 1, 1869, in which he informed her he had placed her money in the hands of William L. Duncan (his son-in-law), who would dispose of it so as to secure her 1¼ per cent. per month interest, and that the latter recommended her to purchase an interest in a homestead company, of which his brother, J. C. Duncan, was secretary, and recommended the purchase. The letter indicates that Duncan had already purchased the interest for her, and inclosed circulars, etc. By advice of friends, Miss Spencer came to San Francisco, interviewed Lucky, who extolled the investment as a fine one, etc., but she declined it, and told him all she wanted was her money. She interviewed Duncan about the first of 1870, told him she wanted no investment, but did want her money. About March, 1870, Miss Spencer received \$1,088 of the money from Duncan, and he then agreed, according to her testimony, to hold the residue of the fund in trust for her, which she informed him she might want any day. This outline of plaintiff's testimony must serve in place of a fuller statement to convey an idea of the origin and condition of affairs between the parties.

The theory of defendant, Duncan, was that Dr. Lucky came to him, and said a friend of his wife had some money which she wished to invest, and would like to invest a part of it in a lot in this city; that he took the money, gave a demand note, for the amount (\$2,100), with interest at 1¼ per cent. per month; bought a share in a homestead corporation, which, upon certain payments being made, called for a lot; that he made such payments from the funds in his hands, received a certificate for the lot, and delivered it to plaintiff with the residue of the money in his hands, etc., to all of

which the said Rebecca Spencer assented. These were the theories around which the testimony clustered, and in support of which a number of witnesses testified. That there was a sharp conflict in the testimony, that some of the witnesses were either very forgetful or untruthful, is quite apparent from the record. The court below evidently believed that there was a deliberate attempt on the part of defendant and his family friends to absorb the funds of the plaintiff, and to foist upon her property in lieu thereof which she had not authorized them to purchase for her, and which she did not want; and that, relying on her inexperience, they wove around her a train of circumstances tending to render their course plausible, while on close scrutiny the fraudulent conduct of defendant in the premises was apparent. We say this must have been substantially the conclusion to which the court below arrived, and, without stopping to analyze the testimony, and showing therefrom the suspicious circumstances pointing with more or less directness to the result reached by the court, it is sufficient to say here that there is sufficient testimony to uphold the findings of the court if it believed the statements of plaintiff's witnesses rather than those of the defendant in conflict therewith.

Upon the question of the claim of plaintiff being barred by the statute of limitations there was also a substantial conflict in the evidence. It is well settled that in cases of trust the statute does not begin to run until the trustee, by word or act, denies the trust, and the beneficiary has notice of such denial. On the 23d day of October, 1888, defendant, in a letter to one Knox, an attorney, who had made a demand upon him, repudiated and denied the trust. This action was brought within two years next thereafter, viz. January 14, 1890. Plaintiff says that she called upon defendant for a settlement in 1874, and that defendant began to talk about the lot, to which she replied that she did not come to talk about the lot, but a settlement, and that defendant then spoke of his brother (J. C. Duncan) being in prison, "and seemed very much overcome, and I walked out of the office." She further adds that "he did not refuse to give me my money, but he turned the conversation by talking about his brother." Defendant testified that the money was demanded from him as early as 1874. If he was to be believed, the action is barred. The court below evidently disbelieved him. This being so, the court, under the previous rulings of this court, was justified in finding that the demand was not barred by the statute of limitations. *Schroeder v. Jahns*, 27 Cal. 274; *Zuck v. Culp*, 59 Cal. 143; *Broder v. Conklin*, 77 Cal. 331, 19 Pac. 513; *Wood, Lm.* § 413. The findings support the judgment, and the order appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(107 Cal. 423)

SPENCER v. DUNCAN. (No. 15,226.)
(Supreme Court of California. June 4, 1895.)
JUDGMENT—FINDINGS—STATUTE OF LIMITATIONS—TRUSTS.

1. Where, in an action for money held in trust by defendant, the defense is the statute of limitation, a finding that the action was not barred by the statute is sufficient to support a judgment for plaintiff, though the date on which plaintiff demanded the money of defendant is not found.

2. Where, in an action to recover money held in trust by defendant, the court found as a fact that the money was so held, and as a conclusion of law that plaintiff was entitled to recover of defendant a certain sum, it was not error, because the conclusion of law was silent as to the trust, to enter judgment decreeing that defendant held in trust for plaintiff such sum, and that he account for the sum to plaintiff, and that plaintiff have judgment against defendant therefor.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Rebecca Spencer against William L. Duncan to compel defendant to account for money held by him in trust for plaintiff. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

W. C. Burnett and Estee & Miller, for appellant. Geo. M. Spencer and Bull & Cleary, for respondent.

SEARLS, C. This is an action to compel the defendant to account for and pay certain moneys alleged to have been received by him, and held in trust for the plaintiff. The cause was tried by the court, written findings filed establishing the trust relation, and finding that there was due to plaintiff the sum of \$1,071.85, with interest at 7 per cent. per annum from May 1, 1870, for which sum judgment was entered in favor of plaintiff. Defendant appeals from the judgment and the cause comes up on the judgment roll.

Two errors are assigned by appellant:

1. That the findings do not fix the precise time when plaintiff made demand for return of the moneys, and, in the absence of such a finding, it cannot be ascertained whether the cause of action is barred by the statute of limitations or not; hence that the judgment is not supported by the findings. The complaint averred a demand upon defendant before suit brought, and the answer admitted such demand. So far, therefore, as a demand was a prerequisite to maintaining the action, it was not necessary to prove or find that a demand was made, it not being an issue in the case. The statute of limitations was pleaded, and became an issue in the case, and there was an express finding thereon against the defendant. That a demand

was made and the date thereof may have been evidence going to such issue, but it was not an ultimate fact to be found by the court, but may well have been an evidentiary fact going to establish the ultimate fact.

2. The second error assigned is to the effect that all of the judgment, save and except that portion awarding plaintiff \$2,678.73 and costs, is outside of and beyond the findings, and hence that the judgment should be modified by eliminating the same therefrom. The portion of the judgment challenged is as follows: "Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that W. L. Duncan, the defendant, holds in trust for Rebecca Spencer, the plaintiff, the sum of \$2,678.73, and that said W. L. Duncan, the defendant, is hereby ordered, adjudged, and decreed to account to and turn over to said Rebecca Spencer, the plaintiff, the possession of said sum of money, to wit, twenty-six hundred seventy-eight and ⁷³/₁₀₀ dollars, and that Rebecca Spencer, the plaintiff, have judgment therefor against the defendant, W. L. Duncan," etc. It is essential to a correct understanding of the point involved to say that the court found that the defendant, W. L. Duncan, admitted to plaintiff that he received the money from the hands of W. T. Lucky, in trust for and for the sole use and benefit of the plaintiff, and promised plaintiff that he would account for thereafter and pay over to her the said sum; that the parties then agreed that the defendant should then presently pay over to plaintiff a portion of said sum, and might retain in his hands the balance of said sum of \$2,160 in trust for the plaintiff, etc. Following the facts as found by the court, and which are regarded as amply sufficient to support the judgment, is the conclusion of law, which is as follows: "The plaintiff is entitled to recover of the defendant the sum of one thousand and seventy-one dollars and eighty-five cents (\$1,071.85), with interest thereon at the rate of seven per cent. per annum from the 1st day of the month of May, 1870, hitherto, together with the costs of this action, and judgment must be entered accordingly." The contention of appellant is that, under this conclusion of law, it was the duty of the clerk to have entered an ordinary money judgment in favor of plaintiff for the sum specified, and that when the judge of the court below went beyond the conclusion of law which he had framed as the measure of plaintiff's relief, and signed a decree adjudging that the defendant is a trustee of plaintiff, and decreeing him to account to and turn over to plaintiff the possession of said money, etc., he transcended his authority, etc.

Section 633 of the Code of Civil Procedure provides that, "in giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly." It is

fair to assume that the object of the legislature in adopting section 633 was two-fold: (1) To preclude the trial court from mingling together questions of fact and law arising in the case, in order that the facts, as presented in the findings, may contain all the essential attributes of a special verdict, to the end that the proper application of the legal principles to the case may be investigated independent of the facts; and (2) that the conclusions of law may serve as a directory to the clerk in entering judgment upon the facts as found. If there are any other objects contemplated by the statute in question, they are not readily discernible. The tenor of the decisions of this court is to the effect that the provision, so far as it applies to the "conclusions of law," is directory. It has been held that an erroneous "conclusion of law" constitutes no cause for reversal if the judgment was right. *Helm v. Dumars*, 3 Cal. 454; *Bleven v. Freer*, 10 Cal. 172; *Haffley v. Maler*, 13 Cal. 14. In the last-mentioned case *Baldwin, J.*, said: "The judgment was right on the undisputed facts, though a wrong reason was given for it. But we do not reverse for what we regard as bad logic, but for what we consider bad law." *Kidd v. Teeple*, 22 Cal. 255, is to like effect. In *Davis v. Baugh*, 59 Cal. 576, a reversal was urged because "the findings and conclusions of the court are inconsistent with each other." *McKinstry, J.*, in deciding the case, used the following language: "Where some of the conclusions of law in a decision are not properly drawn from the facts found, this is no ground for reversing the judgment, if the ultimate conclusion upon which the judgment rests is not erroneous in view of the facts found," etc. *Hayne*, at section 243 of his work on *New Trials*, after citing the above authorities, adds: "It follows from these decisions that the conclusions of law which are ordinarily appended to findings are unnecessary, and, if so, they had better be omitted. The only useful purpose which 'conclusions of law' serve is to inform the clerk as to what judgment is to be entered." In *Miller v. Hicken*, 92 Cal. 229, 28 Pac. 339, *McFarland, J.*, says: "The evidence was sufficient to support the findings, and we see no want of a finding of a necessary or material fact. It is objected that the court did not find in terms that the defendants and intervenor had not 'constructive' notice of plaintiff's mortgage, but that followed from the facts found, and it is immaterial that the court did not make an express 'conclusion of law' to that effect." In the present case every fact was found essential to support the decree in the form and to the extent of its adjudication, as it was signed and entered by the court. Under such circumstances, the omission in the "conclusion of law" to declare that a decree adjudging the defendant to be a trustee should be entered, when the facts as found clearly set forth his fiduciary relation, was of no mo-

ment. If, however, it be conceded that it was error not to find all the "conclusions of law" deducible from the facts as found, what follows? Simply that an error of omission occurred, which was corrected by the final decree. It is a well-settled principle that intermediate errors will not avail where the final conclusion is right. The same principle has been repeatedly expressed by this court when it has been said, in substance, that a judgment which is right will not be reversed because a wrong reason has been given for its rendition. The judgment appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(107 Cal. 398)

RICE et al. v. BOARD OF TRUSTEES OF TOWN OF HAYWARD et al.
(No. 15,762.)

(Supreme Court of California. June 4, 1895.)

TOWN TRUSTEES — AWARD OF CONTRACT — CONSTRUCTION OF SEWERS—REJECTION OF BIDS.

1. Under St. 1889, p. 399, § 1, providing that any town may as hereinafter provided incur indebtedness for an improvement requiring an expenditure greater than the amount allowed by the annual tax levy, the trustees of a town have power to provide for the construction of a sewer system; and therefore St. 1883, p. 93, forbidding the trustees to create a debt in excess of available money in the treasury, is not applicable.

2. The trustees of a town may reject a bid for public improvements put in by a town official, and one which was fraudulent; and in an action involving the propriety of such rejection they may give their reasons for so doing, though their minutes gave other reasons.

3. The act of the board in directing the town engineer to reject bids for public improvements unless accompanied by an offer to purchase bonds is not ground for attacking a contract actually made, it not appearing that the bids were influenced by that fact.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by H. W. Rice and others against the board of trustees of the town of Hayward and others to have canceled a contract for municipal improvements. From a judgment for defendants, plaintiffs appeal. Affirmed.

C. C. Hamilton and G. S. Langan, for appellants. D. M. Conner and Parker & Bells, for respondents.

VAN FLEET, J. By this action the plaintiffs sought to have canceled and annulled a certain contract entered into between said defendant board and the defendant McMahon for the construction of a sewer system for the town of Hayward, and an injunction to restrain the execution and carrying out of the provisions of said contract. Judgment

went for defendants, denying the relief sought, from which and an order refusing a new trial the plaintiffs appeal.

1. The objection that the action of the defendant board in letting the contract is void, as being in contravention of section 865 of "An act to provide for the organization, incorporation and government of municipal corporations" (St. 1883, p. 93), is without force. That section, it is true, forbids the board of trustees of a city or town to "create, audit, allow, or permit to accrue any debt or liability in excess of the available money in the treasury that may be legally appropriated for such purposes"; but that section has no application to the facts of this case. Here the authorities of the town were providing for a public improvement, requiring an expenditure in excess of the amount allowed for such improvement by the annual tax levy of the town, and the proceedings of the board were taken under and in pursuance of the act commonly known as the "Municipal Indebtedness Act." St. 1889, p. 399. That act is a general act, and makes provision for just such contingencies as that confronting the authorities of the town of Haywards in this instance. Its purpose is declared in the initial section, which provides: "Any city, town or municipal corporation, incorporated under the laws of this state, may, as hereinafter provided, incur indebtedness to pay the cost of any municipal improvement, or for any purpose whatever requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy." The subsequent sections provide a method of procedure for accomplishing the purpose desired, with which the acts of the defendant board in this instance would seem to have been strictly in accord; and in the cases provided for therein the act is controlling. *Wetmore v. City of Oakland*, 99 Cal. 149, 33 Pac. 769.

2. Nor was there any such irregularity in the manner of letting or awarding the contract as to affect its validity. The board was justified in rejecting, or refusing to consider, the two bids which it threw out. The findings, which are fully supported by the evidence, show that the one bid was put in by a town official, who could not lawfully take the contract; and the other was clearly a collusive and fraudulent bid. It was not requisite for the board, in making a record of their action on rejecting these bids, to also make an entry of their reasons for so doing, and the fact that the minutes of the board contained a statement of what purported to be their reason in the premises did not preclude the latter from showing at the trial what in fact occasioned their act. The action of the court, therefore, in admitting evidence as to that fact, was not erroneous. Assuming, for the purposes of the argument, that the action of individual members of the board in directing the engineer to inform intending bidders that no bid for the

work would be received unaccompanied by a bid for the purchase of the bonds, can be regarded, as is contended by appellants, as the act of the board, and that the same was unauthorized and improper, as tending to restrict bidding to those able to take or desirous of taking the bonds, it, nevertheless, does not appear that any injury was worked thereby. There is no evidence that any one was deterred by that fact from bidding on the contract, or that any person would have bid without such condition who did not bid with it. Nor is there any evidence to show that the bids that were put in were any higher by reason of that supposed condition than they would have been without it. Under such circumstances, where no fraud or bad faith are shown and no injury appears to have accrued from the irregularity complained of, it will not be regarded as sufficient ground for relief in equity. *Attorney General v. Detroit*, 55 Mich. 181, 20 N. W. 894; *Kelly v. City of Chicago*, 62 Ill. 279.

There are no other points demanding special notice. From a review of the entire record, we are satisfied that there is no substantial ground for which the judgment or the order denying a new trial should be reversed. This conclusion renders it unnecessary to pass upon the motion to dismiss the appeal. The judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.

(107 Cal. 410)

LE BRETON et al. v. COOK et al. (No. 15,610.)¹

(Supreme Court of California. June 4, 1895.)

CONSTRUCTION OF WILL.—PARTIAL INTESTACY—DEVISE OF RESIDUE.

Where testatrix, after making certain bequests, gave the residue of the estate to trustees, and directed them to deliver her homestead and contents to her sister, to be used by her until her death, free of rent, and afterwards directed that all the residue of the estate should be held by the trustees, and kept invested until the sister's death if she should die before the lapse of 10 years after the death of testatrix, and, if not, then, at the end of such 10 years, to sell the residue remaining in their hands, and to distribute the proceeds among certain persons, testatrix did not die intestate as to the homestead and contents, but the same went to the trustees as part of the residue, subject to the right of the sister to occupy it during her life, and at the expiration of the 10 years the trustees had power to sell the same, subject to the sister's right to their use during her life.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by E. J. Le Breton and others against Williametta H. Cook and others for the construction of a will. Judgment modified.

Metcalf & Metcalf and Morrison, Stratton & Foerster, for appellants. Garber, Boalt & Bishop and Carroll Cook, for respondents.

¹ Rehearing denied.

VAN FLEET, J. This is an action brought by the trustees under the will of Cynthia Hoff Shillaber, deceased, to obtain a construction of certain provisions of said will. The will, after making certain bequests of personal property, proceeds as follows: "Fourth. All of the residue of my estate, both real, personal, and mixed, after paying the expenses of administration, I do give, devise, and bequeath unto my said nephew Carroll Cook, and to his brother Wm. Hoff Cook, to be held by them in trust, however, for the following uses and purposes, viz.: (1) My homestead on Sixteenth street, corner of Hoff avenue, in San Francisco, California, together with the furniture therein contained and the statuary not hereinbefore disposed of, they are to deliver possession of to my sister Williametta H. Cook, and she is to be allowed to occupy and use the same until her death, free of rent. (2) The mortgage now held by me on the New York Hotel property, corner of Battery and Commercial streets, San Francisco, executed by my sister Frances H. Lowndes, is to be by said trustees fully canceled and released, and given to my said sister. (3) To pay out of the income of my estate to my true and faithful servants, Charles Payler and Clara Thompson, a sum of five hundred dollars each. (4) All of the residue of my said estate, real, personal, and mixed, is to be held by said trustees and kept invested, the income thereof, after paying all expenses, to be paid in equal proportions to my sisters, Williametta H. Cook and Frances H. Lowndes, until the death of my said sister Williametta H. Cook, or, in case she do not die until ten years have elapsed from and after the date of my death, then until the expiration of such ten years. (5) Upon the death of my said sister Williametta H. Cook, or in case she do not die until ten years have elapsed from and after the date of my death, then, at the expiration of such ten years, all of the residue of my said estate (then remaining in the hands of my said trustees) is to be by such trustees sold and converted into money, and such money, after paying all expenses, is to be disposed of as follows, viz.: Ten thousand dollars is to be paid to my nephews Wm. Hoff Cook and Carroll Cook, to be held by them in trust, the income thereof to be paid to my nephew Channing H. Cook during his lifetime, and upon his death the said principal sum to be paid to my nieces, share and share alike. The remainder of such money so realized from the sale of said property is to be divided and given in equal proportions to my nieces Kate C. Gould (wife of C. B. Gould), Leonide Sue Cook, Gertrude Lowndes, and Theodora Lowndes, except that the proportion going to my niece Kate C. Gould is to be sixteen thousand dollars less than to the remainder of my said nieces, as I have already given to her, through her husband, that amount; and, in case either of my said nieces should die before such distribution, then the proportion

which would have gone to such deceased niece shall be given to her children (if she have any), if not, to her surviving sister; and, in case no sister be surviving, then to the brothers of such deceased niece, in equal proportions to each."

The only question presented on this appeal is as to whether the will makes any disposition of the reversionary interest in the homestead, and the furniture and statuary therein, after the death of Williametta H. Cook, or whether, as to that interest, the deceased died intestate. The court below held that the will made no disposition of that interest, and that the decedent died intestate with respect thereto. The defendants Kate C. Gould and C. B. Gould appeal, and contend that that interest passed to the trustees appointed by the fourth paragraph of the will, and is by them to be disposed of as provided in the fifth subdivision of that paragraph. The case has been argued by counsel with much learning and research, and many cases have been cited and reviewed on each side. With regard to those cases, we may repeat what we said in *Rosenberg v. Frank*, 58 Cal. 387, 411: "The case before us is one of interpreting the meaning of a written document, and decided cases afford but little aid in arriving at a correct interpretation. We hazard nothing in saying that this is in accordance with the universal experience of gentlemen learned in the law, who have been frequently called on to employ their faculties in the solution of such questions. The good sense of what was said by Washington, J., in 1803, in *Lambert's Lessee v. Paine*, 3 Cranch, 131, will be generally acknowledged: 'Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike.'"

The general principles which must control in the determination of the question here presented are well settled. Constructions which lead to intestacy, total or partial, are not favored; and therefore such an interpretation should, if reasonably possible, be placed upon the provisions of the will as will prevent that result. Especially should this be done where the will evinces an intention on the part of the testator to dispose of his whole estate. A devise or bequest of the "residue" of the testator's property therefore passes all the property which he was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will. Civ. Code, §§ 1332, 1333. Where, however, it is manifest from the context, or from the provisions of the will, that the testator used that word in some more restricted sense, it will be given the meaning in which it is clear that the testator used it. It is not sufficient, however, for the purpose of limiting the meaning of the word, to show that the testator did not foresee precisely how his will would operate, or what property in the contingencies

which might happen would pass by the use of that word. If any particular property is *prima facie* within the meaning of the word, it will be held to pass by it, irrespective of the question as to whether or not the testator could be supposed to have had it actually in his contemplation when he framed the devise or bequest. Lastly, a word occurring more than once in a will is presumed to be used always in the same sense, unless a contrary intention appear from the context. As to these principles there is no substantial dispute between counsel, and we therefore need not refer to the many authorities sustaining them. The word "residue" occurs three times in the will in question. After bequeathing certain personal property by the third paragraph of the will, the testatrix, in the beginning of the fourth paragraph, devises and bequeaths to certain trustees, "all of the residue of my estate, both real, personal, and mixed." By the first subdivision of the fourth paragraph she directs the trustees to deliver to her sister Williametta H. Cook the possession of her homestead and the furniture and certain statuary therein, which "she is to be allowed to occupy and use until her death, free of rent." By the second and third subdivisions she directs the trustees to dispose of certain other property. By the fourth subdivision she provides: "All of the residue of my said estate, real, personal, and mixed, is to be held by said trustees and kept invested," and the income thereof to be disbursed in a certain manner. The fifth subdivision then provides: "Upon the death of my said sister Williametta H. Cook, or in case she do not die until ten years have elapsed from and after the date of my death, then, at the expiration of such ten years, all of the residue of my said estate (then remaining in the hands of my said trustees) is to be by such trustees sold and converted into money;" and the proceeds to be disposed of as there directed. Respondents concede that the word "residue," as first used, means all of the property of the testatrix not bequeathed by the third paragraph; but they contend that that word, as used in the fourth and fifth subdivisions of the fourth paragraph, does not include the "reversion" (if it may be so called) of the homestead, furniture, and statuary after the death of Williametta H. Cook. They argue that, as used in the fourth subdivision, it could not be intended to include that property, because the "residue" there mentioned is to be "held" by the trustees, and by them "kept invested," so as to derive income therefrom, which they say would be inconsistent with the "life estate" (so called) of Williametta H. Cook. But they contend that, whether this be so or not, that word as used in the fifth subdivision could not have been so intended, for it is there limited by the words "then remaining in the hands of my said trustees." They urge that Williametta H. Cook might live more than 10 years after

the death of the testatrix; and that, as she is to occupy and use the homestead and furniture until her death, that property would not in that event be "in the hands" of the trustees at the expiration of the period of 10 years. And, finally, they say that this so-called "reversionary interest" particularly in the personal property, could not be sold by the trustees and converted into money. For these reasons, they contend that the will makes no disposition of this property beyond the life of Williametta H. Cook, and that at her death it will fall to the heirs at law of the testatrix. With this reasoning we are unable to agree. It is unquestionable, and it is not disputed, that the entire estate of the testatrix in the homestead, furniture, and statuary was devised and bequeathed to the trustees by the opening words in the fourth paragraph. It is therefore certain that the deceased did not die intestate as to that property. She did dispose of it by her will. Her entire estate therein vested in the trustees, and they hold the legal title. Civ. Code, § 863. The intention of the testatrix to dispose of her whole estate by her will is therefore clear; and, as it will not be presumed that she intended to devise any of it in trust without declaring any effectual trusts, such an interpretation must, if possible, be placed upon the remaining provisions as will include every estate in this property within the trusts created.

The first trust as to this property is contained in the direction of the trustees to deliver the possession of this property to Williametta H. Cook, and to permit her to occupy and use it until her death, free of rent. This provision does not create a "life estate" in the occupant, as has been assumed by counsel. The entire estate, as said above, remains in the trustees, and the beneficiary has a mere personal right of occupancy without rent. The condition of the property, and the estate of the trustees therein, during the life of the occupant, is precisely the same as would be the case as to any other piece of property which the trustees might be, from any cause, unable to rent. They would not be deriving income therefrom, but they would, nevertheless, "hold" it; and it therefore falls within the word "residue," as used in the fourth subdivision. The fact that they could not rent it during the life of the occupant does not conflict with the requirement that they are to "keep" the property embraced in that residue "invested." That direction must be construed in connection with the first subdivision, and with the teachings of ordinary experience, and merely means that they are to keep the property invested, and derive income therefrom so far as they are able. While it was possible that Williametta H. Cook might live more than 10 years, it was equally possible that she might live for a less period; and in that event it would unquestionably be the duty of the

trustees to rent the property, and apply the income as directed in the fourth subdivision. We are therefore clearly of the opinion that the word "residue," as used in that subdivision, includes the property in question.

For like reasons, it is manifest that it is included in the meaning of that word as used in the fifth subdivision. Presumptively, of course, it is so intended, and we see no reason for restricting the meaning of the word as there used. As the whole estate in this property is vested in the trustees, it will be "remaining in their hands" at the expiration of the 10 years, whether Williametta H. Cook be then living or not. Nor is there any legal difficulty in their selling it and converting it into money. Even if Williametta H. Cook could be considered as having a "life estate," within the full meaning of that expression, and the trustees as holding merely a reversion, that reversion is legally the subject of sale. In this state future interests in property, whether real or personal, may be transferred to the same extent and in the same manner as present interests. Civ. Code, §§ 678, 680, 688, 690, 699. And see, also, the notes of the code commissioners to those sections. It would therefore be entirely practicable, in a legal sense, for the trustees to sell and convey this reversion, both as to the homestead and as to the personal property, and thus convert it into money. What they would do, indeed, would merely be to sell the property itself subject to the right of Williametta H. Cook to use and occupy it during her lifetime. The value of her interest, and therefore the value of the remaining interest, is ascertainable by well-known legal rules (*McCampbell v. McCampbell*, 5 Litt. 92); and no difficulty need then arise in making such a sale. Counsel for respondents are mistaken in supposing that such a sale would be invalid, even as to the personal property, for want of immediate delivery. Delivery is requisite only when a present interest is transferred, while the transfer of a future interest only entitles the transferee to the possession at a future period. Civ. Code, §§ 689, 690. The argument of respondents under this head, moreover, proves too much. They direct their attention solely to the contingency that Williametta H. Cook may be still living at the expiration of the 10 years. But, at the time the will was made, the other alternative was at least equally probable, and was presumably equally within the contemplation of the testatrix. By the fourth subdivision the trustees were directed to keep the property invested, which, as to real property, means rented. As the trustees were bound to rent on the most favorable terms obtainable, and as they could not know when Williametta H. Cook would die, they might well make leases which, though not extending beyond the 10 years, would extend beyond her life. If she should die before the expiration of 10 years, with those leases still outstanding, the trus-

tees would be bound, under the fifth subdivision, to sell the property so leased at once. But in so doing they would be confronted with precisely the same difficulty as that which respondents now urge, for they would hold only a reversion in such property. There is, therefore, no reason for supposing that the testatrix, in the fifth subdivision, intended her language to be restricted or deprived of any of its full, legal, and ordinary meaning. As we said at the outset, it is immaterial whether or not she had the various contingencies that might occur clearly before her mind. If she had, the one contingency was as likely to occur as the other, and each presented the same difficulty. If she had not, she at least used language sufficient to provide for every possible contingency, and must be presumed to have done so intentionally.

Some other considerations have been advanced, though not very strenuously urged, by respondents; but, as what has been said in effect disposes of them, it is not necessary to discuss them separately. Nor is it necessary to refer specifically to the cases cited by them. We have given them a careful examination; and, while we are disposed to think that some of them go perhaps too far, we are of opinion that each of them is readily distinguishable from this case, and that our decision is entirely in accord with the principles laid down in them.

The second and tenth conclusions of law of the court below are contrary to the views herein expressed, as is also the second sentence of the twenty-fourth finding. That portion of that finding (which is to the effect that Williametta H. Cook has a life estate in said property, and that said Williametta and the defendants Frances H. Lowndes and Elizabeth H. Oulton have each an undivided one-third interest in the fee thereof, subject to said life estate) is, however, a mere conclusion of law, and should be so treated.

The judgment or decree appealed from is therefore modified by striking therefrom all that portion thereof which is in the following words, "The plaintiffs have fully performed all their duties as trustees in regard," and inserting in lieu thereof the word "as"; also by striking therefrom all that portion thereof which is in the following words, "And that their trust be, and the same hereby is, terminated as to said described property, and every part and parcel thereof," and the whole paragraph next following said words, which begins with the words, "It is further ordered," and ending with the words and figures, "September, 1888," and inserting in lieu thereof the following: "The plaintiffs have performed so much of their duties as trustees as relates to the delivery of the possession thereof to the defendant Williametta H. Cook. It is further ordered, adjudged, and decreed that the plaintiffs hold the said above-described two parcels or lots

of land, and the personal property contained in said dwelling house, described in finding 27, upon the further trust to sell the same, and convert the same into money upon the death of the defendant Williametta H. Cook, or, in case she do not die until ten years have elapsed from and after the date of the death of said Cynthia Hoff Shillaber, then at the expiration of such ten years, and in the latter case to sell the same subject to the right of the said defendant Williametta H. Cook to occupy and use the same until her death, free of rent, and upon the further trust to apply the proceeds of such sale as directed by the fifth subdivision of the fourth paragraph of the will of the said Cynthia Hoff Shillaber, deceased, mentioned in finding 3." The said judgment or decree is further modified by striking therefrom all that portion thereof which is in the following words: "It is further ordered, adjudged, and decreed that the defendant Williametta H. Cook is the owner of a present interest to the extent of the undivided one-third of the fee of the property mentioned in finding of fact 27, and hereinabove particularly described, and that the defendants Elizabeth H. Oulton and Frances H. Lowndes are the owners of a vested future interest to the extent of an undivided one-third of the fee each of said property last above described, subject to the life estate of said defendant Williametta H. Cook therein." As so modified, the said judgment or decree is affirmed; the appellants to recover the costs of this appeal.

We concur: HENSHAW, J.; McFARLAND, J.; TEMPLE, J.; GAMOUTTE, J.; HARRISON, J.

(107 Cal. 438)

VAN PRAAG v. GALE. (No. 15,851.)¹

(Supreme Court of California. June 6, 1895.)

ACTION FOR PERSONAL INJURIES — FALLING THROUGH TRAPDOOR IN SIDEWALK — CONTRIBUTORY NEGLIGENCE.

It appeared that plaintiff and defendant had occupied adjoining stores for a number of years, and that in front of defendant's store there was a trapdoor in the sidewalk for the use of defendant and his tenants, which was opened when ingress to the basement was necessary, and with the use of which plaintiff was familiar. On the day of the accident, about 9 a. m., plaintiff was called to the store on the other side of defendant's, and, when he passed defendant's store, the trapdoor was closed. On returning, he fell into the trapdoor, it having been opened to allow the ashman, whose cart was in front of defendant's door, to go into the basement. Plaintiff had seen the ashman drive up, but had not seen the trapdoor opened. *Held*, that whether plaintiff was negligent was for the jury.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Samuel Van Praag against John Gale for damages for personal injuries. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

¹ Rehearing denied.

A. B. Hunt, for appellant. Stafford & Stafford, for respondent.

SEARLS, C. This is an action to recover damages from the defendant, John Gale, for injuries sustained by the plaintiff in falling through an open trapdoor, constructed and maintained by defendant in the sidewalk, upon the west side of Polk street, between Bush and Sutter streets, city and county of San Francisco. Plaintiff had a verdict for \$400, upon which judgment was entered in his favor. The appeal is by defendant from the judgment. At the close of the testimony, on the part of the plaintiff, defendant moved for a nonsuit upon several grounds, the only important one of which is involved in the proposition that, if any injury was received by the plaintiff, it was due to his own want of ordinary care and prudence, and that his own negligence contributed directly to such injury. The motion for a nonsuit was overruled by the court, and such ruling constitutes the only assignment of error.

The evidence on the part of plaintiff tended to show that for 10 years prior to March 1, 1893, plaintiff had kept a cigar store on the west side of Polk street, between Sutter and Bush streets. Defendant, for say eight years, had owned a building consisting of two stores north of and adjoining plaintiff's cigar store. The store of defendant next to plaintiff was a candy store, and in front of it and close to the building defendant had had trapdoors placed in the sidewalk, say 4 feet wide by 4 feet 4½ inches in length, which opened on hinges from the center, and when open were turned back flat upon the sidewalk. A stairway led from the opening to the basement, which was used by the tenants of defendant's building. The iceman usually came in the morning at 7 o'clock, the ashman about 9 a. m., and the gasman at intervals, and these doors were opened to give them access to the basement. The sidewalk was 15 feet wide, of which 11 feet were clear of the trapdoors. Plaintiff was entirely familiar with the opening, had often been up and down the stairs, had seen it daily for years, and had spoken to defendant of the opening as being dangerous. The opening had no railing or protection around it, and was probably maintained in violation of a city ordinance of San Francisco. On the morning of March 1, 1893, about 9 o'clock a. m., plaintiff, being on the sidewalk in front of his store, was called by Mr. Weinschenk, who kept a jewelry store next north of the candy shop, and went to the jewelry store either over or past the trapdoors, which were closed, talked with the jeweler probably three to five minutes, during which interval the ashman came, and one of the trapdoors was opened to admit him to the basement; and the plaintiff, while returning south towards his store, thinking of what the jeweler had said to him, and perhaps looking at a paper with some figures upon it, fell into the opening,

and was seriously injured. Plaintiff had seen the ashman drive up, but had not seen the trapdoor opened.

The question presented upon the motion for nonsuit was not whether there was some evidence of contributory negligence on the part of plaintiff, but rather was the evidence of such contributory negligence so plain and palpable as to be indisputable, and the inferences or conclusions to be drawn therefrom so plain that it was the duty of the court as a matter of law to pass upon the question and take it from the jury. As a general proposition, cases of negligence (to which those of contributory negligence form no exception) present a mixed question of law and fact, in which it devolves upon the court to say as matter of law what is or amounts to negligence, and upon the jury to say as matter of fact whether or not in the particular case the facts in proof warrant the imputation of negligence. The court furnishes the standard, the jury adjusts the facts, and pronounces them as up to or falling short of the requirements of the standard. *Fernandez v. Railway Co.*, 52 Cal. 45; *Clayards v. Dethick*, 12 Q. B., 439; *Whart. Neg. § 420*. When, however, "the facts are clearly settled, and the course which common prudence dictates can be readily discerned, the court should decide the case as a matter of law." *Shear. & R. Neg. § 26*; *Flemming v. Railroad Co.*, 49 Cal. 253; *Deville v. Railroad Co.*, 50 Cal. 383. In *Railroad Co. v. Van Steinburg*, 17 Mich. 99, Judge Cooley said: "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility; for, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge, trying a similar case, may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury. That contributory negligence is matter of law is plainly the exception, and not the rule."

The gist of the contention in the present case, although not expressed in so many words, seems to be that, as there is no conflict in the testimony, the facts are estab-

lished, and it is the duty of the court to decide the issue as a question of law. But it by no means follows that the facts are admitted because there is no conflict in the testimony. Negligence is not ordinarily proven by direct and positive testimony, and is not so proven in this case. What the plaintiff did is established without dispute and beyond cavil. But whether from this conduct the deduction is inevitable that he did not exercise the precautions for his own safety which a reasonable man would have done under precisely the same circumstances is not so clear. That this is the ultimate fact to be determined must be conceded. It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as matter of law; and, when the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions. *Fernandez v. Railway Co.*, 52 Cal., at page 51, and cases there cited. To some minds probably the conclusion would seem irresistible that he who, with eyes to see, in broad daylight, walks into an open trapdoor in the sidewalk, is lacking in that care and caution which characterizes the man of ordinary prudence. Others may well reason that plaintiff was entitled to a safe passage over a walk prepared by the public for the accommodation of all its citizens. That he was interested and absorbed in the business in hand was in line with observed facts among men of ordinary caution in similar cases. That he should, in aid of his mental process, refer to the figures which he had probably just jotted down, and in so doing fail to see that a passageway, which but a few minutes before he had found safe and free from obstruction, had been turned into a yawning chasm, only evinces a lapsus to which the most thoughtful and prudent men are subject. Bearing in mind that it is only in cases where there is no dispute as to the facts, and no room for difference of opinion as to the inferences and conclusions to be drawn from those facts, that the court is justified in taking the question from the jury (*Beach, Contrib. Neg.* § 449), and we are not surprised at the action of the court in denying the motion for a nonsuit. *Stephenson v. Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618, and 36 Pac. 407, and cases there cited. The surrounding circumstances leave a conclusion, which would otherwise be inevitable, open to debate, and in this respect differentiates it from *Hager v. Southern Pac. Co.*, 98 Cal. 310, 33 Pac. 119, and from *Davis v. Railroad Co.* (Cal.) 38 Pac. 647. *Hager v. Southern Pac. Co.*, supra, comes within a class of cases which, by frequent recurrence, and by reason of the element of recklessness connected therewith, has given rise to a fixed standard by which the law, in the absence of extenuating circumstances, passes upon the question of con-

tributory negligence. *Beach, Contrib. Neg.*, at section 452, where, after discussing the rule requiring one who crosses a railroad track to be on his guard, and before attempting to cross to look attentively up and down the track, it is said: "But, as the law now stands, the standard is fixed. One must look up and down the track. Anything short of that is negligence." In *Davis v. Railroad Co.* there was a known and fixed object, viz. an iron or steel rail, adjacent to a street lamp, over which plaintiff fell. In the present case the object or danger was only occasionally presented, and was not usually existent as a menace, and it was proper in such a case to submit the question of plaintiff's negligence to a jury. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(107 Cal. 446)

BROWN v. MERRILL et al. (No. 19,578.)
(Supreme Court of California. June 7, 1895.)

CORPORATION—LIABILITY OF STOCKHOLDERS.

A stockholder of a corporation may sue the other stockholders for their pro rata of a debt due him.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Joseph Brown against Southern California Motor Road Company, and Samuel Merrill and others, stockholders of the company, on a promissory note. Judgment was rendered for plaintiff, and defendant Merrill appeals. Affirmed.

John W. Craig, for appellant. Rolfe & Rolfe, for respondent.

GAROUTTE, J. This action is against the defendant Southern California Motor Road Company, a corporation, on a promissory note of the company, executed March 4, 1890, and against the other defendants as stockholders, for their respective proportions of the indebtedness on said note, under section 322 of the Civil Code. A several judgment was given against the defendant Merrill, the appellant, for \$336.35, as his portion of said indebtedness, according to the amount of stock he held in the corporation.

Appellant claims that respondent cannot have the benefit of the statute of this state, imposing liability on stockholders for the corporation's debts, because he is a stockholder himself. This contention is based upon the authority of *Bailey v. Bancker*, 3 Hill, 188, and other cases to the same effect; but the reason for the rule declared in those cases is entirely wanting in this state, and it has no application here. In states where those decisions have been made, the relation

of stockholders inter sese is that of partners, and it is thus apparent at a glance that no common-law action for money owing by the corporation would lie by a creditor stockholder against other stockholders. In jurisdictions where the above doctrine has been declared, stockholders are severally and jointly liable for the debts of the corporation, but in this state there is no such liability. Each stockholder has a several liability, and that liability is proportionate to the amount of his stock; and when he has paid his portion of any debt, or of all the debts of the corporation, he is freed from all liability, and has no cause of action against any stockholder for money so paid. In this state we see no reason why a creditor stockholder of a corporation may not sue other stockholders for their pro rata of the debt.

We see nothing in the other questions suggested by appellant's brief demanding discussion. The order and judgment are affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.

(107 Cal. 303)

MACKAY v. MACKAY et al. (No. 15,977.) (Supreme Court of California. May 25, 1895.)

CONSTRUCTION OF WILL—INVESTMENT—PAYMENT OF INCOME—LEGACY FOR MAINTENANCE.

1. Where testator directed his executors to invest a certain sum, and pay the income thereof to a designated person during her life, an order of court requiring the payment to such person of any sum of money directly from the funds of the estate is erroneous.

2. Where testator directed his executors to invest a certain sum, and pay the income thereof, during her life, to his housekeeper, who was, at the time the will was made, and at testator's death, receiving support from him, a "legacy for maintenance" was created, within Civ. Code, § 1369, making such legacies bear interest from testator's death.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Harriet Schenck Mackay against Duncan C. Mackay and Robert G. Mackay, executors of the will of Patrick N. Mackay, deceased, to enforce a trust created by the will. From a decree for plaintiff, defendants appeal. Reversed.

Oliver P. Evans, for appellants. Knight & Heggerty and Gaston Straus, for respondent.

VAN FLEET, J. The deceased, Patrick N. Mackay, died resident of the city and county of San Francisco, on the 21st of April, 1893, leaving a last will, wherein appellants were named as executors thereof. Subsequently said will was duly admitted to probate in the superior court of said city and county, and letters testamentary therein were issued to appellants. Among other things, the will provided: "Third. I be-

queath to my said executors, in trust, the sum of fifteen thousand dollars, which I direct them to invest in such security as they may deem advisable, and to pay the income thereof to Hattie Schenck, housekeeper, presently residing at No. 1625 Polk street, in the city and county of San Francisco, state of California, during her life." In August, 1894, the respondent filed a petition in the superior court, setting up in substance, among other matters not necessary to recite, the fact of decedent's death, and the admission of his will to probate; setting out the provision of the will above quoted, and stating that she was the same person referred to in said provision as Hattie Schenck; that notice to creditors had been published, and that more than a year had elapsed since its first publication; and that an inventory and appraisal of the estate had been returned, showing the value of said estate to be upwards of \$300,000. She further alleged that at the time of the death of deceased, and for many years prior thereto, respondent was wholly dependent upon deceased for support and maintenance, and was entirely supported and maintained by him, and that since the death of deceased she has been without means of support, but dependent upon charity; that the executors of deceased had not paid her, "nor has she ever received any part of said legacy, or income thereof, or any interest thereon, or anything whatsoever, from the said executors or said estate in any manner." And, after alleging that the executors entertain a feeling of enmity and malice towards her, and "that they have attempted, endeavored, acted, managed, and conducted the administration of said estate so as, and with the design, purpose, and intent, to keep petitioner out of, and deprive her from receiving or having in any manner any part of, the legacy, income, or interest" provided for in said will, and that by reason of their said feeling and conduct they are not fit or proper persons to administer said trust, she prays "that the said executors may be compelled to hand and pay over unto the said petitioner, Harriet Schenck Mackay, all the moneys whatsoever due in and by virtue of said legacy, together with the legal interest thereon accrued, dating from the death of said deceased up to and including the time of the granting of the relief herein demanded; also that the trust fund hereinbefore mentioned may be taken from the care, custody, control, and management of the said executors, and that a proper and fit person be appointed as trustee to receive, take, hold, invest, manage, and control said legacy for the uses provided in said last will and testament; and that this court make such order or orders and grant such other and further relief as to it may seem just and equitable." The appellants having answered said petition, a hearing was had, at which evidence was admitted tending to show that respondent was the person named in said be-

quest; that she had been supported by deceased for some 14 years consecutively next preceding his death, and that she had no present means of support other than that to be derived from the income provided for in said bequest. Evidence was also admitted of certain oral declarations made by deceased at the time of giving directions for the drawing of his will, to the effect that he wished to make provision for the investment of such sum as would bring an income of \$60 per month, such income to be paid to the respondent during her life. The court made an order wherein, after reciting the facts found, and its conclusion that said bequest constituted a legacy for the maintenance of respondent, and an annuity to be paid to her from the time of testator's death, it directed: "That the executors of the will of said deceased pay over and deliver out of the funds of said estate unto said petitioner, Harriet Schenck Mackay, she being the same person named in said will as Hattie Schenck, the sum of \$960.00, the said sum being hereby adjudged and decreed to be the amount due and accrued and payable under and upon said legacy, at the rate of \$80.00 per month, from the 21st day of April, 1893, the date of the death of said Patrick N. Mackay, to the 21st day of April, 1894; and also that said executors pay over and deliver unto said Harriet Schenck Mackay, out of the funds of said estate, the sum of \$60.00 on the 21st day of each and every month, commencing with the 21st day of September, 1894, and continuing until the said sum of \$15,000.00 provided in said will shall have been invested and bear an income as directed in said will, and that then said income shall be paid over and delivered by said executors each month to said Harriet Schenck Mackay. It is further ordered that the said sum of \$960.00 and said \$60.00 per month be paid forthwith out of any money now on hand belonging to said estate, as far as the same can be now paid by said executors; and that such amount thereof as cannot be now paid be paid out of any money hereafter coming into the hands of said executors and belonging to the said estate, after the payment of the legal expenses of administration." From this order the appeal is prosecuted.

1. We are of opinion the order was unwarranted. The legacy in question is, by its terms, made to the executors named, in trust for the purposes therein expressed. It is not a legacy payable direct to respondent, and under no circumstances is she entitled to receive any part of the principal sum bequeathed. That sum is to be received and held by the trustees, and they are the only parties to whom the probate court can order it, or any part of it, to be paid. Such an order would constitute a distribution (partial or final). The right of the respondent is merely that of the beneficiary of the trust, and is confined, by the terms of the will, to the receipt of the income to be derived from

an investment of the trust fund. This investment is directed to be made by the trustees, and, until the fund is distributed to the latter, and an investment of it made, there can be no "income" to be paid to the respondent. The only right of the respondent, in the probate court, is, therefore, the right to move the court to make distribution of the fund to the trustees. This distribution the court could grant at any time the circumstances of the estate would warrant it, without awaiting final distribution of the general estate. The petition in this case is not a petition for a distribution of the fund to the trustees named in the will. It seeks rather to have the fund turned over to some other person to be named by the court as trustee,—a power the existence of which in the probate court may well be doubted. But, even if the petition were sufficient in form, the court had no power to make the order complained of. That order distributes nothing to the trustees, but gives to respondent directly something to which she is not entitled under the terms of the will. The will, as we have seen, gives her nothing directly from the estate, much less is she to receive anything from the general assets of the estate. All that she is entitled to is payment by the trustees of the income of the specific fund after distribution of such fund to them. The court, therefore, could have no power to do more than to distribute to the trustees named the fund in question. It was not authorized to order the payment to respondent of any sum whatever from the funds of the estate, as is the effect of the order appealed from.

2. As it results from the foregoing that the order of the court below must be reversed, and as the petition is, in our judgment, susceptible of amendment so as to entitle the respondent to proper relief in the premises, we will notice one other point which will be involved in the future disposition of the matter in controversy,—whether or not the legacy bears interest from the date of testator's death. The testator's intention in the clause of the will containing the legacy in question must be ascertained "from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." Civ. Code, § 1318. The only evidence as to the circumstances under which the will was made, outside of the testator's oral declarations, is to the effect that respondent had been supported by the testator for 14 years next before his death. The fact that she is now without means is immaterial. The will does not create an annuity, because it is not "a bequest of certain specified sums periodically." Civ. Code, § 1357. It is merely a bequest of a specified sum in gross, the income of which (an uncertain quantity) is to be paid to another person. Construing the words of the will, however, in connection with the circumstance that respondent had been supported by the testator

for a long period, and was in receipt of such support at the time of the making of the will, we are of opinion that the provision in question created a "legacy for maintenance." It does not seem to be necessary, under section 1369 of the Civil Code,¹ that the legacy should be made directly to the person to be maintained thereby. If made in trust to one "for" the maintenance of another, it would seem to fall within that section, and, if so, would bear interest from the death of the testator. In this view it will be the duty of the court, in distributing the fund to the trustees, also to distribute to them such interest as shall have accrued upon it at the date of such distribution. A fair construction of sections 1368 and 1369 would also seem to require that this interest, when distributed to the trustees, should be deemed to be in lieu of the income specified in the legacy, up to the date of the distribution, and should therefore be paid by them to the respondent as income accrued at that date.

3. A motion was made to dismiss the appeal herein on the ground that the appeal was taken before the order appealed from had been entered at length in the minutes of the court. It is only necessary to say that we think it sufficiently appears from the record that the order had been so entered. The motion to dismiss the appeal is denied. The order appealed from is reversed, and the cause remanded, with directions to the court below to permit the parties to amend their pleadings as they may be advised, and thereupon to take such further proceedings as are not inconsistent with this opinion.

We concur: GAROUTTE, J.; HARRISON, J.

(27 Or. 487)

SIMON v. NORTHUP et al.

HANSON v. HIRSCH et al.

(Supreme Court of Oregon. June 3, 1895.)

BRIDGE AND FERRY — ACQUIREMENT BY CITY — MAINTENANCE BY COUNTY — SPECIAL ACT — VALIDITY — SUFFICIENCY OF TITLE — TAXATION.

1. Act of 1895, providing for the appointment of a bridge committee, to acquire in the name and on behalf of the city of Portland a certain bridge and ferry, and to issue and sell the bonds of the city in payment thereof, is not void because it compels the city to pay for the expense incurred without its consent.

2. Act of 1895, providing for the acquisition by a committee of a certain bridge and ferry on behalf of the city of Portland is not in conflict with Const. art. 4, § 20, requiring every act to embrace but one subject, which must be expressed in the title, in providing for the necessary details to carry out its general purpose.

3. Act of 1895, to procure certain bridges and a ferry on behalf of the city of Portland, does not violate Const. art. 4, § 23, which prohibits special or local laws "for laying, opening and

working on highways." etc., as the highways to which the act referred were public in their character and open to use before its passage, and the constitutional provision does not apply to the public bridges and ferries of a city.

4. Act of 1895, providing for the acquirement of a certain bridge and ferry on behalf of and at the expense of the city of Portland, and to transfer them to the county court, and requiring the county court to levy a tax to meet the expenses of maintenance and interest on the bonds, does not conflict with Const. art. 4, § 23, which forbids any special or local laws "for the assessment and collection of taxes."

5. The public highways of a city are not its private property, and hence the legislature may transfer their supervision and control to another governmental agency if it does not thereby divert them to a use substantially different from that for which they were originally intended.

6. That part of the act which provides for the taxation of the property of the county for the payment of the debt of the city of Portland, previously incurred in the purchase and construction of certain highways, is void.

7. So much of the act of 1895 providing for the acquirement of certain bridges and ferries within the city of Portland as requires the county to maintain a certain other ferry, is void, as not being within the title of the act.

8. The title of the act stating that it is one of its purposes to cause the county court to "assume the management, control and supervision of such bridges and ferries," the act may properly require the county to provide means to pay the expenses of the management.

Appeals from circuit court, Multnomah county; H. Hurley and L. B. Stearns, Judges.

Actions by Joseph Simon against H. H. Northup and others and John R. Hanson against Sol. Hirsch and others. From a judgment for defendants in each case, plaintiffs appeal. Modified and affirmed.

W. W. Thayer and L. B. Cox, for appellant Hanson. Jos. Simon, O. F. Paxton, and W. P. Lord, for appellant Simon, and also for respondents Hirsch and others. W. D. Fenton and J. F. Watson, for respondents Northup and others.

BEAN, C. J. These two cases, which for convenience were heard together in this court, involve the constitutionality of an act of the legislature of 1895 providing for the acquisition by the city of Portland of the Morrison street bridge, Stark street ferry, and the upper deck of the steel bridge, and requiring the supervision, management, and control of said bridges and ferry, when so acquired, and of all the free bridges and ferries of the city acquired under the acts of 1891 and 1893, to be turned over to the Multnomah county court, to be thereafter supervised, managed, and controlled by said court. The provisions of the act, in brief, are: That a committee, designated as a bridge committee, is thereby appointed, and charged with the duty of acquiring in the name and on behalf of the city of Portland, by purchase or condemnation, the Morrison street bridge and Stark street ferry, and of leasing the upper deck of the steel bridge, and for that purpose it is authorized to issue and dispose of the bonds of the city, not to exceed in amount the sum of \$200,000. After the two bridges

¹ The section reads: "Legacies bear interest from the time when they are due and payable, except that legacies for maintenance or to the testator's widow bear interest from the testator's decease."

specified and the ferry are thus acquired and are ready for use, the bridge committee is required to turn them over to the county court of Multnomah county. The act further provides that the bridge committee appointed under the act of 1891, and which now has control of the Madison and Burnside street bridges and Albina ferry, shall immediately turn over and deliver to said court all the bridges and ferries and property connected therewith in its possession and under its control, and the county court is required to take charge of, maintain, and operate the same, as well as the bridges and ferry to be acquired under this act, as free bridges and ferries, and to that end is given power and authority to employ all such agents or servants as it may deem necessary, and to make all needful rules and regulations for the conduct, management, and use of such bridges and ferries by the city, its inhabitants, and the public in general. The county court is required to levy and collect, in the manner and form as other taxes are levied and collected, a tax each year upon all the taxable property within the county sufficient, with such revenues as may be received from said bridges and ferries, to maintain and keep them in good condition and repair during the ensuing year, and to pay the annual rental for the upper deck of the steel bridge; and it is also required to levy and collect a tax sufficient to pay the interest to accrue upon the bonds authorized by this act to be issued, and also upon the bridge bonds already outstanding against the city, amounting to \$550,000; and, at the expiration of 10 years from the passage of the act, the county court is required to levy and collect an additional tax, sufficient to raise a sum of money annually equal in amount to one-twentieth part of the bonds then outstanding, to be used as a sinking fund, for the purpose of paying off and retiring such bonds. It is declared by the act, however, that the bonds already issued, and those to be issued, in accordance with its provisions, are to remain as existing, valid, and binding obligations of the city of Portland, and the city is directed and required to pay, as the same matures, the interest on the bonds, and the principal thereof when due, in the event that the county court of Multnomah county fails or neglects to do so. It is further provided that the county court shall establish and maintain a free ferry across the river at Sellwood at a cost not to exceed \$2,400 per annum, and for that purpose it shall cause to be used such of the ferry boats as may be acquired by it under this act. The bridge act of 1891 and the amendment thereto of 1893 are repealed. It is stoutly contended that the act in question is unconstitutional for the several reasons hereinafter noticed, and, while we are satisfied that the contention is well founded in some respects, and are conscious that in others the validity of the act is not free from doubt, yet we cannot declare it wholly void

because some of its provisions are so and others are involved in doubt. The courts will never exercise the extraordinary power of declaring an act of the legislature unconstitutional unless there is a plain, palpable, and clear conflict between the statute and the constitution, which, in our opinion, does not exist in this case. *King v. City of Portland*, 2 Or. 152; *Cook v. Port of Portland*, 20 Or. 580, 27 Pac. 263.

In the first place, the entire act is challenged upon the ground that it is incompetent for the legislature to compel the city of Portland to incur a debt for the construction of public bridges within its boundaries, and much was said at the argument about the inexpediency and injustice of such legislation, and the effect previous legislation of this character has already had upon the financial affairs of the city. But the question is one of power alone, and, however unjust, inexpedient, or even oppressive such legislation may be, the courts are powerless to declare it invalid if it is within the legitimate exercise of legislative powers. A municipal corporation is but the creature of the legislature, and in its governmental or public capacity is one of the instruments or agents of the state for governmental purposes, possessing certain prescribed political and municipal powers, to be exercised by it on behalf of the general public rather than for itself; and over it, as such agent, the authority of the legislature is supreme, and without limitation or restriction other than such as may be found in the constitution. There is a line of authorities which hold, and perhaps properly, that a municipal corporation cannot be burdened with a debt without its consent for a matter of local, as distinguished from state, purposes. *Park Com'rs v. Detroit Common Council*, 28 Mich. 228; *People v. Mayor, etc., of Chicago*, 51 Ill. 17; *People v. Batchellor*, 53 N. Y. 128. But it seems to be substantially agreed that when the debt or liability is to be incurred in the discharge of some duty which is imposed upon the municipality exclusively for public purposes, and in the performance of which the general public, as distinguished from the inhabitants of the particular municipality, have an interest, it is within the power of the legislature to compel it to perform such duty and incur a debt therefor. That the making and establishment of public highways and bridges, and the assessment and collection of taxes, are within the legitimate legislative powers, and are among the ordinary subjects of legislation, cannot be questioned. Nor do we think it can be successfully denied that the bridges and ferries referred to in the act under consideration will, when acquired, belong to the city of Portland in its public or governmental capacity, and that in the acquisition of them it is but discharging a public or state duty which it is entirely proper for the legislature to impose upon it; and therefore, if there

is no limitation in the constitution, it is no objection to the validity of an act for that purpose that a debt or liability against the corporation is to be created without its consent. *Cooley, Tax'n*, 682; *Dill. Mun. Corp.* § 74; *Winters v. George*, 21 Or. 251, 27 Pac. 1041; *State v. George*, 22 Or. 142, 29 Pac. 356; *City of Philadelphia v. Field*, 58 Pa. St. 320; *Bank v. Katz*, 57 Md. 145; *Davis v. Railroad Co.*, 47 N. Y. 400. That the construction of bridges and highways in a city, and the incurring of a debt therefor, should ordinarily be left to the judgment and discretion of the proper municipal authorities is manifestly just and in harmony with the right of local self-government and the theory of our political institutions, but the policy of such legislation is not for the courts. When the power is conceded, the courts cannot inquire into the expediency or manner of its exercise, or the motives or reasons prompting the particular act. We conclude, therefore, that the act in question is not invalid because it compels the city of Portland to incur a debt, without its consent, for the acquisition of public bridges and ferries.

It is next contended that the act embraces more than one subject, and therefore is in violation of section 20, art. 4, of the constitution, which declares that: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." The design of this provision of the constitution was to prevent matters wholly foreign, and having no relation to each other, from being embraced in one bill, and "this purpose is fully accomplished when the law has but one general object, which is fairly indicated by its title." *People v. Mahaney*, 13 Mich. 495. The subject or general object of the law in question, as expressed in its title, is the acquisition, control, and management of certain specified bridges and ferries across the Willamette river at Portland, and the details by which it is to be accomplished are matters properly connected therewith, and do not constitute more than one subject within the meaning of the constitution. Whether the body of the act contained any provisions which are void because not properly within the subject expressed in the title, will be considered later.

It is also contended that the act is in conflict with subdivision 7, § 23, art. 4 of the constitution, which forbids the passage by the legislature of special or local laws "for laying, opening, and working on highways, and for the election or appointment of supervisors." It may be conceded that the act in question is special and local, but still we do not think it comes within the provision of the constitution referred to. This provision was probably designed to require the legislature to provide by general law for the laying, opening, and working of the ordinary highways and public roads of the state, and to prevent any interference with the general highway system by special or local acts. But

if it is applicable to public highways within a municipal corporation, the act under review clearly does not come within its provisions. It does not in any sense provide for the laying or opening of a highway. The bridges and ferries referred to therein were, at the time of the passage of the act, and for a long time before had been, open and in use by the public as highways. Their character as such was already established. The bridges and ferries purchased, acquired, and constructed by the commission appointed under the act of 1891 were then free and open highways, and, while it is true that the public easement was subject to the payment of tolls for passage over the bridges and ferry to be acquired under its provisions, they were nevertheless public highways, and the rights of the owners were to be extinguished before their supervision and control was to be transferred to the county court. By the transfer to the county contemplated by this act, these bridges and ferries were to continue as public highways, but their character as such is in no way derived from the act itself, and therefore it does not provide for the laying or opening of a highway, and the case of *Maxwell v. Tillamook Co.*, 20 Or. 495, 26 Pac. 803, which declares an act which did so provide invalid, is not in point. The effect of the act of 1895 is simply to transfer the management, control, and maintenance of certain existing public highways from one governmental agency, constituted and appointed by the legislature, to another, designated by the same authority, but it does not undertake to lay out or open or provide for the laying or opening of such highways. Nor do we think the act in question is for the working of highways within the meaning of the provision of the constitution under consideration. This provision, so far as the working of highways is concerned, was intended to apply to such roads and highways as are a part of the general highway system of the state, and can be maintained and kept in repair under a general law, and not to the public bridges and ferries of a city, which are exempt from the operation of such laws, and which, in the nature of things, cannot be so kept up and maintained. *Elliott, Roads & S.* 329. Indeed, it was said by Judge McArthur in *East Portland v. Multnomah Co.*, 6 Or. 65, that this provision of the constitution only applies and is limited to the roads and highways traversing the rural districts, and not to the streets and alleys of a city; and in *City of Lafayette v. Jenners*, 10 Ind. 79, it is said by way of argument that a street is not a highway in any sense within the meaning of a constitutional provision like ours, and it is not apparent that this construction would fall to accomplish the purposes intended by the framers of the constitution. But whether this is so in the matter of opening and laying of highways it is unnecessary to consider at this time, for no such question is presented by this record.

But it does not seem to us that the legislature is inhibited by this provision of the constitution from transferring, by special or local law, the supervision and control of an existing public bridge or ferry constructed by and within the boundaries of a municipal corporation from such corporation to a county, and requiring the latter to maintain and keep it in repair. The constitution of 1874 of the state of New York contains a provision forbidding the passage by the legislature of any private or local bill "laying out, opening, altering, working or discontinuing roads, highways or alleys," and this provision was invoked to defeat a private and local act of the legislature of that state which authorized the conveyance by a certain turnpike company of a portion of its road to park commissioners, and which made provision for the improvement and ornamentation of the road authorized to be conveyed, and for the payment of the costs of such improvement, and for the keeping of the same in repair; but the court of appeals held that the constitutional provision was only designed to prevent any interference with the general highway system of the state, or with keeping the ordinary highways and public roads in repair under that system, and the supervision of the officers designated, and in the use of the means and the labor provided by law, and that the act in question did not in any of its provisions provide for the opening or working of a highway in the sense in which that term is used in the constitution, although the road referred to belonged at the time to a private corporation, which was charging and collecting tolls thereon. *People v. Banks*, 67 N. Y. 568. This case, in many of its features, is similar in principle to the case at bar, and it seems to us the doctrine announced there is controlling here.

It is next objected that the act is violative of subdivision 10, § 22, art. 4 of the constitution, which prohibits the passage by the legislature of special or local laws "for the assessment and collection of taxes for state, county, township, or road purposes." The evident purpose of this provision was to prohibit the legislature from passing a special or local law providing a mode or manner for the assessment and collection of taxes in the enumerated cases which would interfere with or contravene the method of assessing and collecting taxes as provided by the general law, but not, in our opinion, to inhibit the legislature from authorizing or requiring a county to levy and collect a tax at the same time and in the same manner as other taxes are levied and collected for specified public purposes, and that is all the law in question required. It does not purport to provide a special manner for the assessment and collection of taxes, but only requires the county of Multnomah to include in its estimate for county purposes a sum sufficient to meet certain expenses which, by the act in question, the county is required to pay, and

a tax sufficient to meet these expenses is to be assessed and collected as other taxes are assessed and collected; and hence we do not think it is a special and local law for the assessment and collection of taxes within the meaning of the constitution.

It is also contended that the legislature cannot take from the city of Portland the supervision, management, and control of the public bridges and ferries belonging to it, and transfer them to the county of Multnomah. In the first place, these bridges and ferries are not now, and never have been, under the supervision of the city of Portland, but are managed and controlled by a committee or commission appointed for that purpose by the legislature, and this act only purports to transfer their management and control from such committee to another state or governmental agent. But, if it were otherwise, the law is now too well settled to be questioned that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the legislature is the representative of the public at large, it has, in the absence of any constitutional restriction, paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency so long as they are not diverted to some use substantially different from that for which they were originally intended. 2 Dill. Mun. Corp. 656, and authorities there cited; Cooley, Const. Lim. (5th Ed.) 335, and note. In accordance with this principle, it was held in *Railroad Co. v. Portland*, 14 Or. 188, 12 Pac. 265, that an act of the legislature granting the use of the public levee of the city of Portland to a railway company for railway purposes was a valid exercise of legislative powers. So, also, it was held in *People v. Walsh*, 96 Ill. 232, that it was competent for the legislature to transfer the control of the streets of a city to park commissioners, to be by them controlled for boulevard and driveway purposes. A city occupies, as it were, a dual relation to the state,—the one governmental or political, and the other proprietary or private. In its governmental or political capacity it is nothing more than a mere governmental agent, subject to the absolute control of the legislature, except as restricted by the constitution, and such property and easements as it may have in public streets and ways are held by it in such capacity, and at the will of the legislature. But, on the other hand, such property as it may hold or acquire in its proprietary or private capacity is as much protected by the constitution as the property of the private citizen, and of which it cannot be deprived except for public purposes, and only then upon just compensation. To the latter effect are the authorities cited and relied upon by the defendant, and they are therefore not in point in this discussion.

It is next contended that it is not within

the power of the legislature to compel the property of Multnomah county to be taxed for the payment of a debt of the city of Portland, incurred in the purchase and construction of the Madison and Burnside street bridges and Albina ferry, and to be incurred under the act in question before the county is required to receive or accept the Morrison street bridge, Stark street ferry, or the upper deck of the steel bridge. On this question there seems to be but little authority, but we think it clear upon principle that such legislation cannot be sustained. As Parker, C. J., says: "It certainly must be admitted that, by the principles of every free government, and of our constitution in particular, it is not in the power of the legislature to create a debt from one person to another, or from one corporation to another, without the consent, express or implied, of the party to be charged." *Hampshire v. Franklin*, 16 Mass. 83. A question involving the authority of the legislature to compel a town to be taxed for the payment of debts previously contracted for the purpose of acquiring title to and constructing a public park, partly within the boundaries of the town sought to be charged, was before the court of appeals of New York (*In re Lands in Town of Flatbush*, 60 N. Y. 398), and in holding such legislation invalid the court, speaking through Mr. Justice Miller, said: "Had the respondents been originally assessed for benefit conferred under a proper law, it might then be said that the assessment was for public use, and not for a subsisting debt, and such an assessment could have been enforced. But such is not this case. And those assessed are required, by the proceedings of the commissioners, to aid in the discharge of a debt previously contracted, and to contribute money which is to be paid into a sinking fund, to be provided for the payment of bonds, already issued, for the location and improvement of the park. There is no principle that I am aware of which sanctions the doctrine that it is within the taxing power of the legislature to compel one town, city, or locality to contribute to the payment of the debts of another. The government has no such authority, and this case is entirely without a precedent. If such assessments were authorized, they might not be limited to adjoining towns, cities, or villages, but applied to those located at great distances from each other. Such legislation would be unjust, mischievous, and oppressive, and cannot be tolerated." It is competent for the legislature, in the exercise of its plenary powers over public highways of the city of Portland, to transfer the management and control of the bridges and ferries in question from the commission appointed by it to the county, and to determine and provide the mode in which the burden of maintaining and keeping them in repair shall be borne in the future (*Scituate v. Weymouth*, 108 Mass. 128), but it is not within its power

to summarily declare that a debt of the city of Portland shall be paid by the county, although in fact incurred for the construction of such bridges and ferries. Nor do we think the fact that the city of Portland is within the county of Multnomah, and perhaps contains a large proportion of the inhabitants and taxable property of the county, in any way affects the question. The two corporations are separate and distinct entities, and, so far as we can see, it is no more competent for the legislature to compel the county to pay the debts of the city than the city to pay those of the county. It would indeed be, as Miller, J., says, "without a precedent," to compel every property owner in the county outside of the city to suffer a lien upon his property for the next 30 years for its proportionate share of the interest and principal due and to become due on a debt of the city already contracted and outstanding. If such legislation can be sustained, there is nothing to prevent the legislature from compelling property in the county to be taxed for any or all debts of the city incurred for public or governmental purposes, and it would hardly be contended that legislation so manifestly unjust and mischievous could be sustained. The legislature may perhaps compel a municipal corporation to recognize and pay a debt, although not binding on it in a strict legal sense, when there is an equitable or moral obligation on the corporation to pay it. *Dill. Mun. Corp. § 75*. But no such authority exists when there is neither a legal, moral, nor equitable obligation resting on the corporation sought to be charged, as in this case, where it is proposed to summarily transfer the debt from one corporation to another.

And, finally it is claimed that so much of the act of 1895 as requires the county to levy a tax for the maintenance and repair of the specified bridges and ferries, and to maintain a ferry at Sellwood, is invalid because not within the subject as expressed in the title of the act. The title of the act by its terms is limited to the acquisition and control of certain specified bridges and a particular ferry to be acquired under its provisions, and to the bridges and ferries in the possession and under the control of the present bridge commission, and we do not think the provision requiring the county to maintain a ferry at Sellwood can be said to be within the subject of the act as so limited, or properly connected therewith, and hence such provision must be declared invalid. But it is clearly stated in the title that one of the purposes of the act is to require the county court of Multnomah county "to assume the management, control and supervision of such bridges and ferries," and this is certainly broad enough to sustain a provision requiring the county to provide the funds with which to pay the expenses of such management, control, and supervision, and such provision is germane to and prop-

erly connected with the subject expressed in the title, and valid.

Having examined all the objections urged, we conclude that the act under consideration is constitutional and valid except in so far as it requires the county of Multnomah to levy a tax and pay the interest and principal on the bridge bonds of the city of Portland, and to maintain a ferry at Sellwood.

(21 Colo. 237)

FINCH v. TURNER et al.

(Supreme Court of Colorado. June 3, 1895.)

SALE UNDER EXECUTION — REDEMPTION — EXECUTION OF SHERIFF'S DEED — SUIT TO ENFORCE LIEN — PERSONAL JUDGMENT — EXECUTION.

1. Where a judgment debtor's interest in a mine is sold on execution, the fact that the sheriff's deed purports to convey the entire mine does not invalidate the deed as to the judgment debtor's actual interest therein.

2. Where, in an action to enforce a mechanic's lien, a decree is rendered enforcing the lien, and also embracing a personal judgment against defendant, plaintiff may voluntarily relinquish the right to enforce the lien, owing to the invalidity of the decree in that respect, and still enforce the personal judgment.

3. The purchaser from a judgment debtor of land previously sold on execution against the latter acquires only the rights of the debtor therein, and therefore, as against him, a sheriff's deed for the land may issue at any time after six months from the sale, as provided by Gen. St. 1883, § 1851.

4. The fact that a judgment creditor holding several judgments against the same judgment debtor, after selling land of the judgment debtor under one of the judgments, purchases the land at sales under executions issued on the other judgments, does not constitute a redemption by him from the sale on the first judgment, so as to render a sheriff's deed subsequently issued and based on the first sale invalid.

Hayt, C. J., dissenting.

Appeal from district court, Arapahoe county.

Action by Marcus Finch against Robert Turner and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

This action was instituted by the appellant (plaintiff below) for the purpose of removing a cloud upon his title to an undivided three-eighths interest in the Wallace lode, situate in Clear Creek county, Colo., and to compel a conveyance thereof by the defendants to the plaintiff. Trial was had upon an agreed statement of facts,—which are stated in this opinion in so far as they are pertinent,—and the court dismissed the complaint, from which judgment the plaintiff prosecutes this appeal.

It is conceded that on March 16, 1883, the title to an undivided three-eighths interest in the Wallace lode was in J. S. Sanderson, and it is this interest which is in controversy here; the plaintiff claiming it by deed dated February 3, 1890, the defendants by virtue of a sheriff's deed executed and recorded on March 3, 1885, which deed was made pursuant to a sale under an execution issued upon a judgment in favor of the plaintiff

obtained in the county court of Clear Creek county in a suit wherein one John F. Teal was plaintiff and Sanderson and others were defendants. If Sanderson's title was divested by such sale and deed, the defendants should prevail; otherwise the title of the appellant is good.

At the trial the appellees relied upon various other sheriff's deeds, based upon divers judgments obtained against Sanderson and others, but, after a careful examination of the record, we are satisfied that the defendants can sustain their claim to this property, if at all, only under the sale and the sheriff's deed based upon the Teal judgment. The case should, therefore, be considered and determined and made to depend upon the validity of the Teal judgment and the regularity of the proceedings employed to enforce it. While Sanderson was the owner of this property it appears that he and some of the other owners employed Teal to do work on the mine, but did not pay him therefor. In August, 1883, Teal, to preserve his rights under the mechanic's lien act, duly filed with the county clerk and recorder notice of his claim of a lien for his work done upon the mine. Thereafter, and within the statutory time, he brought suit upon this claim, the object of which was to establish a lien upon the lode for the amount of the judgment to be recovered. Personal service was had upon Sanderson and other defendants, including the appellant, but all of the owners of the property were not made parties to the action, nor were any other lien claimants of record made parties thereto. Default was entered against the defendants served. Hearing was had, and a decree entered in favor of the plaintiff, embraced in which was a personal judgment against the defendants, and a lien therefor established against the property. A writ of venditioni exponas was awarded, directing that the property be sold thereunder, the sale to conform, as nearly as may be, to sales upon execution; and there was an order to the effect that, if the premises when sold should not bring sufficient to satisfy the judgment, plaintiff should have execution for the residue. For reasons which are not stated in the record, but unquestionably for one reason, at least,—that the judgment creditor was satisfied that that portion of the decree establishing the lien was invalid,—no steps were taken to carry out those provisions of the decree establishing the lien, but an ordinary execution was sued out upon the personal judgment embodied in the decree, and sale thereunder had on June 2, 1884, whereat A. M. White was the purchaser. Thereafter, and before the time for redemption expired, this certificate of sale was assigned to Robert Turner, one of the appellees, to whom, upon the 3d day of March, 1885, no redemption having been made, the sheriff executed his deed for the whole of said Wallace lode, as assignee of said certificate.

Elas Miles, Sidney H. Dent, and Marcus Finch, for appellant. L. C. Rockwell and A. D. Bullis, for appellees.

CAMPBELL, J. (after stating the facts). It will be conceded, of course, that although the certificate of sale and the sheriff's deed included all of the Wallace lode, the grantee of the deed acquired only such interest as Sanderson owned therein. But whatever irregularity there may have been in including in the execution and in the certificate of sale and the sheriff's deed the entire lode, this will not invalidate the deed, or the grantee's title thereunder, as to the interest which the judgment debtor actually owned. As we have seen, the decree in the Teal case established a lien upon the property, and awarded a venditioni exponas, under which the property was to be sold to satisfy the personal judgment embodied in the decree as a part thereof.

1. It is contended that the abandonment by the judgment creditor of his rights to enforce the lien was equivalent to a surrender of all his right to enforce any part of the decree, and that the issuing of an ordinary execution upon such personal judgment, and the sale thereunder, and the sheriff's deed in pursuance thereof, are void. In passing we may observe that we fail to see the appropriateness of the particular writ awarded, and it may be that the judgment creditor was likewise sensible of the inadequacy of the writ to enforce the lien, and such may have been an additional ground for waiving the lien, even if valid. In *Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456, the court held that the lien as established by the trial court could not be sustained, because the claimant failed to observe the substantial requirement of the statute prescribing what should be included in the recorded notice of the lien. But the court held that a personal judgment might be rendered upon which execution might issue, and dismissed the proceedings as far as the lien was concerned, but ordered execution to be issued for the collection of the debt as in case of money judgments recovered through ordinary actions at law. The only material difference in the facts between that case and this is that in the former the superior advantages of the lien were lost by a ruling of the court, while in this case the lien claimant voluntarily relinquished his right to enforce the lien which, if valid, would have given him greater rights than would an execution on an ordinary money judgment. The appellant strenuously insists that the lien is invalid, and yet objects to the act of the claimant waiving the same. We agree with appellant that the decree, in so far as it established a lien, cannot be sustained, and an attempted enforcement thereof would have been useless. But as, in the former case, the personal judgment and its enforcement by an ordinary execution were saved to the judgment creditor notwithstanding the lien fell by the judgment

of the appellate court, so, in this case, the right remains to the lien claimant who established his claim to enforce the personal judgment, although he voluntarily relinquished what the trial court declared a lien, but which cannot be upheld by this court as valid.

2. The appellant insists, however, assuming the validity of the Teal judgment, that the execution of the sheriff's deed on March 3, 1885, was premature and void, because it issued before the expiration of nine months from the date of the sale. To this there are two answers: (1) The sale was had on the 2d of June, 1884. The sheriff's deed was issued March 3, 1885. Between the date of the sale and the date of the sheriff's deed nine calendar months intervened. But (2) if this were not true, the appellant, being a grantee of Sanderson, the judgment debtor, cannot be heard to complain. He is subrogated to the rights of his grantor, and has such rights as his grantor would have, and none other. As to the judgment debtor and his grantee, the deed may issue at any time after the expiration of six months. Gen. St. 1833, § 1851.

3. It is said that Turner was the owner by assignment of three other judgments against Sanderson, and while we do not consider it necessary to determine whether or not there is proper evidence in the record to support this assertion, yet, assuming it to be true, it is urged that before the sheriff's deed under the Teal judgment was issued to Turner executions were issued, and sales made under these three judgments, and Turner became the purchaser thereof, so that he thereby redeemed from the sale under the Teal judgment, and consequently the sheriff's deed of March 3d is void. We do not consider the claim tenable. There was no intention on the part of Turner to redeem. None of the statutory provisions for redemption were complied with in any respect. Besides, one who has several judgments against a debtor may, if he sees fit, enforce all of them; but if any particular property of a judgment debtor is legally sold under a valid execution, the entire interest of the judgment debtor therein is divested, and a subsequent sale of the same property under other executions conveys nothing. As we have already determined, the Teal judgment was valid, the sale under the execution regular, and the sheriff's deed was executed as the law provides. By such proceedings all the interest that Sanderson owned in this property was divested, and became vested in Turner, whose deed thereof was placed upon record long before the appellant obtained his deed from Sanderson.

The appellant challenges the constitutionality of the mechanic's lien act on the ground that the legislature did not follow the provisions of the constitution in passing the same, but, as the rights of the defendants do not in any sense rest upon that act, the point need not be determined. Besides, the record fails to show that any evidence of such noncompliance was brought to the attention of the trial

court in such a way as to call for its ruling thereon, or to permit of a review of the same in this court. It follows that the judgment of the district court should be affirmed. Affirmed.

HAYT, C. J., dissents for the reasons expressed in the dissenting opinion in the case of Cannon v. Williams, *supra*.

(21 Colo. 296)

HARTSEL et al. v. PEOPLE, to Use of KEABLES.

(Supreme Court of Colorado. June 3, 1895.)

EXECUTORS AND ADMINISTRATORS—SETTLEMENTS OF ACCOUNT—ESTOPPEL.

Under Gen. St. 1883, § 3629, providing that, when an administrator shall publish proper notice of his desire to make a final accounting, the court may approve his accounts and discharge him, but that no such discharge shall in any manner affect the rights of any creditor, heir, or devisee to sue on the bond of the administrator for any breach of the condition thereof, the heirs are concluded, in an action on the administrator's bond, as to all matters embraced in the administrator's account.

Appeal from district court, Chaffee county.

Action by the people, for the use of Emily Madeline Keables, against Nancy M. Hartsel and others, on an administrator's bond. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Action upon the bond of an administratrix, brought by an heir after reaching majority. The amounts as stated in the opinion represent only the one-quarter interest of plaintiff as such heir. It is averred in the complaint, *inter alia*, that the father of plaintiff, one Frank Mayol, departed this life upon June 3, 1874, leaving the defendant, now Nancy M. Hartsel, his widow, and Emily Madeline Mayol and Richard Mayol, his children, his only heirs, and leaving an estate of the value of \$31,000. It is further alleged that on the 13th day of June, 1874, the defendant Nancy M. Hartsel was appointed administratrix of said estate, and that, after giving the bond sued upon in this action, she entered upon the discharge of her duties. The breach alleged in the condition of the bond is a failure to pay over moneys collected for the estate, and failure to account for certain property coming into her hands as administratrix. The answer denies certain allegations of the complaint, and confesses and avoids others; and, as an additional defense, the defendants set up the proceedings of the probate court of Chaffee county in the matter of the administration of the estate of Frank Mayol, deceased. The records are set forth in full, including many reports made by the executrix of her acts and doings as such, with the orders of the court approving them. These orders conclude with an order of final settlement and discharge of the administratrix, of date January 7, 1884.

A. S. Weston and M. J. Bartley, for appellants. G. K. Hartenstein, for appellee.

HAYT, C. J. (after stating the facts). Of the items relied upon in this action as a proper charge against the administratrix, several were disallowed by the court, and are not now contested, and consequently will not be further alluded to. The first item allowed was for \$320. This amount was turned over in cash to the administratrix, and was designated in the appraisement, but for some reason it was not charged to or accounted for by her. The next item is for \$1,000, in live stock belonging to the estate, and turned over to Fred Mayol, and for which the administratrix received credit in her accounts, although this stock was not included in the appraisement or charged to the administratrix in any way. The third item is for a collection of \$233 on a certain note described as the Newitt note. This item was called to the attention of the probate court in a letter by Samuel Hartsel, the husband of the administratrix, who is shown to have acted for and by her authority, but it does not appear that this amount was ever charged to the administratrix or passed upon by the probate court in any way. The fourth and last item is a claim of \$1,649, money collected by Mrs. Hartsel as administratrix, and reported to the court as having been received by her, and ordered by the court to be turned over to Mr. Hartsel, the guardian of plaintiff.

The principal contention of counsel in this case is in reference to the effect to be given the latter part of the following section of the General Laws of 1883.

"Sec. 3629. If it shall appear that such notice hath been duly published, the court may, upon the day named therein, hear and examine the accounts of the executor or administrator, which shall be rendered in the same manner as at other settlements, and the objections of any parties in interest who may object thereto, and if it shall appear that the executor or administrator hath fully and faithfully administered all the estate of the decedent, which hath come to his hands, according to the provisions of this chapter, the court may approve such accounts and discharge the executor or administrator, but no such discharge shall in any manner affect the right of any creditor, heir or devisee, to bring an action upon the bond of such executor or administrator, for any breach of the condition thereof."

Appellants contend that as the probate court is a court of record, having general jurisdiction in the settlement of estates, appointment of guardians, etc.; that its orders and judgments are final and conclusive, and not open to collateral attack. The appellee does not dispute the correctness of the above statement as a general proposition, but says that the same is changed by the statute above given; his contention in this behalf being that in a suit upon the bond the entire matter

is left open to investigation by reason of this language: "But no such discharge shall in any manner affect the right of any creditor," etc. In order that we may determine the effect of that portion of the section to which our attention is invited, it will be necessary to refer for a moment to the effect that should be given to decrees and orders of the probate court in the absence of such a statute. The law in this regard is stated as follows in Black on Judgments (section 644): "A decree of the probate court settling an executor's or administrator's final account, and discharging him from his trust, after due legal notice, and in the absence of fraud, is conclusive upon all matters or items which come directly before the court until reversed; and it will be presumed that it was founded upon proper evidence, and that every prerequisite to a valid discharge was complied with; nor can the decree be impeached in any collateral proceeding. * * * The decree, however, is conclusive only as to the matters embraced in the account. It is no bar to the claims of creditors or heirs which did not in any manner form the subject of it." Mr. Woerner, in his work entitled the American Law of Administration, at section 506, says: "It seems a self-evident proposition that the judgment or decree of the probate court on the final settlement by an executor or administrator is conclusive only upon the matters therein embraced. That which has not been tried cannot be said to be adjudicated. The probate court cannot divest itself of jurisdiction over an executor or administrator by deciding that an account is final as to any matter not included in the account before it; nor is such decree or judgment conclusive of matters collaterally recited, but not directly adjudicated. It is important, therefore, that the executor or administrator should, for his own protection, include in his account every item which constitutes an element in the settlement." The conclusions of these text writers are well supported by both reason and authority. The county court in this state is given general jurisdiction in probate matters, settlement of estates, etc. It may be said that it was primarily created for the exercise of such jurisdiction, but, if its judgments are open to collateral attack, its usefulness would be destroyed. That such is not the law has been held in the following among other cases: *Bateman v. Reittler*, 19 Colo. 547, 36 Pac. 548; *Woodruff v. Cook*, 2 Edw. Ch. 259; *Jennison v. Hapgood*, 7 Pick. 1; *Tebbets v. Tilton*, 24 N. H. 120; *Crossan v. McCrary*, 37 Iowa, 684; *Sparhawk v. Buell*, 9 Vt. 41; *Chambers' Appeal*, 11 Pa. St. 436.

Recurring now to the statute, it seems evident that it does not give or purport to give a new right of action. It provides only that the discharge of the executor or administrator shall not affect the right to bring any action on the bond. The right alluded to is clearly a right existing independently of the

statute. In so far, therefore, as the claims made against the administratrix were considered and passed upon by the county court sitting as a court of probate, the judgment of that court, in the absence of fraud or mistake, must be considered as final and conclusive as that of any other court of competent jurisdiction. By this rule, an executor or administrator is not liable when called upon to account a second time for the same matters; but, if he would protect himself from future liability, he must be careful to see that his accounts presented to the court having jurisdiction of the administration of the estate embrace all his transactions had in such representative capacity. Taking the items that enter into the judgment of the district court, the first item, for \$320, was properly allowed. As this money passed into the hands of the administratrix, and was never charged to or accounted for by her, the probate court never passed upon this item or had the same before it for consideration. The item of \$1,000 was also properly allowed, this being the value of certain stock of the assets of the estate turned over to Fred Mayol, and for which stock the administratrix never accounted. The third item, of \$233, was not accounted for by the administratrix, and was not passed upon by the probate court. This item was justly chargeable to the administratrix. There was no error in the allowance of the fourth and last item. This money is traced to the hands of the administratrix, and in the order of distribution made by the county court under date of April 3, 1879, it was ordered to be paid to Mr. Hartsel, the guardian of plaintiff, for her use and benefit. The district court found that this order of distribution was never complied with in this particular, and hence gave judgment for the amount. Interest was properly chargeable upon these items, as it appears that the money was appropriated by the administratrix to her own use. Finding no error in the record, the judgment will be affirmed. Affirmed.

GODDARD, J., did not participate in the determination of this cause.

(21 Colo. 271)

PEOPLE ex rel. HART v. ANDERSON.
(Supreme Court of Colorado. June 3, 1895.)

DISBARMENT OF ATTORNEY.

Proceedings for the disbarment of an attorney, upon the relation of a married woman, for failure to pay over to her the proceeds of notes placed in his hands for collection and collected by him, will be discharged where the notes were sold and delivered to the attorney by the relator's husband for an adequate consideration, under circumstances that would indicate knowledge and consent on the part of the relator.

Proceedings by Elizabeth Hart against William W. Anderson for his disbarment. Dismissed.

Sam B. Berry, for relator. Whitford & Lindsley, for respondent.

PER CURIAM. The relator brings this proceeding to disbar respondent for alleged misconduct in his office of attorney. She alleges, in substance, that in the month of January, 1890, she indorsed and placed in his hands for collection certain notes; that he collected the same, and neglects and refuses to pay over to her the money so collected. Respondent, in his return to the rule to show cause, etc., denies that the notes in question were delivered to him by relator, except three thereof, aggregating the sum of \$75, which sum he collected and paid to relator; that the other of said notes were delivered to him by the husband of relator in pursuance of a transaction between them; and that, as owner, he collected the latter, and retained the proceeds, as he had a right to do. Without noticing in detail the terms of the contract under which respondent claims title to the notes, or the testimony introduced upon the hearing, suffice it to say that, upon a careful consideration of the entire evidence, we are clearly satisfied that the notes in question were not delivered to respondent by relator for collection, as she alleges, but were sold and delivered to him by relator's husband, for an adequate consideration, under circumstances that would indicate a knowledge and consent on the part of relator, and that certainly show the utmost good faith on the part of respondent. We find that the charge against respondent is not true. The rule is therefore discharged, and the proceedings dismissed.

(21 Colo. 289)

STEVES et al. v. CARSON et al. (No. 3,136.)
(Supreme Court of Colorado. June 3, 1895.)

ISSUANCE OF SUMMONS.

Under Civ. Code 1887, providing that civil actions shall be commenced by the filing of a complaint, or by the service of a summons (section 32), and that the court has jurisdiction from the time of filing the complaint (section 44), the court may exercise its discretion in granting or refusing leave to issue summons after the time for issuing it has expired.

Error to court of appeals.

Action by Parker Steves and others against J. C. Carson and others. From a judgment of the court of appeals (30 Pac. 1101) affirming a judgment of dismissal, plaintiffs bring error. Reversed.

Wilson & Stimson, for plaintiffs in error.

GODDARD, J. The plaintiffs in error commenced this action on June 5, 1889, by filing in the district court of Pitkin county a complaint in support of an adverse claim filed in the United States land office at Glenwood Springs, May 10, 1889. No summons was issued. On July 6, 1889, the defendants in error specially appeared, and moved the court

to dismiss the cause, and strike the complaint from the files, because no summons had been issued within 30 days from the date of filing the complaint. On July 9, 1889, plaintiffs in error filed a cross motion for leave to issue summons in the cause, upon the ground that the failure to issue the summons was due to excusable neglect, etc. Affidavits were introduced in support of this motion to the effect that E. C. Stimson, Esq., the attorney who prepared the complaint, gave it, with money to pay the docket fee, to a clerk in his office, with instructions to file the same, and to request the clerk to issue summons thereon; that on the following day he left the state, and was absent for the period of six weeks, and did not know until his return that summons had not been issued in pursuance of his direction; that he had the entire charge of the case; and that his partner, Mr. Wilson, did not know the complaint had been filed. The court below sustained the motion to dismiss the action, and overruled the motion for leave to issue summons, upon the ground that "the court * * * has no discretion, and is without power to order summons after the expiration of said thirty days." Section 33, Civ. Code 1887, provides that "the clerk shall endorse on the complaint the day, month and year the same is filed, and, at any time within one month after the filing of the same, the plaintiff may have a summons issued. The summons may be signed by the clerk, and directed to the defendant, to be issued under the seal of the court, or it may be signed and issued by the attorney for the plaintiff." On error to the court of appeals, that court affirmed the judgment of the court below, upon the authority of the case of *Coombs v. Parish*, 6 Colo. 206, and, *inter alia*, said: "However much the circumstances as detailed in the affidavits might have appealed to the discretion of the court in the matter, we are unable to concede that the question of discretion is in any way involved."

We think the court of appeals was in error in holding that the case of *Coombs v. Parish* concludes the question here presented, to wit, whether the district court had discretion in the matter. It does not appear from the record in that case that any facts were shown or relied on as an excuse for not issuing summons within the time prescribed; and no intimation is found in the opinion that, if there had been, the trial court could not have exercised discretion; and, furthermore, that decision was based upon the Code of 1877, which provided (section 29) that "civil actions * * * shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuing of a summons therein." By section 46 it is provided that, "from the time of the service of the summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceed-

ings." Therefore, that action had not been commenced. We find a very material change in the Code of 1887, section 32 providing that "civil actions shall be commenced by the filing of a complaint * * * or by the service of a summons." Section 44 provides, further, that "from the time of the filing of the complaint * * * the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings." Hence in the case at bar the court had acquired jurisdiction, and, by virtue of its general powers, had control of the proceedings; and it was clearly within its province to consider and weigh the evidence presented, and, in the exercise of a sound discretion, to grant or refuse the relief asked. If it satisfactorily appeared that plaintiffs had done all that was incumbent upon them to procure the issuance of the summons, and the omission to issue it was due to the oversight or neglect of the clerk, then they ought not to be prejudiced by such failure or neglect, under the well-settled principle that no person shall suffer from the nonfeasance of a public officer in the performance of his official duties. On the other hand, if it appeared that the failure to issue the summons was due to the neglect of plaintiffs, then they should suffer the penalty of such neglect. In *Dupuy v. Shear*, 29 Cal. 233, the leading case cited and relied on as sustaining the conclusion of this court in the *Coombs Case*, it is said: "If the court had any authority to direct a second summons to issue, it must be because, by filing the complaint and issuing a summons thereon, a suit had been commenced, within the meaning of the provisions of the practice act; and there was thenceforth a suit pending and within the control of the court, which the court, by virtue of its general powers over the subject-matter, was authorized to dispose of; and, as incident to this power, it was authorized to direct process to issue for the purpose of acquiring jurisdiction of the person. * * * Conceding this authority to exist, the exercise of the power rests in the sound legal discretion of the court." While we might not feel at liberty to interfere with the action of the court below in dismissing the case, had it done so, in the exercise of its discretion, we feel compelled to reverse its ruling, because it failed to exercise any discretion, but felt bound to dismiss the action under a mistaken notion of its power in the premises. The judgment of the court of appeals is accordingly reversed, with directions to reverse the judgment of the district court, and remand the cause for further proceedings. Reversed.

(21 Colo. 283)

STEVES et al. v. CARSON et al. (No. 3,137.)
(Supreme Court of Colorado. June 3, 1895.)

Error to court of appeals.

Action by Parker Steves and others against J. O. Carson and others. From a judgment of the

court of appeals (30 Pac. 1102) affirming a judgment of dismissal, plaintiffs bring error. Reversed.

Wilson & Stimson, for plaintiffs in error.

PER CURIAM. The record in this cause presents the same question involved in the preceding case (40 Pac. 569), and was submitted in connection therewith. For the reasons given in the opinion in that case, the judgment of the court of appeals is reversed, and the cause remanded. Reversed and remanded.

(21 Colo. 279)

WINTER v. GOEBNER.

(Supreme Court of Colorado. June 3, 1895.)

SPECIFIC PERFORMANCE—INDEFINITENESS OF CONTRACT—SUFFICIENCY OF CONSIDERATION.

1. A contract provided that defendant should bond a mining property for three years at a sum named and give a working lease on it for the same time, holding one-fifth interest in the net profits of the lease, the mines to be developed for sale, and ore to be shipped when convenient and profitable, defendant to be employed in the mines and profits to be divided. *Held*, that the agreement was too indefinite to sustain a decree for specific performance. 30 Pac. 51, affirmed.

2. A promise for a promise is not such a consideration as will support a decree of specific performance, nor does the presence of seals import such a consideration. 30 Pac. 51, affirmed.

Error to court of appeals.

Action by William J. Winter against Robert Goebner for the specific performance of a contract, and for damages for its breach. From an affirmance (30 Pac. 51) by the court of appeals of a judgment for defendant, plaintiff brings error. Affirmed.

T. E. Walters and J. M. Lomery, for plaintiff in error.

PER CURIAM. This case is brought here on a writ of error to a judgment of the court of appeals. The facts upon which the controversy arises are fully stated, and the law applicable thereto ably discussed, in the opinion of the court of appeals in *Winter v. Goebner*, 2 Colo. App. 259, 30 Pac. 51. We fully concur in the reasoning of the learned writer of that opinion, and the conclusion reached. The judgment is accordingly affirmed. Affirmed.

(21 Colo. 322)

JEROME v. BOHM.

(Supreme Court of Colorado. Feb. 8, 1895.)

REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE—PAROL TRUST—AGREEMENT AS TO LAND.

1. The rule, that where no exception is taken to the final judgment, the sufficiency of the evidence to sustain it will not be considered on appeal, is applicable to equity cases.

2. Plaintiff deeded to her son certain land under an oral agreement that he was to sell part thereof to discharge certain indebtedness thereon, and then reconvey to her one-third of the remaining portion. This agreement was to be reduced to writing by the grantee, but this was not done, and part of the lands were sold and the incumbrances discharged. *Held*, that plaintiff could maintain her suit upon the agreement, and establish the trust by parol evidence.

3. Testimony taken on a trial before a court not having jurisdiction of the subject-matter, but having jurisdiction of the parties and power to administer oaths, may be given in evidence on another trial of the same cause where the witness has in the meanwhile died.

4. Gen. St. 1883, § 3641, provides that no party shall testify of his own motion when the adverse party defends as executor, unless when called as a witness by such adverse party. *Held*, that plaintiff, after being called by defendant executor to prove the execution of a certain paper filed of record, was competent to testify in her own behalf for all purposes.

5. Where defendants on the trial introduced evidence to prove the defense of *res judicata*, and treated it as in issue, they cannot object for the first time on appeal that it was not traversed in the pleadings.

Appeal from district court, Arapahoe county.

Suit by Magdalena Bohm against John L. Jerome, executor, impleaded with another, to enforce a trust. From a judgment for plaintiff, defendant Jerome appeals. Affirmed.

This is a suit brought by Magdalena Bohm against John L. Jerome, executor of the last will of Mary Bohm, deceased, and others, to enforce a trust. For cause of action plaintiff alleges, *inter alia*: That on the 4th day of January, 1878, she was the owner in fee of the following described premises, situate in Arapahoe county, Colo., to wit, the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 14, township 4 S., of range 68 W. That this land was incumbered by certain deeds. "That at the date aforesaid, to wit, January 4, 1878, the plaintiff entered into a parol agreement with Charles Bohm, her son, now deceased, whereby the said Charles Bohm, in consideration of the conveyance to him of the premises aforesaid, agreed to take said property, and sell and dispose of such portions thereof as might be necessary to pay off said incumbrances, from time to time, as might be necessary for the protection of said property from sacrifice, and, when said indebtedness was fully paid off, to execute and deliver to the plaintiff a good and sufficient deed for the undivided one-third of such portions of said premises as might then remain undisposed of, and it was at the same time agreed between plaintiff and the said Charles Bohm that the said agreement should be reduced to writing and signed by said Charles Bohm, and delivered to the plaintiff, to evidence the trust of said Charles Bohm in the premises in favor of the plaintiff, but that no particular time was specified at which the same should be done, and the execution thereof was from time to time postponed until the time of his death, as hereinafter stated, and was never done. That, under and by virtue of the agreement aforesaid, the plaintiff did, on the 4th day of January, 1878, execute and deliver to the said Charles Bohm, a warranty deed to the said premises. That, as plaintiff is informed and believes, said incumbrances have now been fully paid off and discharged, and she is of right entitled to a conveyance of the undivided one-third of the remaining portion of said premises, as hereinafter more particularly described." That

Charles Bohm caused said premises to be platted into blocks, and on the 15th day of December, 1883, he conveyed to Mary Bohm, his wife, certain blocks. That Mary Bohm had full knowledge of the agreement between the plaintiff and Charles Bohm at the time of said conveyance, and the same were conveyed to her without any valuable consideration. That on the 17th day of April, 1885, Charles Bohm died. That on the 7th day of March, 1887, the said Mary Bohm died, leaving all her rights and interest in the property by will to her stepdaughter, Mary M. Bohm, the minor child of Charles Bohm. That the defendant, J. L. Jerome, is the executor of the will, and as said executor he sold and conveyed to Richard Cline certain of the blocks, and sold certain other blocks, for the sum of \$8,000, which amount is still in his hands. Defendant answered by general denial, and pleaded *res judicata* and the statute of limitations. Upon the trial of the cause, October 20, 1891, the court found the issues joined in favor of plaintiff, and against the defendant Jerome, as executor, etc., to the extent of one-third of the interest in the net proceeds derived from the sale of the property in controversy, and directed an accounting between said parties; to which finding of the court said defendant Jerome duly excepted. Afterwards, and on November 30, 1891, final decree was entered upon an accounting had by the court, wherein it was decreed that the plaintiff recover against the defendant Jerome, as executor of the estate of Mary Bohm, deceased, the sum of \$5,208.90, etc. The evidence produced by the parties upon the accounting is not preserved by a bill of exceptions, nor was any exception taken to the final decree. The defendant Jerome brings the case here on appeal.

Rogers & Stair and John L. Jerome, for appellant. Keller & Sales and Felker & Dayton, for appellee.

GODDARD, J. (after stating the facts). Many of the numerous errors assigned involve a review of the judgment upon the evidence. Under the well-established practice of this court, no exception having been saved to the final judgment, we are precluded from considering the testimony either as to its probative force to support the alleged trust, or its sufficiency to sustain the defense of *res judicata* or the statute of limitations. *Patton v. Manufacturing Co.*, 3 Colo. 265; *Bank v. McCaskill*, 16 Colo. 408, 26 Pac. 821; *Law v. Brinker*, 6 Colo. 555; *Hochmark v. Richler*, 16 Colo. 263, 26 Pac. 818; *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248; *Burnell v. Wachtel* (Colo. App.) 36 Pac. 887. The contention of counsel for appellant, that this rule is not applicable to equity cases, is answered by several decisions of this court. Among others, see *Mining Co. v. Kirtley*, 8 Colo. 108, 5 Pac. 649; *Blatchley v. Coles*, 6 Colo. 82; *Bank v. McCaskill*, *supra*.

It remains only to consider those assigna-

ments predicated upon exceptions, duly reserved upon the trial, to the admission of evidence, and we are enabled to do this only by indulging in perhaps the unwarrantable assumption that the evidence introduced upon the accounting, and not preserved by the bill of exceptions, could not, in its very nature, qualify or affect the evidence so admitted upon the trial of the main issues. These assignments of error challenge, first, the admissibility of any proof under the complaint, because the alleged trust was void under the statute of frauds. Over the objection of defendant, the deed of plaintiff to Charles Bohm, and other conveyances of title to the property in controversy, were introduced in evidence; and the testimony of Ferdinand Bohm, a deceased witness, given upon the trial of the suit in the superior court of Denver, between the testatrix Mary Bohm and the appellee Magdalena Bohm, was admitted, and Herman Bohm allowed to testify to the parol agreement alleged in the complaint. The admissibility of this evidence we do not regard as an open question. This court, in the case of *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790, in discussing the counterclaim filed in that case by Magdalena Bohm, the plaintiff here, and which stated in substance the trust set forth in her complaint herein, used the following language: "Where a person occupying a fiduciary relation to the owner of real estate takes advantage of the confidence reposed in him by virtue of such relation to acquire an absolute conveyance thereof, without consideration, through a verbal agreement, which he promises to reduce to writing,—as, for example, that the land conveyed to him is to be held in trust for some legitimate purpose,—a refusal, under such circumstances, to reduce the verbal agreement to writing, or to reconvey the land to the real owner, is such an abuse of confidence as to vest a court of equity with jurisdiction to inquire thoroughly into the entire transaction, and to set aside the conveyance, or administer other proper relief." Even if the doctrine thus announced is not to be taken as the "law of the case," we adopt it as a correct enunciation of the rule applicable to trusts of this character.

Second, the admissibility of the testimony of Ferdinand Bohm is further challenged because plaintiff, by averring in her replication, and contending upon the trial of this cause, that the superior court had no jurisdiction of the subject-matter of that suit, is estopped from claiming that the evidence of said witness was given under the sanctity of an oath. It by no means follows that, if the superior court was without jurisdiction of the subject-matter of the controversy in that suit, and without power to grant the ultimate relief sought (a question not presented by this record), that it also lacked the authority, having obtained jurisdiction of the parties, to compel the attendance of witness

es and to legally administer oaths for the purpose of elucidating the truth of the facts involved in the controversy, and upon which even its jurisdiction might depend, or that the evidence adduced was given *coram non iudice*, in the event the court should finally determine it had no jurisdiction to grant ultimate relief in the case. The testimony of this witness was taken under the sanctity of an oath lawfully administered, and we cannot perceive wherein appellee, by her replication or otherwise, controverts this fact. We think this contention is without merit.

The third and further objection presented by the record, is that the appellee was permitted to testify in her own behalf, the action being one wherein appellant defended in his representative capacity, as executor, etc. She was first called by defendant to prove the execution of a paper filed of record, giving notice of her claim to the property in question. She was then, over defendant's objection, allowed to testify in her own behalf. Our statute (section 3641, Gen. St. 1883) provides "that no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf * * * when any adverse party sues or defends * * * as executor * * *, unless when called as a witness by such adverse party, so suing or defending." It will be seen that the statute prohibits parties to an action from testifying, when the adverse party sues or defends in a representative capacity, of their own motion, or in their own behalf, unless called by the adverse party; but, when called as a witness by such party, the inhibition of the statute is removed, and they become competent to testify as fully as any other witness in the case. *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604. The court below, therefore, correctly held that defendant, by calling appellee as a witness in the first instance, made her a competent witness for all purposes. Our conclusion is that the record before us presents no reviewable error that justifies a reversal, and the judgment is accordingly affirmed. Affirmed.

On Rehearing.

(June 17, 1895.)

PER CURIAM. Upon rehearing it is urged that we erred in our former opinion in holding that, for want of an exception to the final decree, we were precluded from considering the sufficiency of the evidence to sustain the defense of *res judicata*, since that defense was not put in issue by the replication, and stood admitted upon the face of the pleadings; and hence it appeared upon the record proper that the court had no jurisdiction to render judgment in favor of appellee. We are not clearly satisfied that the plea of *res judicata* relied on conclusively shows an adjudication in the former suit of

the particular cause of action set forth in the complaint herein, and, under the view we take of the matter as now presented, it is unnecessary to determine that question. Appellant, upon the trial, and throughout the proceedings in the court below, treated this defense as though it had been controverted, introduced evidence in support thereof, and submitted the issue to be determined as one of fact. Having thus proceeded as though the matter was in issue, it is too late now to raise the objection for the first time that, in fact, this defense was not traversed. *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462. In that case the answer contained new matter that, if not traversed by the replication, entitled defendants to judgment; but, the defendants having submitted the cause to trial upon the evidence as though issue were joined, this court held that "by introducing evidence to prove the affirmative allegations of their answer they treated them as controverted and put in issue, and it is now too late to raise the specific point, for the first time, that there was no issue to try. The objection has clearly been waived." We think that upon the record before us we were correct in holding that the defense of *res. judicata* was determined upon the evidence introduced, and, no exception having been taken to the final decree, we are precluded from considering the sufficiency of that evidence, and therefore adhere to our former opinion.

(6 Colo. App. 284)

CALLAWAY, County Treasurer, v. DENVER & R. G. R. CO.

(Court of Appeals of Colorado. May 13, 1895.)

SCHOOL-DISTRICT BONDS — TAX FOR INTEREST — CHANGE OF DISTRICT BOUNDARIES—EFFECT.

In November, 1883, school district No. 1, for the purpose of building a schoolhouse, issued bonds payable 15 years after date. In December, districts Nos. 3 and 17 were carved out of District No. 1. Afterwards, and previous to January, 1892, defendant company secured a right of way upon lands of the United States, and constructed a railroad, part of which was in districts Nos. 1 and 17. For the year 1892 a tax was levied on defendant's railroad for interest on and for a sinking fund to pay the bonds. *Held*, that defendant was not liable under Gen. St. § 3090, providing that if there shall be any change of lines of a school district so as to leave any portion of the taxable real estate of the district out of the district, "which was subject to taxation at the time of the issue of the bonds," such real estate shall not be released, and shall be assessed to pay the interest and principal of such bonds as if it were still within the district.

Error to district court, Montrose county.

Action by D. A. Callaway, county treasurer, against the Denver & Rio Grande Railroad Company to collect a school tax. From a judgment sustaining a demurrer and dismissing the action, plaintiff brings error. *Affirmed*.

This suit was brought by plaintiff in error as county treasurer to collect a school tax of \$60.91, for the use of school district No. 1,

in Montrose county. It is alleged in the complaint that in November, 1883, school district No. 1 legally issued bonds for \$8,000, with interest at 10 per cent., payable 15 years from date, for the purpose of erecting a schoolhouse; that the bonds remained unpaid with the exception of \$2,000; that, at the time of the issuing of the bonds, the territory afterwards organized as school districts Nos. 3 and 17 formed a part of school district No. 1. When the territory was set off, and the new districts formed, is stated to have been December 21, 1883. After the date of the separation, and previous to January 1, 1892, the defendant entered upon public land of the United States, secured a right of way under the acts of congress, and constructed a railroad, of which 10 miles or more was in school districts Nos. 3 and 17. For the year 1892 a tax of three-fourths of a mill was levied for interest on the bonds, and one-half of a mill for a sinking fund to pay such bonds. The question is in regard to the tax upon the property of the defendant in school districts Nos. 3 and 17, for the bonds originally issued in school district No. 1. A general demurrer was filed to the complaint, that the facts stated did not constitute a cause of action. Upon argument the demurrer was sustained. Plaintiff stood by his complaint, and a judgment was entered dismissing the action.

John Gray, F. D. Catlin, and H. T. Sale, for plaintiff in error. Wolcott & Valle and W. W. Field, for defendant in error.

REED, P. J. (after stating the facts). But one question is presented by the record,—whether or not property that had no existence at the time of the making of the bonds, and not until some years after the territory had been set off, and school districts Nos. 3 and 17 formed, could be taxed for the payment of the bonds. The bonded indebtedness was created in 1883,—in the same year the new school districts were formed. The land remained the property of the United States until appropriated and improved by the defendant. Until such entry and improvement, the land was not taxable, and the property of defendants not in existence. By the general school law of 1883 (Gen. St. §§ 3022, 3023) provision is made for the creation of new school districts, and the division of existing districts to create such new ones. The regularity of the proceedings in creating the new districts in this case and the proper corporate existence of districts Nos. 3 and 17 are unchallenged. Section 3090, Gen. St. (section 4062, Mills' Ann. St.), is as follows: "No change in the boundary line of such school district shall release the taxable real estate of the district from assessment and levy of taxes to pay the interest and principal of such bonds, and if there shall be any change of the lines of such school district, so as to leave any portion of

the taxable real estate of the district out of the district, which was subject to taxation in the district at the time of the issue of such bonds, the assessment and levy for principal and interest of such bonds shall be made on such property as if it were still within the district, and if there shall be any change of the lines of such school district, so as to annex any taxable real estate, after the issue of such bonds, the real estate so annexed shall thereafter be subject to the assessment and levy for principal and interest of such bonds." This is the only statutory provision on the subject that I can find, and upon the construction the decision must depend. The language seems so clear and unmistakable that, were it not for the ingenious argument of counsel, no construction would seem necessary or possible. The first part of the section seems to clearly limit it to the taxable real estate existing within the boundaries of the original district at the time of the creation of the bonded indebtedness. If any doubt existed in regard to the construction of the first part of the section, it would seem to be entirely removed by what follows. The language is clear and explicit: If by the changing of the lines, any portion of the taxable real estate out of the district "which was subject to taxation in the district at the time of the issue of such bonds," etc.; clearly limiting the property to be taxed to the real estate subject to taxation within the territorial limits at the time of the creation of the debt, but subsequently cut off and embraced in the new district. If the section is not conclusive, it must be by reason of some conflict with constitutional provisions rendering it inoperative, and not by reason of any indefiniteness of the language used.

Two or three times in the course of argument for plaintiff, attention is called to what counsel designates as "annotation" of the statute, referring to the "catch words" at the head of the section in *Mills' Statutes*. They are: "Change of Boundaries Does not Release Property." Counsel seems to be laboring under the misapprehension that they are a part of the statute, and should control the construction; and they are no more a part of the statute than the general index, and are placed there by the compiler for convenience.

It is urged that the construction put upon the section of the statute by the court renders it in conflict with article 10, § 3, and article 10, § 10, of the constitution. The former is that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. The latter: "All corporations in this state shall be subject to taxation for school purposes on the real and personal property owned, and used by them within the territorial limits of the authority levying the tax." I cannot see what application either provision has to the question under discussion;

there is no charge of discrimination either in favor of or against the corporation, and in both the latter clause takes the present tax out of the constitutional provisions. It is alleged in the complaint that the property is in school districts 3 and 17, and that the assessed tax is for the benefit of No. 1. The right of a school district to tax is a local right, confined to the territorial limits of the district, and by both sections of the constitution the right is restricted to the authority within the territorial limits. Hence, unless by operation of law extending the right of taxation outside of the school district, and giving it extraterritorial rights, the provisions of the constitution would prohibit the authorities of school district No. 1 from exercising any such right in the other districts. Whether or not the statute in question is inoperative and void by reason of conflict with the constitution by attempting to extend the authority to tax property beyond the territorial limits of its authority is a question not involved, and upon which I express no opinion. If void, that would end the case, as the only right to exercise extraterritorial authority must be derived from the statute. But the statute, being in derogation of the general law, and extending the right to tax only under certain circumstances and conditions, must be strictly construed, and limited to the property embraced in it.

The argument in regard to uniformity of taxation and possible double taxation is one that works both ways, and might defeat the right contended for. The right of a school district to impose taxes within its boundaries is unquestioned. If the right were exercised, and at the same time an adjoining school district imposed a tax upon the same property, the question might be presented which was valid or whether both were, determined. Good reasons for holding the statute valid, and also for restricting its operations, specifically, to the property mentioned in it, are not wanting. At the time of the creation of the bonded indebtedness, the right to tax the entire taxable real property of the district for the payment of interest and principal was undoubted, and parties taking the bonds had a right to rely upon such income for payment. Upon that basis and on that security the parties contracted. To diminish the security would be unjustifiable. To increase it by adding property in expectancy would have been an act of gratuitous generosity. The settlement, progress, and development of a new country, and the necessity of increased educational facilities, were wisely anticipated by the legislature; hence the provision for the division of old districts and the creation of new ones. When the new was formed from the old, the new took any taxable real estate within its boundaries, subject to the liens existing; while for its own purposes and revenue it had to rely upon the taxable real property created subsequent to the crea-

tion of the bonded debt. To extend the right of taxation of the original district to after-created property in the new district, or to relieve the new district from legal burdens imposed before its creation, would be equally unjust and inequitable.

It is insisted in argument, at some length, that the property in question was liable to the tax because it had not been specially exempted by statute. It is said, "A statute exempting property from taxation must be explicit," and several authorities are cited in support of the proposition. There is no question in regard to the correctness of the proposition or the numerous authorities asserting it, but I am at a loss to see how they are applicable to this case. The property has never been, by legislative enactment or otherwise, exempted from taxation. The question is not whether it shall be taxed, but where; and it is clear that no exemption is necessary to prevent property in one school district from being taxed in another. The question is one of authority, not exemption. If followed to its logical conclusion, the contention is that all taxable real estate made taxable after the debt was created, or hereafter made taxable, in school districts Nos. 3 and 17, was taxable for a debt created for the building of a schoolhouse in school district No. 1, until the debt should be discharged; making its neighbors pay its debts while it retained the benefits of its proceeds. After careful examination of all the authorities cited, I can find none sustaining the position assumed.

My conclusion is that the statute in question must be strictly construed, and that the right to tax for the bonded indebtedness must be limited to the real estate which was taxable as such at the time the bonded indebtedness was contracted; that it had no prospective operation; that land at the time belonging to United States was exempt from taxation, and not taxable real estate at the time the debt was created; and that parties who subsequently acquired the title took it free from any liability incurred by reason of the debt. The judgment sustaining the demurrer and dismissing the action will be affirmed. Affirmed.

(6 Colo. App. 224)

EVERSMAN et al. v. CLEMONS.

(Court of Appeals of Colorado. May 13, 1895.)

ATTACHMENT — CLAIM BY INTERVENER — BONA FIDES OF SALE — EVIDENCE — PREFERENCE BY INSOLVENT.

1. Plaintiffs attached a stock of goods as defendant's, which were in possession of and claimed by intervener under a bill of sale from defendant, made before the attachment. The inventory of sale to intervener contained fewer articles, and was considerably less in amount, than the sheriff's inventory in attachment. *Held*, that plaintiffs were entitled to their attachment lien on the goods not included in the sale to intervener.

2. Defendant sold his stock of goods to inter-

venor, leased the store room, and delivered the keys and possession to him. *Held*, that intervener was given exclusive possession of the goods sold.

3. Fraud will not be presumed, but, being largely a question of intention, may be deduced from acts incompatible with honesty.

4. Whether an assignment is fraudulent as to creditors is a question of intention, to be determined from all the attending circumstances.

5. An insolvent, in disposing of the property under his control, may legally prefer one creditor to another if he acts in good faith.

Appeal from district court, Pitkin county.

Action aided by attachment by J. G. Eversman and others against John A. Richie for goods sold. Anthony Clemons intervened, claiming to be the owner, and had judgment. Plaintiffs appeal. Reversed.

C. R. Bell, for appellants.

REED, P. J. Appellants (plaintiffs below) brought suit by attachment in the county court against one John A. Richie, a baker and retail grocer in the city of Aspen, to recover \$108.07 for goods sold and delivered. The attachment was levied upon the stock on the 11th of December, 1893. Appellee was a baker, and had been employed by Richie for nearly a year. Richie owed him, as shown by the testimony, for such labor, \$369.55, and, being unable to pay, proposed to sell him the stock of goods. On the 8th and 9th of December what was claimed to be an inventory was taken, a schedule made, and the goods transferred by a bill of sale. The rooms in which the business was carried on and fixtures were leased to intervener for three months, and on the evening of the 9th keys and possession were delivered. On the night of the 10th, a sign, with the name of the intervener as successor to Richie, was placed upon the building. The day following, the attachment was levied upon the stock as the property of Richie. The stock inventoried, purporting to be the entire stock, amounted to a trifle over \$400, which, after paying wages (\$369.55), left a balance of \$31.55, for which appellee gave a note. Appellee intervened in the suit, claiming to be the owner. There is no record of the proceeding in the county court, nor statement of result, but appellee appears, inferentially, to have taken an appeal to the district court, where a trial was had, resulting in a verdict as follows: "We, the jury, find the issue joined in favor of Anton Clements, Intervener." Judgment was rendered that appellee "was the owner of the goods and entitled to the possession of the property described in his petition" and for costs. From such judgment an appeal was prosecuted to this court.

Several errors are assigned, the first four being those supposed to have occurred upon the introduction of evidence. They were so unimportant that they could not have materially influenced the result, and will not be further regarded. Eight following are to the instructions of the court, and the balance general. The jury was exhaustively

charged. Twelve elaborate instructions were given at the request of respective counsel. No serious errors appear in them, and they are undoubtedly the law of the case, so far as they are applicable to the facts proved. The view of the case by the court, and evidently of counsel, is peculiar. One important factor in arriving at a result appears to have been entirely overlooked upon the trial and in appellants' argument. The title of intervener to some \$400 of stock, inventoried, scheduled, and covered by a bill of sale, appears to have been sufficiently well established, and sufficient possession to have been given, to warrant the finding of the jury. The testimony in regard to it was not contradicted or the credibility of the parties testifying attacked. The finding of the facts was the business of the jury, and where, as in this case, the facts were controverted, such findings are conclusive.

But another important fact was also established,—that the sale of Richie did not embrace the entire stock. The officer who levied the writ made an inventory of the goods taken by him, which schedule was put in evidence, and competent evidence of the value given, by which it appears that much of the stock was not embraced in the sale to the intervener. The sale to him embraced 123 enumerated articles, the inventory of the sheriff 220 articles. The purchased articles of intervener amounted to \$401, for which he paid. The value of the entire stock attached was fixed at \$684.76, showing the value of the goods not embraced to have been \$283.76. The court, counsel, and jury seem to have regarded the transaction of necessity as an entirety, where the finding must be for either the attaching creditors or the intervener for the entire stock. The charges to the jury embraced the whole stock. Neither counsel nor court called the attention of the jury to the fact that the intervener could only assert title to the specific articles bought, and to the value of \$401. Why it was not done, the goods separated, and the claim of appellants of \$108 enforced against the excess, is not explained. As it was, the jury gave the verdict, and the court judgment, for \$280 worth of goods he had neither bought nor paid for. For this error the judgment must be reversed.

As there must be a new trial, I will briefly refer to the positions taken in argument by counsel for appellants, appellee not being represented. It is contended that there was no proper and legal change of possession. The change of possession, and whether exclusive possession was given, was a question of fact to be determined by the jury. The question was submitted under proper instructions, and found for the intervener. Several authorities are cited in support of the proposition that the possession must be exclusive, and that a concurrent or joint possession is not permissible. As far as shown by the evidence, the goods sold were

delivered, and the vendee was invested with absolute and exclusive possession. It is urged in argument that the sale was collusive and fraudulent as against creditors, but there was no evidence to establish fraud or collusion. Fraud cannot be inferred or implied, but must be established, like any other fact, by competent evidence. It is true that to a great extent fraud is a question of intention, and that fraud is to be deduced from the acts incompatible with honesty. Any assignment of property for the purpose of hindering, delaying, or defeating creditors is fraudulent; any transfer to put the property beyond reach of creditors or to reserve benefits to himself is fraudulent; hence the question is one of intention, which must be determined from all the circumstances. *Otley v. Manning*, 9 East, 64; *Waite, Fraud*, Conv. 22; *Pettibone v. Stevens*, 15 Conn. 26; *Sturtevant v. Ballard*, 9 Johns. 342; *Lloyd v. Fulton*, 91 U. S. 485; *Humes v. Scruggs*, 94 U. S. 22; *Hunter v. Ferguson*, 3 Colo. App. 287, 33 Pac. 82.

One legal proposition as stated by counsel is incorrect and restrictive. It is, in effect, that only a perfectly solvent party can control and make a valid sale of property. The law is the same whether the vendor is solvent or insolvent. So long as a debtor retains control of his property he can legally prefer one creditor to another. If insolvent, he can pay to one his entire indebtedness, to another nothing, and such discrimination is legal. It is only a question of bona fides of the transaction. In this case, as shown by the evidence, and unchallenged, the intervener had worked for Richie until he had due him \$369. Self-preservation is the first law of nature. He became afraid of losing the debt; urged payment. Richie was unable to pay except by a transfer of goods, and, although other creditors may have suffered or been delayed, he had a legal right to receive full payment, and, if discrimination was a necessity, it was worthily exercised in favor of the man who earned it by honest, continued labor. The judgment will be reversed, and a new trial ordered. Reversed.

(6 Colo. App. 165)

JOHNSON v. PEOPLE.¹

(Court of Appeals of Colorado. April 8, 1895.)

CONSTITUTIONAL LAW—UNIFORMITY OF LAWS AND PENALTIES—DELEGATION OF POWERS TO CITIES.

1. The provision of an act amending a city charter, that, within the city, the laws of the state, as to Sunday closing of saloons, shall be in force, is not violative of Const. art. 6, § 28, providing that all laws relating to courts shall be general and of uniform operation throughout the state, though other cities, by their charters, had been given exclusive power to regulate such matters by ordinance.

2. An act, general in its provisions, as to Sunday closing of saloons, is not violative of any constitutional provision as to uniformity of penalty for the same offense because a less penalty

¹ Rehearing denied June 10, 1895.

is provided by ordinance in those cities which, by their charters, have been given exclusive power to regulate Sunday closing.

Error to district court, Arapahoe county.

Charles Johnson was convicted of a violation of the Sunday-closing law, and brings error. Affirmed.

H. B. O'Reilly, for plaintiff in error. The Attorney General, for the People.

REED, P. J. On December 5, 1892, the prosecuting attorney filed in the district court an information charging plaintiff in error with having kept open a saloon for the sale of liquors on the Sabbath day, in the county of Arapahoe, in this state. A trial was had, resulting in a conviction and sentence to pay a fine of \$100, and to stand committed until the fine was paid. The finding as to the facts and the guilt of the party are not questioned.

Counsel for plaintiff in error says, in argument, "the record presents numerous and highly-important questions of constitutional law," but, as nearly all of them had been decided by the supreme court, the contention would be confined to the last plea to the jurisdiction, which is as follows: "The saloon referred to is within the corporate limits of the city of Denver, Arapahoe county, Colorado. At the time the offense is charged to have been committed, said city of Denver had accepted the powers conferred upon it, under its charter, with reference to dramshops and the closing of saloons on the Sabbath day, and had enacted an ordinance in conformity with the powers so conferred and limited, which was at the time in full force and effect. It was not in the power of the legislature to provide in the charter of said city that the general laws of the state concerning the closing of saloons on Sunday should be in force in said city, forasmuch as, in the charter of every other municipality in the state, it is expressly provided that the jurisdiction of the municipal authorities with reference to these matters shall be exclusive, that the only means of regulating the liquor traffic shall be by ordinance, and that under such ordinance alone can offenders be prosecuted and punished. It was beyond the power of the legislature to provide that, for keeping a saloon open upon the Sabbath day in the city of Denver, one may be fined \$500, and imprisoned 18 months. In addition to what penalties may be imposed under the ordinances of the city, whereas, in every other municipality in the state, the utmost limit of punishment is 90 days' imprisonment, with absolute immunity from prosecution or punishment under the laws of the state." The second paragraph of the plea sets up the fact that, by virtue of the grant of power delegated to the municipality, the city had passed an ordinance with reference to dramshops and the closing of saloons on Sunday, which was in full force and effect at the time of the conviction. It is inferable from the third paragraph that by the charter the sole and ex-

clusive jurisdiction over the subject-matter was delegated to the city, and that the legislature was without power to continue the general laws of the state upon the same subject in force after granting the charter; and the reason given is that in granting charters to other municipalities no such reservation had been made, hence the law was unconstitutional. The fourth paragraph is more in the line of reasoning or argument against the justice of the law, by reason of the penalties for violation being much greater under the state law than those imposed by municipal ordinances in other cities of the state, and its excessive character is shown by comparison with the ordinances of such cities. The only question presented seems to be the constitutionality of the act of 1891, p. 79, § 7. The balance, in regard to the punishment, and the supposed discrimination against the people of the city of Denver, might with greater propriety be addressed to the legislature than to the court. If the granting of exclusive control of the subject to other municipalities, and retaining state control in the city of Denver, was beyond legislative power, by reason of conflict and discrimination, the question arises whether the charters of other cities are void by reason of the exclusive control given, or the charter of the city of Denver is unconstitutional by reason of the withholding of exclusive control. If the latter, then the city charter, and not the general law of the state, would be declared void and inoperative, and the general law would remain operative and in full effect. I can readily understand how, under an ordinance of the city, the validity of the ordinance may be questioned in regard to powers conferred and reserved; but I cannot understand how the general law, and its constitutionality, can be brought in question in this case because of the rights reserved to the state. This was a proceeding under state law, in which no city ordinance was involved. The plea that another court might have concurrent jurisdiction, had the case been brought there, would not oust the jurisdiction of the state court, and the failure of the legislature to delegate all its authority could not abrogate or impair the general law. Consequently, if there was an inherent invalidity, it was in the charter, and could only be raised in the construction of the powers of the city under it. It is elementary, if not axiomatic, that the general law of a state cannot become void, unconstitutional, or inoperative by a failure to delegate all its authority to a municipal corporation. Had the exclusive power of control been delegated, such fact might be pleaded to oust the jurisdiction of the state court; but, when the contention is that by a failure to delegate it the state courts are deprived of jurisdiction, it appears to be wrong end first.

A brief statement of the general law defining the relations that exist between a state and municipality may simplify, and aid in the solution of, the question presented: There is no contractual relation exist-

ing between a state and a municipality. "They are merely government institutions created by law for the administration of the public affairs of the community." Dill. Mun. Corp. §§ 3, 19-24; 1 Mor. Priv. Corp. § 3; Dartmouth College v. Woodward, 4 Wheat. 518; Bonaparte v. Railroad Co., 1 Baldw. 205, Fed. Cas. No. 1,617; Ten Eyck v. Canal Co., 18 N. J. Law, 200: "Legislative acts respecting the political and governmental powers of municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure, when the constitutional rights of creditors and others are not invaded." Dill. Mun. Corp. §§ 63, 64. "The power of the legislature to alter and abolish municipal corporations, to erect new corporations in the place of the old, to add to the old, or to carve out of the old a new corporation," etc., and general power over the corporation, is admitted by all, as a proper exercise of state sovereignty. Legislative authority over municipal corporations is supreme, except when limited by the constitution. Id. § 65. In Ang. & A. Corp. § 31, it is said: "The legislature, as the trustee or guardian of the public interest, has the exclusive and unrestrained control; and, acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends, or the public interest will be best subserved. The right to establish, alter, or abolish such corporation seems to be a principle inherent in the very nature of the institutions themselves, since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. Such institutions are the auxiliaries of the government in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature, because there can be no reciprocity of stipulation, and because their objects and duties are incompatible with everything of the nature of contract." See, also, McKim v. Odom, 3 Bland, 417; Berlin v. Gorham, 34 N. H. 266; Robertson v. City of Rockford, 21 Ill. 451; People v. Wren, 4 Scam. 273; Sloan v. State, 8 Blackf. 361; Girard v. Philadelphia, 7 Wall. 1; Barnes v. District of Columbia, 91 U. S. 540. In People v. Hall, 8 Colo. 497, 9 Pac. 34, it was said: "The general assembly is omnipotent as to municipal corporations in this state, except as limited or controlled by the constitution. It calls them into being, and endows them with whatever powers and privileges they possess, and may at any time absolutely end them." The power to create municipal corporations by special charters is clearly given by the constitution, in article 15, § 2; and absolute control over them, extending to the right to alter, revoke, or annul any charter, is given by article 15, § 3. What powers may be

granted, and what withheld, and what restrictions shall be imposed in the exercise of the powers granted, are clearly within legislative control, and the right to limit and circumscribe granted powers by repeal of former grants is unquestionably with the legislature. When the sale of intoxicating liquors is not prohibited by the constitution, the legislature may confer upon a municipality exclusive power to regulate and license the traffic. Huffsmitth v. People, 8 Colo. 175, 6 Pac. 157; State v. Andrews, 11 Neb. 523, 10 N. W. 410; Bennett v. People, 30 Ill. 389; Village of Coulterville v. Gillen, 72 Ill. 599. "But general laws relating to the subject are not impliedly repealed by statutory or charter provisions enabling a municipal corporation to pass ordinances regulating the business." 2 Beach, Pub. Corp. § 1264; Gardner v. People, 20 Ill. 430; Loeb v. City of Attica, 82 Ind. 175; Town of New Hampton v. Conroy, 56 Iowa, 498, 9 N. W. 417. In article 6, § 11, of the constitution, it is declared, "The district court shall have original jurisdiction of all causes both at law and equity and such appellate jurisdiction as may be conferred by law." Whether or not the legislature can delegate the constitutional power and functions by it conferred upon the district court, and provide that an inferior municipal court shall be invested with exclusive jurisdiction, to the exclusion of the district court, is a question that we are not called upon to determine; but we are satisfied that a failure or refusal of the legislature to divest that court of its general jurisdiction, and confer it exclusively upon another court, violates no constitutional provision, and that all grants to a municipal corporation are to be strictly construed, and that general laws prevail, unless abrogated by specific and exclusive grants of power to the corporation. It follows that the reservation or restriction upon exclusive jurisdiction of the municipal corporation by the amendment of the charter in 1891, that "all laws of the state concerning Sunday closing shall be in force in said city," was not a violation of the constitution, but a specific reservation of the power not delegated to the municipality.

It is urged that it violated article 6, § 28, of the constitution, which declares "that all laws relating to courts shall be general and of uniform operation through the state." The law under which the appellant was tried and convicted was the general law of the state,—the penalty the same, and the method of procedure the same, throughout the entire state,—unless, as claimed, in certain localities exclusive jurisdiction had been delegated to municipal authorities. There is much force in the argument that the penalty for the same offense is not uniform, but if, as claimed, certain municipalities have made the penalty less than that of the general law, the

trouble is with the city ordinances, and the fact that they have made a lighter penalty could not affect the validity of the general law. Uniformity of penalty for the same offense seems to have been contemplated by the constitution, and should prevail, but the result could only be attained by legislation. Courts are powerless, unless the result could be achieved by declaring all ordinances, where the penalty was less than the laws of the state, invalid and unconstitutional. Those convicted under ordinances where the penalty is lighter would hardly set up the inequality. The only question presented being that raised by the plea, and the only contention that the act of 1891 was unconstitutional, by reason of the reservation of jurisdiction to the state courts, the judgment will be affirmed. Affirmed.

(6 Colo. App. 294)

KOLL v. BUSH et al.

(Court of Appeals of Colorado. May 13, 1895.)

FORMER APPEAL—RES JUDICATA—PLEADING—INCONSISTENT DEFENSES.

1. On appeal in an action by a discharged employé to recover for the unexpired term under a contract to render "satisfactory service," a judgment for plaintiff was reversed on the ground that his employers were the sole judges whether the services were satisfactory. *Held*, that on a new trial, where the evidence was the same, it was proper to direct a verdict for defendants.

2. In an action by a servant to recover for the unexpired term under a contract to render satisfactory services, the fact that defendant alleged that plaintiff was not discharged, as alleged, but quit the service voluntarily, did not preclude him from also asserting as a defense that the services were unsatisfactory.

Error to district court, Arapahoe county.

Action by John Koll against William H. Bush and W. S. Morse, doing business as Bush & Morse. There was a judgment for defendants, and plaintiff brings error. Affirmed.

This suit was before this court on a former occasion. See *Bush v. Koll*, 2 Colo. App. 48, 29 Pac. 919. Reference will here be made to that case for a statement of the facts. Upon the first trial, plaintiff got judgment for \$413.83. An appeal was taken to this court, where the judgment was reversed, and cause remanded. When called for the second trial, counsel for defendant moved the court for a judgment for the defendants; that, under the decision of the court, there was no question to be tried.

The Court (Rising, J.): "I have examined the decision of the court of appeals, governing this case, very carefully, and, if the evidence of the defendants should be the same as it was at the former trial, I should take the case from the jury, no matter what the plaintiff's evidence may be. Under the decision, the defendants' testimony is conclusive on the question as to whether the plaintiff's services were satisfactory to them or not."

Mr. Dunklee, counsel for the plaintiff:

"We have an additional witness that corroborates the plaintiff, Mr. Koll,—William Youtz,—who was present when Koll was discharged, and who will testify practically as Mr. Koll did, that the defendants were satisfied with plaintiff's services, and that Mr. Bush expressed himself so after the discharge, as testified to by Mr. Koll at the former trial."

The Court: "It would not make any difference if there were fifty witnesses to the same effect."

Mr. Dunklee: "I make the further objection that the question as to whether the defendants were dissatisfied with the plaintiff's services or not is not raised by the answer. That question is not in issue. They deny that they discharged the plaintiff, and allege that plaintiff voluntarily and of his own accord quit the employ of defendants, and refused to continue therein."

In order to get the matter properly before the court, the following stipulation was filed: "It is hereby stipulated by the respective parties that the evidence on the part of the plaintiff would be the same as at the former trial, as contained in bill of exceptions on file in the court of appeals, with additional evidence of William Youtz, which it is stipulated would be the same as plaintiff's; and it is further stipulated that the evidence of the defendants would be the same as at the former trial."

By the Court: "In view of the decision of the court of appeals, there is nothing to be submitted to a jury under the stipulation that evidence would be the same as at the former trial, and the additional evidence offered by the plaintiff could not change the result. If the evidence was in, and before the jury, I should direct a verdict for the defendants; consequently I will enter judgment for the defendants the same as directing a verdict."

"Now comes the plaintiff in error in the above-entitled action, and respectfully alleges to the court that there is manifest error in the record and proceedings aforesaid in this, to wit: that the judgment of the court is against the law."

Geo. F. Dunklee and O. E. Jackson, for plaintiff in error. Teller, Oranhood & Morgan, for defendants in error.

REED, P. J. (after stating the facts). No new factor or element was brought into the case by the new trial. The court regarded the decision of this court as conclusive upon the evidence introduced upon the first trial. There was no new evidence. It was stipulated that the evidence of William Youtz, a new witness for plaintiff, would be the same as plaintiff's. Such stipulations are to be discouraged, as being too vague and indefinite. There was much in plaintiff's testimony that others could know nothing about, but it must be presumed that the witness would testify the same in regard to the facts

and circumstances attending the quitting of the employment by the plaintiff. The evidence was conflicting and contradictory,—that of the plaintiff that he was arbitrarily discharged; that of the defendant that he left voluntarily, and that his conduct and service had not been satisfactory, and, failing to reform it, he was discharged. In my view of the case, it was immaterial which was the fact. For the purposes of this decision, as in the former case, the contention of the plaintiff that he was discharged will be adopted. The first contention of plaintiff's counsel is that under the answer as made there was no issue in regard to the satisfactory character of plaintiff's services. The allegations in the complaint are: "That on the 20th day of August, 1888, the plaintiff entered the service of the defendants under the said contract, and served until the time hereafter mentioned, discharging all of his said duties faithfully, and performing all the terms and conditions of said contract on his part, and was willing and ready to continue in such service, and comply with all the conditions of said contract, during all the time mentioned in said contract. That on the 9th day of February, 1889, although the plaintiff was ready and willing to remain in said service, and perform all of the conditions of said contract, for the remainder of said term, the defendants refused to suffer the plaintiff to continue in their employ, or perform the conditions of said contract, and wrongfully discharged the plaintiff therefrom, without any reasonable cause whatever, and have thence hitherto refused to employ the plaintiff for the remainder of said term." Disregarding the allegations in the answer in regard to plaintiff's having voluntarily quit the employment, we come to the following: "Deny that plaintiff rendered good or satisfactory service, as in said complaint stated, and, on the contrary, allege that he did not render good service, and that the same was not satisfactory;" which clearly forms an issue with the paragraphs of the complaint stated. Counsel seems to labor under the misapprehension that, defendants having alleged that plaintiff was not discharged, but quit voluntarily, they were precluded from setting up any defense or contesting the demand upon other grounds. Such is not the law of pleading under the Code. Several seeming antagonistic and contradictory defenses may be pleaded. They may be new matter, not responsive to any allegations in the complaint; matters which at common law were considered "in avoidance," and, if not replied to, would be taken as confessed. One fundamental fact appears to have been overlooked: Plaintiff declared upon the contract, and set it out in *haec verba* in his complaint as a basis of recovery. He alleged full compliance, and could only recover upon full proof of it. The defendants alleged noncompliance and failure to perform it. The issue of whether plaintiff quit voluntarily or was discharged was not

the only or controlling issue. The evidence upon that point was conflicting, contradictory; but, admitting that he was discharged, as the jury evidently found, then the right to discharge would control, and that would entirely depend upon the legal construction of the contract. The instruction which was claimed to have been erroneous appears to be the correct construction warranted by the wording of the document, and well sustained by authority. It was: "The court instructs you that under the contract in evidence in this case the plaintiff contracted to render satisfactory service to defendants, and the defendants had the right to discharge the plaintiff at any time when the service of the plaintiff was not satisfactory to them; but to entitle defendants to discharge plaintiff on that ground, the claim made by them that such services were not satisfactory must be made in good faith,—that is, the defendants must have been really dissatisfied with the service of the plaintiff to authorize his discharge upon that ground. And if you believe from the evidence that the defendants discharged the plaintiff because they were really dissatisfied with the services in the line of his employment, then you must find for the defendants, and it is not necessary that the defendants should have any cause for such dissatisfaction; but if you believe from the evidence that defendants were not really dissatisfied with the service of the plaintiff in the line of his employment, and that such claim is not made in good faith, then defendants were not authorized to discharge the plaintiff on that ground." It appears to have been entirely disregarded by the jury, for, taking all the testimony,—that of both plaintiff and defendants,—and it establishes the fact that under the existing circumstances, and as they had for some time existed, the performance of the duties and services could not be satisfactory to either party by reason of continued jarring and friction, while the proper prosecution of the business of defendants was so intimately dependent upon the chief cook and his subordinates, employed by him, that any want of harmony or laxity of discipline was of necessity destructive of business. The evidence clearly shows that up to the time the gas range was put in the work of plaintiff was satisfactory. After it was put in there was revolt, and attempt to compel removal; and the fact must be remembered that plaintiff was responsible for the entire management; hired and discharged subordinates, and, following his lead, the whole troop made war upon the gas range. The evidence of plaintiff is subject to grave criticism. In regard to what occurred between Bush and himself he says: "Bush said: 'You get your money and get out. * * * Get out of this place. Pack up your things, and get out of here.'" He afterwards testified, "He said: 'Well, John, you need not consider yourself discharged,'" but he went. Mr. Bush testified: "I found the

dinner all ready, and, the hour for serving the dinner having arrived, and everything off the gas range and on the steam tables for serving, I found the gas, as usual, turned on at full head. I walked around, and turned it off, and said in a very quiet way: 'John, I don't want you to use this gas except when you have use for it. Don't have it turned on in this way. I have been to Chicago and other places, and seen them work these, and I know all about it. I know I ought to be able to tell you.' He said, 'If you know so damned much about it, you don't need my services.' I said, 'No, sir; I don't,' and walked out of the kitchen. That was everything that passed between Koll and myself." There is one significant fact in connection with what occurred. Plaintiff testified: "Bush said: 'Pack up your things, and get out of here.' I says, 'All right,' and then, at that time, the cooks jumped up that were eating their lunch, and they said, if I was discharged they would quit with me." Plaintiff claimed that the issue was whether plaintiff had quit or had been discharged, and yet not one of the entire corps of cooks who were present at the time was called to substantiate plaintiff's testimony. The only witness called to support plaintiff was Joseph Holstein, and he testified in a vague and indefinite manner as to what he had heard, and was not present at the altercation. Defendants testified that one means used to compel the abandonment of the gas range was the unnecessary and wasteful use of gas, and at the time of the trouble Bush testified it was on in full force, and he shut it off. This is undisputed, and plaintiff said, "I remember now that dinner was ready right then. With the exception of a little seasoning of different dishes, everything was ready." He also testified that as fast as cooking was completed the dishes were taken off the range, and placed on a steam chest; consequently, at the time, it was a useless burning of gas. It will be observed that upon the original trial the entire case rested upon the uncorroborated testimony of plaintiff, contradicted by Bush, and in important matters by Morse.

In construing the contract it is elaborately urged that the clause of the contract, "The said party of the second part agrees to give his entire time and attention to the business for which he is employed, and to render good and satisfactory service," is meaningless, or means something else. The language is clear and unequivocal. It was an *ex parte* agreement on the part of the plaintiff that his services should be satisfactory. To whom, if not to his employers? No other tribunal was provided for to show, as is argued, that it should have been satisfactory. The business would not admit of delay while the question was submitted to the courts or to arbitration, nor was the plaintiff to decide the question. The clause was a part of the contract relied on. It was inserted for the purpose for which it was used. If it meant anything, it meant

what was clearly expressed,—the right of defendants to discharge when the service was not satisfactory to them; and all specious, ingenious, and sophistical arguments by counsel, without showing some other clear and valid construction, seem a mere waste of time and words. The only logical conclusion to be deduced from them is that plaintiff should decide whether or not his work was satisfactory, and, if satisfactory to himself, he could retain it to the end of the year. It must also be remarked that by the terms of the contract the hiring was monthly, at \$130 per month; not a lump sum for a year's service. The former opinion of this court can be sustained by many additional authorities. In *Wood's Law of Master and Servant* (page 210, § 109) it is said: "Of course, where the contract expressly provides that the master may discharge the servant during the term, if he so elects, his election to discharge him is sufficient, whether with or without cause; as, if he reserves the right to discharge if the servant's services are not satisfactory, he need not assign any reason for the discharge, nor is any reason necessary beyond the bare circumstance that the master is not satisfied." See *Schouler, Dom. Rel. § 612*; *Browne, Dom. Rel. 124*. In *Spring v. Clock Co.*, 24 Hun, 175, suit was brought for damages or unearned wages. The contract of employment was as follows: "I, George Spring, agree to work for the Ansonia Clock Company as clock-case maker, for one year from this date, for the sum of \$1,200, payable in equal weekly installments; and the Ansonia Clock Company agrees to pay said Spring as above, provided his work and services shall be to their satisfaction. Should there be any disagreement, the installments are to be paid only to the time of such disagreement, unless an amicable settlement can be arranged." Under this agreement the plaintiff performed services from its date to the 1st day of December following, when he was discharged without assignment of any cause, except he was not the man the company wanted. At the close of the plaintiff's testimony the complaint was dismissed. Upon appeal the unanimous opinion of the court was: "The plaintiff complains of this disposition of the case, and insists that under the contract some cause should have been assigned for his dismissal, and that the contract bestowed on the defendant no power to discharge him without the assignment of a reason. We cannot yield assent to such construction. Without the provision for that purpose introduced in the contract, the law secured to the defendant the right to discharge the plaintiff at any time for cause, and it must be assumed that the provision on that subject was inserted in the contract to enable the defendant to exercise more power in discharging than could have been exerted in its absence. The contract of the defendant to pay is subject to the proviso that the services shall be to its satisfaction, and that fact is subject to no determination but the will of

the company, expressed through the proper agency. The determination of the question whether the services of the plaintiff under this contract were satisfactory belonged entirely to the company, subject to no control from the courts. The will of the company is the only tribunal to which the question can be referred." The following by Barnard, P. J., concurred in by the other members of the court: "The fair import of the agreement in writing between the parties was that the hiring was to be for one year, provided the plaintiff suited the defendant as a workman. The paper did not leave the reason for the discharge open to dispute. In case the defendant should be dissatisfied with plaintiff's 'work and services,' then the right upon plaintiff's part to wages should cease. In other words, the employment was during the pleasure of the defendant. The complaint was, therefore, properly dismissed, and the judgment should be affirmed, with costs." See, also, *Tyler v. Ames*, 6 Lans. 280; *Hart v. Hart*, 22 Barb. 606; 2 Pars. Cont. § 59; *Andrews v. Belfield*, 2 C. B. (N. S.) 779; *Gibson v. Cranage*, 39 Mich. 49; *Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. 906; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583; *Exhaust Ventilator Co. v. Chicago, M. & St. P. Ry. Co.*, 66 Wis. 218, 28 N. W. 343; *Singerly v. Thayer*, 108 Pa. St. 291, 2 Atl. 230; *Seeley v. Welles*, 120 Pa. St. 69, 13 Atl. 736. Aside from the right to discharge reserved in the contract, the testimony establishes existing conditions—insubordination and disregard of orders—warranting a discharge, and, in the business of defendants, imperatively demanding it. No rule is better settled than that every contract for the hire of services, whether for a month, a year, a definite or indefinite time, is subject to the right of the employer to discharge the employé for sufficient cause; and that then no future salary can be collected. *Wood, Mast. & S.* §§ 118, 119; *Smith, Mast. & S.* 69; *Harrington v. Bank*, 1 Thomp. & C. 361; *Libhart v. Wood*, 1 Watts & S. 265; *Beach v. Mullin*, 34 N. J. Law, 343; *Champion v. Hartshorne*, 9 Conn. 570; *Shaw v. Chairtie*, 3 Car. & K. 25; *Turner v. Mason*, 14 Mees. & W. 112; *Horton v. McMurtry*, 5 Hurl. & N. 674; *Lacy v. Osbaldiston*, 8 Car. & P. 80. The question presented was by the former decision *res adjudicata*; but, owing to the fact that the former opinion was not unanimous, I thought it best to fully review the case, instead of referring to the former adjudication as conclusive. The judgment of the district court will be affirmed. Affirmed.

(6 Colo. App. 341)

CONSOLIDATED HOME SUPPLY DITCH & RESERVOIR CO. v. HAMLIN.

(Court of Appeals of Colorado. Dec. 10, 1894.)

**LIMITATION OF ACTIONS—CONTINUING NUISANCE—
PERCOLATION OF WATER—MEASURE OF DAMAGES—SUCCESSIVE ACTIONS.**

1. Defendant constructed a ditch through plaintiff's land over which it had secured a right

of way, and, several years thereafter, by the gradual precolation of water from such ditch, owing to the character of the soil, damage resulted to plaintiff's land. *Held*, that the nuisance was a continuing one, and damages could be recovered for injuries occurring within six years before suit.

2. The fact that compensation for the right of way taken by defendant was submitted to arbitration at the time the ditch was built did not preclude a recovery for subsequent injury to the remainder of the land.

3. The leakage being a necessary result of the character of the soil, the injury arising therefrom was a permanent one, and the measure of damages was the diminished value of the land.

4. Having recovered damages for such permanent injury to the land, no further action, by reason of a continuance of the nuisance, will lie.

Appeal from district court, Larimer county.

Action by Oliver T. Hamlin against the Consolidated Home Supply Ditch & Reservoir Company. From a judgment for plaintiff, defendant appeals. Affirmed.

In 1882 appellant excavated a ditch, known as the "Home Supply Ditch," over the land of appellee. In 1883 and 1884, it excavated the Lake ditch, below and nearly parallel to the former, across the same land. Both ditches were on the side hill, and in both, at certain points, the material through which the ditches were excavated was shale, or loose, porous rock, at which points the ditches were carried around "draws," or natural drainage depressions that led down upon and over the lower and better portion of appellee's farm. Of percolation and damage from the upper ditch it is unnecessary to speak, as it was comparatively slight previous to the construction of the second ditch, and after that it must of necessity have come through and from the lower ditch. In neither ditch were any artificial means used to prevent percolation and wasting of water at points where the loose material and character of the rock required that it should be protected. The evidence establishes the fact that, from and after the construction of the Lake ditch, the percolation, at first limited, increased in quantity, or the effect became such, by the continual discharge, as to submerge, or at least destroy for agricultural purposes, a fraction over 53 acres of the lower and most valuable portion of plaintiff's farm. The evidence shows that, although the seepage commenced in 1885, there was but a comparatively small amount of land injured or destroyed until 1889; that after that date his crops were destroyed; that, three or four years previous to bringing suit, officers were informed of the damage being done, and at several times afterwards; and that in the fall of 1891 the attention of the officers was called to the matter, and they agreed to look it over and see what could be done, but no further action was taken, and this suit was brought. Appellant answered, setting up as special defenses that, when the Lake ditch was built, the value of the right of way across the land of appellee and the damage to the balance of the estate was submitted to arbitration, and a finding and award had in favor of ap-

pellee, that the amount was paid, and that the damage by seepage was covered by the award, consequently that the action could not be maintained; also pleaded the statute of limitations. The case was tried to a jury, resulting in a verdict and judgment for appellee of \$1,200.

B. L. Carr and F. P. Secor, for appellant.
Jeff. McAnelly, for appellee.

REED, J. (after stating the facts). A large number of errors are assigned, many going to the admission and refusal of evidence in establishing the extent of the damage sustained, others going to the instructions of the court. The case has been ably and exhaustively argued by counsel. The court limited the evidence to the period of six years before action brought. The plaintiff testified that in 1884 seepage destroyed about one acre, in 1885 about three or four acres.

The first contention of counsel for appellant is, the fact having been established of the injuries having commenced seven or eight years before bringing the action, no action could be maintained, and that the court erred in holding that the action was based upon a continuing nuisance, and that damages were recoverable for six years preceding the bringing of the action. Many authorities are cited in favor of the contention,—most of them from the state of Iowa, two from the state of Illinois. In *Van Pelt v. City of Davenport*, 42 Iowa, 308, cited by counsel, the question was in no way involved nor adjudicated. In *Stodghill v. Railroad Co.*, 53 Iowa, 341, 5 N. W. 495, plaintiff was the owner of land crossed by a natural stream. The railroad company built an embankment, dug a new channel, and permanently diverted the stream from the land of plaintiff. The court very properly held that the damage was entire, and susceptible of recovery immediately upon the permanent diversion of the stream, and that the plaintiff could not divide his claim, and maintain successive actions. In *Simpson v. Keokuk*, 34 Iowa, 568, cited by counsel, no such question was raised. The case of *Powers v. Council Bluffs*, 45 Iowa, 652, comes nearer than any other from that state in sustaining the contention, if only the syllabus is looked to. Indian creek, a crooked living stream of water, meandered the street of the city. The city changed its course by cutting a ditch on the side of the street and diverting it across the front of lots owned by the plaintiff. The court held that, when the ditch was dug and water diverted, all the damage had been sustained, and an action would then lie, that there was no subsequent and continuing damage, and the statute commenced to run at the date of the diversion, and the action was barred in five years. In principle, this case is not distinguishable from *Stodghill v. Railroad Co.*, supra. The case is carefully con-

sidered and the distinction drawn which takes the case at bar out of the decision in that. The court says: "The only question in this case is as to the character of the damage. Was it, as it accrued from day to day, new damage? If so, the plaintiff was entitled under the evidence to recover some damages, although his right of action as to a part of the damages sustained might be barred. We have to distinguish, then, between what must be regarded as original damages and what may be regarded as new damages." *Van Orsdol v. Railroad Co.*, 56 Iowa, 470, 9 N. W. 379, was a suit brought for the diversion of a stream in the construction of the railroad, whereby sand and earth were washed upon and deposited on plaintiff's land. The defendant, as in this case, contended that the injury complained of occurred in 1873, when the railroad was built, and that the action was barred by the statute of limitations. The evidence showed that no damage occurred until 1876, and the court held that the statute did not run until the damage was done. In *Railroad Co. v. McAuley*, 121 Ill. 160, 11 N. E. 67, counsel seem to have overlooked one important part of the decision. The court in discriminating between a permanent injury, where the whole damage occurred at the date of the act, and a continuous injury or nuisance, says: "The continuance of the injurious acts is considered a new nuisance, for which a fresh action will lie; and although the original cause of action is barred, damages may be recovered for the continuance of the nuisance,"—citing with approval *Wood, Lim. Act. 371*. *Thompson v. Reed*, 48 Ill. 118, though discussing the statute of limitations, was in regard to bill for board, and has no bearing upon the question under discussion.

Counsel cite *Gould on Waters* (section 416), but an examination shows it only relates to permanent injury, complete when the act is done, not to a continuing trespass or nuisance. If the contention of counsel is adopted, there can be no recovery in cases of this character. Taking the line of authorities relied upon, we would find that the cause of action accrued at the time the ditch was excavated. At that time there was no damage to compensate, nor could it have been foreseen that, in the future, water, percolating from the ditch, and by subterranean channels or courses, upon the surface of the underlying rock, seeking a lower level, would find a basin where the further drainage would be stopped, and a large body of subterranean water, accumulating from year to year, would ultimately extend to the surface and destroy a large portion of the farm. The damages being long subsequent to the building of a ditch, and the injury arising from causes impossible to have been foreseen, and the extent of the injury impossible to determine, it follows that at the time of the construction there was no cause of action, and no recovery could have been had, nor after

two or three years, when the injury became apparent, and three or four acres of land had been destroyed, could the damage sustained and prospective damage have been recovered, as contended, in a single action, from the impossibility of knowing the extent of subsequent injury. It will be apparent that the damage arose from the other class of injuries. No suit could have been maintained until some actual injury was caused to the plaintiff by the water, resulting from the improper construction of the ditch. The right to construct and operate the ditch had been granted. No damage could have been recovered for the construction, but all unforeseen and resulting damage from its operation and improper construction and continuance could be recovered. Washb. Easem. 591. In 3 Bl. Comm. 220, it is said that every continuance of a nuisance is a new one for which a fresh action will lie. The leading English cases sustaining this doctrine are *Holmes v. Wilson*, 10 Adol. & E. 503, and *Bowyer v. Cook*, 4 Man., G. & S. 236. In 1 Wm. Saund. 20, note 1, it is said, "The continuing of a trespass from day to day is considered in law a several trespass on each day." See *Battishill v. Reed*, 18 C. B. 696, and *Stroyan v. Knowles*, 6 Hurl. & N. 454. In *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765, it was said: "If the cause of action be, not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the plaintiff sustained the injury." But few of the leading American authorities out of the great mass need be cited. The distinction between the two classes of injuries are fully discussed in *Gould, Waters*, § 423; *Wood, Nuis.* §§ 853-856; and *Wood, Lim. Act.* § 180. Of state decisions, see *Canal Co. v. Lee*, 22 N. J. Law, 243, where the court held: "An actionable nuisance may be caused by an act perfectly lawful in itself, when the nuisance complained of is only a consequence of that act." It was also held: "The statute of limitations is no bar to allowing damages done within six years, by a nuisance erected before the six years, in case where the nuisance has not been so long continued as to raise presumption of a grant." See, also, *Butler v. Peck*, 16 Ohio St. 334; *Railway Co. v. Franz*, 43 Ohio St. 623, 4 N. E. 88; *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83; *Canal Co. v. Hitchings*, 65 Me. 140.

The conclusions reached are: (1) That the court did not err in its application of the statute of limitations in restricting it to the six years' preceding the bringing of the action; (2) that the injury being one that could not be foreseen nor the damage estimated, no cause of action arose from the construction of the ditch, such act being lawful, and a cause or causes of action only arose subsequently, in which damage to the time of the bringing of suit only could be recovered; (3) that the nuisance or trespass was continuous, and the subsequent damage continually

being incurred, and that the ditch company were liable until the nuisance was abated and the cause of damage removed; (4) that successive suits might be brought and maintained for the damages sustained subsequent to the former recovery. In *Sedg. Dam.* (2d Ed.) 241, it is said: "Every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie,"—cited with approval in *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765. See, also, 3 Bl. Comm. 220; *Canal Co. v. Wright*, 21 N. J. Law, 469; *Vedder v. Vedder*, 1 Denio, 257. The law of continuing nuisances and continuing trespasses is admittedly the same. The case of *Water Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565, cannot, as supposed by counsel, be considered as conclusive of this case. There is enough in that opinion to take this case out of its operation. It is said: "It follows that appellee should have been limited in his recovery to such injuries as resulted from negligence or want of care in the construction of appellant's ditch and reservoir, or in the subsequent use of the same, and it was error to permit the jury to consider and allow damages for seepage and leakage not resulting from such negligence or want of care." This puts the decision in harmony with the great number of American decisions, and also the English cases. In *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765, it was said by the learned court: "But if * * * the damage which accrued to the plaintiff was caused by the negligence of the defendants they would be responsible." This case was put fairly upon negligence in constructing the ditch and its subsequent operation. Undoubtedly, in the *Middaugh Case* the law was properly applied to the facts proved, but in all of this class of cases each case must depend upon its own facts as established.

In nearly all of this class of cases the condemnation proceedings and award of damages precede the construction and presumes the work will be properly constructed and operated. The doctrine contended for would be monstrous. To hold that by reason of damages allowed for right of way and what inconvenience and detriment could be foreseen, a party was concluded and barred from the recovery of damages unforeseen, and arising from faulty construction and want of proper protection, would be to hold, in effect, that by the purchase of a right of way the purchaser became the owner of the entire estate, and that if the line of the canal was upon the line of the higher part of the farm, the entire farm could be made subservient and destroyed with impunity, because, if it could be held to cover one or five acres destroyed, there would be no limit except the extent of the tract. In England the rule is well and concisely stated in *Railroad Co. v. Evans*, 15 Beav. 322, to be that the ordinary damage is included in the assessment, but that "any future extraordinary

damage is not intended to be included in it." See, also, *Lawrence v. Railroad Co.*, 16 Q. B. 643, and *Rex v. Railroad Co.*, 3 Adol. & E. 683. American authorities are in harmony with it. Counsel cite and rely upon *Mills, Em. Dom.* § 216: "All damages are presumed to have been considered in the assessment,"—but failed to turn to section 217: "Damages arising afterwards, unforeseen damage," where the text and numerous authorities fully sustain the conclusion we reach. See *Eaton v. Railroad Co.*, 51 N. H. 504, where it is said: "The fact that the parties making the assessment did not, or could not, anticipate the damage, does not include the right to damages." "Such damages may be recovered by common-law action, if not within the purview of the parties making the assessment." *Eaton v. Railroad Co.*, supra; *Calhoun v. Palmer*, 8 Grat. 88; *Whitworth v. Puckett*, 2 Grat. 523. "The fact that the loss was not suffered within a short time after the construction of the road does not make it any the less a taking. The testimony must depend upon the injurious effect, and not on the length of time necessary to produce the effect." *Eaton v. Railroad Co.*, supra; *Canal Co. v. Spears*, 16 Ind. 441.

The amount of compensation for land taken, and damage to balance of the estate, was submitted to arbitration, an award made, and the amount accepted. It is urged that this is conclusive, and that such award anticipated and covered all future damage. It would be sufficient to say that the subsequent damages arising from the contingency of the peculiar character could not have been foreseen, anticipated, or considered. That it was not considered or anticipated was shown by the evidence of one of the arbitrators. A further sufficient answer would be that no such element of damage was embraced in the submission of award.

It is contended at great length, in argument, that the plaintiff could not maintain his action because the property injured had been conveyed by deed of trust to secure borrowed money. No proof was made, nor was there any plea or issue. So far as the record is concerned, it seems to have rested entirely upon a statement of the facts to the court by counsel for appellant during the trial. The evidence showed appellee to have been in possession, previous to and during the time the injuries occurred, and still in the possession at the bringing of suit and trial, which was sufficient in an action of trespass against a party not asserting title. This principle is so well settled that authorities in its support are hardly necessary, but see *Carney v. Reed*, 11 Ind. 417; *Look v. Norton*, 55 Me. 103; *Chicago v. McGraw*, 75 Ill. 566; *Darling v. Kelly*, 113 Mass. 29; *Bac. Abr.* tit. "Trespass"; *Wat. Trespass*, § 772.

It is also urged that the court erred in regard to the proper measure of damages, and improperly admitted evidence of the value of

the land destroyed and the subsequent depreciation of the entire estate by reason of the injury. In cases of this kind several different methods may be adopted to furnish the jury data upon which to base a verdict: (1) The depreciated value of the estate by reason of the trespass; (2) the rental value of the land; (3) the destruction of crops, and value of the use of the land to the proprietor. Neither is held proper to the exclusion of others. The true rule seems to have been stated in *Seely v. Alden*, 61 Pa. St. 302: "In general the rule for the measure of damages in cases of tort may be said to be that which aims at actual compensation for the injury, and whatever ascertains this is proper evidence to be submitted to the jury." See *Water Co. v. Hartman*, 38 Pac. 62, recently decided in this court, not yet officially reported, and authorities cited. In this case evidence of crops lost, the value of the use of the land to the owner during the time, or the rental value, was sufficient to warrant the verdict. We cannot know whether the destruction of the land and diminished value of the estate was considered by the jury at all in estimating the damages. We do not think there was any serious error in the court's instructions given, or in its refusal to give those asked, or that any serious error occurred upon the trial to warrant a reversal of the judgment. Affirmed.

On Rehearing.

(June 10, 1895.)

THOMSON, J. It is contended, in support of this petition for rehearing, that our decision is in conflict with the decision of the supreme court in the case of *Water Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565. I do not think that decision has any application whatever to this case. That was an action for damages occasioned by water percolating through the banks and bottom of the defendant's canal, under, through, and upon the lands of the plaintiff. It appeared from the pleadings that, at the time the canal was constructed, a proceeding was instituted by the defendant in the county court of Arapahoe county to condemn a right of way for its canal over the plaintiff's lands, in which there was judgment of condemnation, and an award to the plaintiff of \$2,163.75 for the land taken, and \$1,500 as damages to the land not taken. These sums were accepted by the plaintiff. The amount of the award was in excess of the jurisdiction of the county court, but the supreme court held that the plaintiff, by accepting and retaining the money, estopped himself from questioning the validity of the judgment, and treated the proceeding as if it had been conducted in a court of competent jurisdiction. The law governing condemnation proceedings is exhaustively discussed by Mr. Justice Hayt, who delivered the opinion, and the conclusion reached that all damages consequential upon seepage from the canal, and not resulting from its neg-

ligent or unskillful construction or use, were or should have been included in the award, and were therefore, by the judgment in condemnation, *res adjudicata*. This conclusion is expressly based upon the provision of the statute that in condemnation proceedings the owner, or those interested in the real estate taken, shall be awarded damages, not only for the land or property taken, but also the damages, if any, to the residue of the land or property. The utmost extent to which the decision goes is that, by virtue of the language of the statute, all the damages, present and prospective, that are the natural, necessary, or reasonable incident of the improvement, will be conclusively presumed to have been assessed in the condemnation proceedings, and cannot be relitigated. The feature of condemnation does not exist in the case at bar, and the presumption by which a judgment in a condemnation proceeding concludes the parties and the court is not present. When the Home Supply ditch was constructed, a contract was entered into between the Home Supply Ditch Company and the plaintiff, in reference to his compensation and damages for the construction of that ditch across his land. The contract does not appear to have been in writing. Of course, what its terms were, whether these damages were included in it, and whether it was carried out, were questions of fact to be determined upon the evidence. It could not bind the parties except as to the matters embraced in it, and what those were could be ascertained only by an investigation of the facts. The differences between the parties on account of the construction of the Lake ditch were submitted to arbitrators. The agreement of arbitration and the award are as follows:

"Agreement to Arbitrate.

"Whereas, a controversy exists between the above named, the Consolidated Home Supply Ditch and Reservoir Company, a corporation, duly organized and existing under and by virtue of the laws of the state of Colorado, and Oliver T. Hamlin, which controversy may properly be the subject of a civil action between said parties. And whereas, the said controversy relates to the amount of damages resulting to the said Oliver T. Hamlin by the reason of the construction of a certain irrigating ditch, called the 'Lake Ditch,' on and through the following described premises of the said Hamlin by the said the Consolidated Home Supply Ditch and Reservoir Company, that is to say: The right of way for the said ditch through the east half of the southwest quarter of section thirty-four, township five north, of range sixty-nine west; the southeast quarter of the same section; the south half of the northeast quarter of same section; and the southeast quarter of the northwest quarter, same section,—all in Larimer county, Colorado; also, damages for the condemnation of a basin or lake called the 'Godwin Lake,' and the land

upon which said lake is located, owned by the said Hamlin. Said lake located upon the following described lands: Part of the south half of the southwest quarter section number thirty-four, township five north, of range sixty-nine west, the northeast quarter of the northeast quarter of section number four, and the northwest quarter of the northwest quarter of section number three, township four north, of range sixty-nine west, in Larimer county, Colorado. Said basin more fully shown by plat thereof attached, and made a part of this contract, marked Exhibit A, as well as plat of line ditch: It is therefore fully agreed by the said the Consolidated Home Supply Ditch and Reservoir Company and Oliver T. Hamlin that they hereby submit all matters, and all matters of difference above mentioned, in relation to the said right of way and said reservoir, to the following named arbitrators, that is to say: John Sullivan, John Hahn, and Warren Blinn, who are to meet for said purpose at the office of James M. Aldrick, in the town of Loveland, Larimer county, Colorado, at 10 o'clock a. m., on the 9th day of November, A. D. 1883, and they agree to abide the award of said arbitrators, and that the award of the said arbitrators, when made, may be filed by the successful party with the clerk of the district court of Larimer county, Colorado, in the Second judicial district of said state, as a basis of a judgment, and that an execution may be issued for its collection. In testimony whereof the said the Consolidated Home Supply Ditch and Reservoir Company has caused its corporate name to be hereto signed by its president, and its corporate seal to be hereto affixed by its secretary, and the said Oliver T. Hamlin has hereunto subscribed his name, this 7th day of November, A. D. 1883. The Consolidated Home Supply Ditch and Reservoir Company, [Seal] by C. J. Chapman, as President. Oliver T. Hamlin.

"Attest: E. S. Allen.

"Award.

"We, the undersigned arbitrators, appointed by the submission hereto annexed, having met at the office of James M. Aldrick, in the town of Loveland, at 10 o'clock a. m., Friday, November 9, 1883, and after having been duly sworn, we proceeded to hear the allegations, evidence, and arguments of the parties, and after hearing the same, and being fully advised in the premises, to make the following award: (1) We award to Oliver T. Hamlin, as damages for the right of way for the ditch described in the contract hereto attached, fifty-two feet wide along the line thereof, as now surveyed and marked by furrows, five hundred and sixty dollars. (2) We award to the said Hamlin, as damages for the said lake taken, described in the contract hereto attached, two hundred dollars. (3) We make a total award to the said Hamlin for all damages, and pay of arbitrators,

seven hundred and sixty-nine dollars. This November 9, 1883. The said award shall be binding upon the said company when the said Hamlin shall cause to be deeded to said company the title to said right of way, and a deed to the right of way through the land known as the 'Godwin Lake,' together with a release and conveyance to said company by the Godwin Reservoir Company of all its rights and franchises, James Sullivan. John Hahn. Warren Blinn."

From the statement of the controversy in the agreement, it seems reasonably clear that the difference between the parties was concerning the right of way through the plaintiff's land and the Godwin lake or reservoir, which it appears had already been appropriated by the defendant. But the submission itself is explicit upon the subject. It submits to the arbitrators the matters of difference in relation to the right of way and the reservoir, and no other matters. The damages awarded are for the right of way and the lake, and nothing else. The question of damages to the residue of the land was not submitted or passed upon. It probably did not occur to the parties that the remainder of the land would ever sustain any injury in consequence of the ditches, because, as yet, there was nothing to indicate it. The seepage which occasioned it did not commence until 1885. The arbitration proceedings, therefore, present no obstacle to a recovery by the plaintiff in this action. As far as the ditches are concerned, it is clear from the plaintiff's testimony that there was no negligence in their construction, and there is no evidence of their subsequent negligent management; but the question of negligence is not in this case, and all allegations concerning it in the complaint may be rejected as surplusage. I think the evidence of the diminished value of the land, in consequence of the seepage, was properly received. Damages occasioned by a nuisance which is not of a permanent character are measured by the loss suffered before the commencement of the suit; but where it is permanent, all damages resulting from it are recoverable in one action, and the diminished value of the property affected by it is their proper measure. It is, perhaps, not always easy to make the distinction; but the court, in *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83, lays down the following rule, which seems to me to be founded in reason, and which can be readily applied to this case. It is as follows: "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the ex-

penditure of his own means." See, also, *Powers v. Council Bluffs*, 45 Iowa, 652. The ditches in question are necessary to render the land through which they pass productive. The country requires them, and it is presumed that they will be maintained for an indefinite period of time. The evidence is that they were constructed in the ordinary and usual manner, and that the seepage is a necessary result of the character of the land. The seepage will therefore continue, and the same injury result from it, as long as the ditches are used. The cause of the injury is permanent, and therefore the injury itself is permanent. The evidence of the diminution in the value of the land was properly received, the instructions submitted the question involved fairly to the jury, and the verdict must be assumed to include the entire damage sustained; so that the plaintiff will be entitled to no further action by reason of a continuance of the nuisance. I think the judgment was rightly affirmed. All the judges concurring.

(8 Colo. A. 232)

CITY OF DENVER v. AARON.¹

(Court of Appeals of Colorado. March 11, 1895.)

ACTION AGAINST CITY — DEFECTIVE STREET—EXCAVATION BY WATER COMPANY—NOTICE OF DEFECTS.

The city council granted a license to a water company to lay its pipes under the surface of the streets, and provided by ordinance that the water company should save the city harmless from all loss through negligence in excavating the streets, and that whenever the water company should open any street it should restore it to as good condition as before, and, in case of failure to do so for 24 hours, notice should be given to the company to do so by the officer having charge of the streets, and in case of default after notice the street would be put in order by the city at the company's expense. The company filled an excavation so loosely that some days afterwards, while driving across the street, the wheels of plaintiff's wagon sank therein, and plaintiff was injured. *Held* that, though notice of the defective condition of the street was unnecessary to render the city liable, it would be presumed to have had notice by virtue of its own ordinance.

Appeal from district court, Arapahoe county.

Action by Mendall Aaron against the city of Denver for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

A. B. Seaman and Louis K. Pratt, for appellant. Sullivan & May and Charles O. Patton, for appellee.

THOMSON, J. Mendall Aaron brought this action against the city of Denver, a municipal corporation, to recover damages for injuries received by him by reason of the dangerous condition in which an excavation in one of its streets, made by the Denver

¹ Rehearing denied June 10, 1895.

Water Company, was suffered to remain. The facts in evidence were undisputed, and the court directed a verdict in plaintiff's favor for such amount as, in the opinion of the jury from the evidence, would compensate him for his injuries. The instructions upon the question of damages are unobjectionable. They correctly stated the law applicable to the facts, and the decision of the case here turns upon the action of the court in directing a verdict. The facts are as follows: On the 10th day of April, 1890, an ordinance was adopted by the city council of the defendant granting to the Denver Water Company the right and privilege of laying down, continuing, and maintaining water pipes, valves, hydrants, and apparatus for the conveyance and distribution of water in, upon, along, and through certain of the streets of the city, including the street upon which the injuries were received. Section 3 of this ordinance reads as follows: "Sec. 3. The Denver Water Company, its successors and assigns, shall at all times, save and hold the city harmless of and from all loss, cost or damage to person or property, occasioned by any negligence in the excavation of any street, lane, alley or public place, within the city, made by it in the laying of any of its mains, pipes, valves, or other apparatus. And whenever the said the Denver Water Company, its successors or assigns, shall open or cause to be opened any street, lane, alley or other public place for laying any mains, pipe, valve or hydrant, or other apparatus, it shall forthwith, restore the same to as good condition, as the same was in before any such opening, at its own expense, and in case of any failure so to do, for a space of twenty-four hours after the laying of such main, pipe, hydrant, valve or other apparatus shall be completed, notice shall be given to the said company so to do, by the officer for the time being having charge of the streets in said city; and in case of default for twenty-four hours after such notice, the said street may be put in such order by the said city, but at the expense of the said company." The excavation in question was made in pursuance of the grant contained in the ordinance, but, although it was filled to the level of the surface of the street, and seemed to be safe and in good condition, the filling was loosely thrown in, so that wheels of vehicles upon striking it would immediately sink; thus leaving the place in a dangerous condition, and all the more dangerous because it was apparently safe. On the 18th day of June, 1891, some days after the filling was done, the plaintiff, while crossing the street in a wagon, at the intersection of another street, came upon the place where the excavation had been made, without knowledge of its unsafe condition, and, upon striking the insufficient filling, the front wheels suddenly sank, throwing him out of the wagon, and causing the injuries complained of.

The duty of keeping its streets in repair and in reasonably safe condition for travel in the usual modes rests primarily upon the municipality, and it must answer for any injury occasioned by its neglect of such duty. This duty cannot be avoided, suspended, or cast upon others by any act of its own. 2 Dill. Mun. Corp. § 1024. Notice, actual or implied, of an obstruction or defect in a street, occasioned by accident, or by the act of a wrongdoer, must be brought home to the city, before any liability can be fastened upon it; but it cannot defend upon the ground of want of notice where the act is done by itself or by its authority. If it authorizes dangerous excavations to be made in its streets, either by contractors directly under it or by persons to whom license for the purpose is granted, it cannot unburden itself of its responsibility upon those by whom the work is done. If it permits others to tear up its streets, it is its duty to see that they do the work in a safe manner. It is immaterial what measure of control of the work it has reserved in itself; nor does its liability rest upon the doctrine of respondeat superior. Being charged with the care of its streets, it cannot relinquish its supervisory control of them; and, whether it places them in a dangerous condition itself, or permits others to make them dangerous, it is equally responsible. 2 Dill. Mun. Corp. § 1027; *Storrs v. Utica*, 17 N. Y. 104; *Russell v. Inhabitants of Columbia*, 74 Mo. 480; *Hanford v. City of Kansas*, 103 Mo. 172, 15 S. W. 753; *Boucher v. City of New Haven*, 40 Conn. 456.

But, waiving the responsibility imposed upon the city by law, and conceding to counsel the full benefit of their contention that its liability is dependent upon notice to it of the defect in the street, then, by virtue of its own ordinance, it will be conclusively presumed to have had notice. The ordinance provided that, upon failure by the water company for 24 hours after laying its pipe to put the street in the required order, the city, by its proper officers, should notify it to do so; and, upon further failure of 24 hours, that the city should do the work itself. The duty it assumed was not dependent upon information to be conveyed to it of the defect, or upon the existence of the defect for a sufficient length of time to warrant a presumption that it was known. The city was obliged to know for itself whether the work was properly done or not, to the end that the required steps might be taken if it was improperly done. It gave itself 24 hours after the pipe was laid, and not 24 hours after it should receive some kind of notice, within which to move; and therefore it became bound to know, when the work was done, whether it satisfied the requirements of the ordinance. This knowledge, which it was bound to have, it will be conclusively presumed to have had, and it cannot be heard to say that it did not receive some other notice. The evidence was

undisputed. It fully and clearly sustained the allegations of the complaint, and the court therefore properly instructed the jury that the plaintiff was entitled to a verdict. The judgment will be affirmed. Affirmed.

(16 Mont. 302)

HARRIS et al. v. RAMSEY, Sheriff.

(Supreme Court of Montana. June 10, 1895.)

CHANGE OF VENUE—DISCRETION OF COURT.

An order changing the venue for the convenience of witnesses and to promote the ends of justice, as authorized by Code Civ. Proc. § 62, made upon affidavits, will not be disturbed on appeal when no abuse of discretion appears, and no brief has been filed or argument made by appellant.

Appeal from district court, Missoula county; Frank H. Woody, Judge.

Action by Lewis A. Harris and another against S. G. Ramsey. From an order granting a motion for a change of venue, defendant appeals. Affirmed.

Marshall & Corbett, for appellant. Bickford, Stiff & Hershey, for respondents.

DE WITT, J. This is an appeal from an order granting a motion for a change of venue, made upon the grounds of the convenience of the witnesses and the ends of justice. Code Civ. Proc. § 62. Upon the hearing affidavits were used in support of and in opposition to the motion. We find no error in the exercise of discretion of the lower court. No brief was filed by appellant, and no argument made by him in this court. When appellants take such course, we shall not make an elaborate search to find error. *City of Helena v. Brulo*, 15 Mont. —, 39 Pac. 456, citing *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132; *Territory v. Mooney*, 8 Mont. 151, 19 Pac. 595; *Territory v. Stanton*, 8 Mont. 157, 19 Pac. 593; *State v. Dakin* (Mont.) 39 Pac. 848. The order appealed from is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 267)

LEWIS v. WEYERHORST.

(Supreme Court of Montana. June 3, 1895.)

VERIFICATION OF ANSWER—INFORMATION AND BELIEF.

Under Code Civ. Proc. § 89, providing that if the complaint be verified the denial of each allegation must be specific and be made positively, or according to the information and belief of defendant, a specific denial, with an allegation that it is on defendant's information and belief, is sufficient.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by John A. Lewis against Joseph Weyerhorst on notes. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action on two promissory notes.

The complaint alleges that defendant executed and delivered these notes to Robert Grix on the 10th day of June, 1891; that on the 23d day of June, 1893, the said Grix assigned said notes, and all claims thereunder against the defendant, to the plaintiff for value, and that plaintiff is the owner and holder thereof. The answer denies specifically, on information and belief, that said notes were ever assigned by said Grix to the plaintiff, for value or at all. Plaintiff moved the court for judgment on the pleadings. This motion was sustained, and judgment entered against the defendant for the amount of the notes and costs. From this judgment the defendant appeals.

Oliver M. Hall, for appellant. Chas. O'Donnell, for respondent.

PEMBERTON, C. J. (after stating the facts). The question presented by this appeal is whether the specific denial, on information and belief, contained in the answer, of the assignment of the notes sued on, presented a material issue for trial. Section 89, Code Civ. Proc., provides: "If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant." Section 96, Code Civ. Proc., provides that: "The affidavit of verification shall state that the facts stated in the pleading are true to the knowledge of the person making it, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true." In *McClay v. Sands*, 94 U. S. 586, the supreme court, in construing the statutes above referred to, say: "The denial, when made, must be specific, but it is none the less specific because based on information and belief. Provision is made for an issue by a formal denial, where sufficient knowledge or information upon which to base a belief cannot be obtained. This implies that, if the necessary information can be obtained, a statement must be made predicated upon that, and, if it is to be made, we cannot see what harm can result from adding the grounds on which it is based. It is the same for all the purposes of an issue whether the qualification is given or not, and the issue is the material thing to be attained. But section 63 seems to us to be conclusive upon the propriety of the practice. There provision is made for one form of verification if the statement is upon personal knowledge, and another if upon information and belief. Why this, if information and belief in a proper case were not sufficient to justify an averment? But, unless the pleading shows that the statement is founded upon information, etc., the form of the oath prescribed would be of no avail, because that contemplates a positive verification in all cases where it does not appear in the body of the pleading that a qualification is intended. In some

states, the practice acts require a verification only to the effect that the party believes his statements to be true. In such cases there is no necessity for qualifying the averments in the pleading, because the oath prescribed established all the limitation that is necessary. In Montana, however, the qualification must be made in the pleading. * * * We think, therefore, that the denial upon information and belief was sufficient to present an issue for trial, and that the court erred in deciding otherwise." Section 63, referred to supra, is now section 96 of the Code of Civil Procedure. See, also, to the same effect, *Stacy v. Bennett*, 59 Wis. 234, 18 N. W. 26; *Meadowcraft v. Walsh* (Mont.) 39 Pac. 914. To entitle plaintiff to recover in this action it was necessary for him to allege an assignment to him of the notes sued on. If so, it was essential that he prove the assignment, if the answer contained a specific denial thereof. The assignment of the notes by Grix to the plaintiff was not a matter presumptively within the knowledge of the defendant, and, if not, then the defendant was permitted, under our statutes and the authorities, to deny the same on information and belief, and such denial presented a material issue for trial. We think the court erred in holding otherwise, as it did by rendering judgment on the pleadings. The judgment is reversed, and the cause remanded for trial.

DE WITT and HUNT, JJ., concur.

(16 Mont. 221)

GARDNER v. CALDWELL, Sheriff, et al.
(Supreme Court of Montana. June 3, 1895.)

PROPERTY IN RECEIVER'S HANDS—LEVY UNDER
EXECUTION—INJUNCTION.

A court, after having appointed a receiver for a corporation, will restrain the enforcement of a judgment, afterwards obtained in a court of co-ordinate jurisdiction in another district, against property in the hands of the receiver, by levy and sale thereof.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Action by E. M. Gardner, receiver of the Gallatin Canal Company, against White Caldwell, sheriff, and another, to enjoin the sheriff from selling, and defendant Marlow from trying to enforce a judgment against, the property of said company. From a judgment overruling a demurrer to the complaint, and awarding an injunction, defendants appeal. Affirmed.

The plaintiff brings this action to enjoin the sheriff of Gallatin county from levying upon and selling the property of the Gallatin Canal Company, said property being in the hands of respondent as receiver, and to enjoin defendant Marlow from trying to enforce the collection of a judgment against the property of said Gallatin Canal Company. In March, 1892, one W. H. Tracy et al. commenced an action, which is still pend-

ing, in the district court of the Ninth judicial district, against the Gallatin Canal Company. In May, 1892, plaintiff, Gardner, was duly appointed by said court as receiver of all the properties and assets of said Gallatin Canal Company. He qualified as receiver, and at once took into his possession and under his control all of the properties, franchises, rights of way, and assets of said corporation, and is now in possession of all of said properties, and has issued receiver's certificates for the repairs of said canal property. In April, 1893, and while the receiver was in charge, defendant Marlow sued the Gallatin Canal Company, by action commenced in the district court of the First judicial district, and obtained judgment against the said Gallatin Canal Company for about \$28,000. In July, 1893, execution was issued in said judgment, commanding the sheriff of Gallatin county to levy upon and sell the properties of said Gallatin Canal Company, or so much thereof as might be necessary to satisfy said debt, which properties are those in the possession of plaintiff as receiver. The complaint further pleads that the sheriff is about to levy upon and sell said properties, and that the sheriff and said Marlow had actual knowledge that this plaintiff was the receiver of the Gallatin Canal Company, and in possession of the properties of said company. The defendants demurred generally to the complaint. Their demurrer was overruled. Judgment awarding an injunction was made and entered, as prayed for in plaintiff's complaint. Defendants appeal.

Massena Bullard, for appellants. Hartman & Hartman, for respondent.

HUNT, J. (after stating the facts). The issue tendered by the pleadings may be briefly stated as follows: Where, in an equitable action, a receiver has been appointed, pendente lite, by a court of competent jurisdiction, to take charge of the property and affairs, including rights of way, franchises, and assets of a corporation, and has taken charge and is in possession of all such property, can a judgment creditor of the corporation, who instituted his action and obtained his judgment in a court of co-ordinate jurisdiction in another district in the state, subsequent to the appointment of such receiver, and subsequent to the taking of possession by such receiver, levy an execution upon the property of the corporation in the hands of the receiver, or upon any interest that such corporation may have in such property in the receiver's hands? Under established and familiar principles governing the functions of receivers in charge of property in litigation, the receiver is to be regarded as the officer of the district court of Gallatin county, which, in the exercise of its chancery powers, appointed him. He stands as an indifferent person, clothed with the power of re-

ceiving and preserving the property and assets involved in the suit wherein he was appointed, for the benefit of whoever may finally be declared to be entitled to them. The principle upon which the court proceeded is based upon that of securing the subject-matter of the litigation to whoever may ultimately own it and be lawfully entitled to the possession of it. To effectually carry out this object, the court itself has, by its order appointing a receiver, declared that it was inequitable that either party should have possession or control of the Gallatin Canal, or any other property of the Gallatin Canal Company, and the rents, issues, and profits thereof, pending the litigation of the case referred to in the complaint. Without changing the title, but in the exercise of what is regarded as a branch of the extraordinary powers of a court of equity, the court may be said to have taken possession of the property, and deprived the corporation of its possession, and, through the receiver, assumed the entire control and custody thereof, and retains the same until, by formal adjudication, there is a determination of the rights of the parties interested. But the appellants claim a right to levy upon and sell the property of the corporation, even though it be in the receiver's hands, arguing that, while they may not have a right to dispossess the receiver, yet they may sell the canal, and thus establish a lien thereon, which need not interfere with any future act of the receiver, who would only proceed having due regard for the judgment creditors' rights. Just how appellant proposes to proceed to execute his plan without interfering with the receiver we cannot tell; nor can we satisfactorily reconcile his position with the reason of the established rules of equitable jurisdiction, which forbid generally any interference with the possession of the receiver, not only upon grounds of convenience, but of danger of defeating the object of placing the fund or property custodia legis, by having the property wrested from the receiver's possession at the instance of any particular creditor, or so incumbered as to impair its value in his hands as a fund for final distribution in any judgment to be rendered in the original suit.

The earliest case to which the court have access and the leading authority laying down the doctrine that where a receiver has been put in possession of an estate, or, to be more accurate, where the court has once taken possession by putting a receiver upon the estate, is *Angel v. Smith*, 9 Ves. 335, decided in 1804. Ejectment was brought without leave of court. Lord Eldon said: "It is clearly a contempt of this court to disturb sequestrators; and the party cannot claim, though by an adverse title, in any other way than by coming to be examined *pro interesse suo*. Consider the consequence. How are sequestrators to defend their possession against an ejectment? The court of king's bench have decided that where a sequestration is award-

ed to collect money to pay a demand in equity, if it is not executed, that is, if the sequestrators do not take possession, and a judgment creditor takes out execution, notwithstanding the sequestration awarded there may be a levy under the execution; intimating that, if the sequestration is executed, the other, though prior, must come here." The writ of sequestration referred to by the lord chancellor was issued to seize the personal estate and profits of the real estate of a defendant, and to detain them subject to the order of the court. It was intended to enforce the performance of the decree of the court where a defendant absconded. *Bl. Comm*, bk. 3, p. 444. It was argued before Lord Eldon, as appears by the report above referred to, that there was no difference between the position of a receiver and that of sequestrators, who were the officers of the court. Lord Eldon held that he had no doubt that, where sequestrators were in possession under the process of the court for the purpose of raising a duty, their possession could not be disturbed, even by an adverse title, without leave, "upon this principle: that the possession of the sequestrators is the possession of the court." "As to receivers, I am very sure, though I cannot refer to the case, that the same rule has obtained wherever a receiver has been put upon the estate. I am also very confident that I have heard that motion for leave to bring an ejectment against the receiver more than once, since I have sat here. The register also apprehends such motions have been made. There may be inconvenience in that, but the inconvenience the other way is enormous. If it is necessary to ask leave, the court must have credit for never refusing it where it ought to be granted; and, if so, very great purposes of convenience may be answered by putting the party to ask it."

We find this general principle sustained in the case of *Atlas Bank v. Nahant Bank* (*Mass.* 1839; *Shaw, C. J.*) 23 Pick. 480, where it was held in the case of an attachment by an individual creditor of the assets of a bank, made after the filing of the bill asking for an injunction on the bank, on the appointment of the receivers, that the transfer of the property to the receivers necessarily removed the property from all future liability to attachment at the suit of an individual creditor; that the proceedings had relation to the time of the filing of the bill.

In *Hubbard v. Bank*, 7 Metc. (*Mass.*) 340, in distinguishing between the case of an attachment before and one made after proceedings were instituted, praying for an injunction and the appointment of receivers, the court say: "In the latter case the attachment is ineffectual. The property is in other hands, and beyond the process of an attachment."

In *Noe v. Gibson* (1839) 7 Paige, 513, Chancellor Walworth said: "It is well settled that after a receiver has been appointed, and has

taken the rightful possession of the property, it is a contempt of court for a third person to attempt to deprive him of that possession by force, or even by a suit or other proceeding against him without the permission of the court by whom the receiver was appointed;" and declared that this principle was applicable to every other interference with the possession of a receiver, sequestrator, committee, or custodian who holds the property as the officer of the court, as his possession is in law the possession of the court itself.

The supreme court of the United States, in *Wiswall v. Sampson* (1852) 14 How. 52, decided that, when a receiver had been appointed, his possession is that of the court, and any attempt to disturb it without the leave of the court first obtained will be a contempt on the part of the person making it. As peculiarly applicable to the contention of the appellants in the case at bar, we quote the following language from the opinion of Justice Nelson: "It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receivers, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise, the whole fund may have passed out of his hands before the final decree, and the litigation become fruitless. It is true, in administering the fund the court will take care that the rights of prior liens or incumbrances shall not be destroyed, and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?"

In *Field v. Jones* (1852) 11 Ga. 413, in equity, the receiver was held not subject to garnishment, and not at liberty to bring or defend actions without especial leave of court; that he was but the agent of the court, and could not involve it in litigation; and that, if a receiver were subject to garnishment, such liability would defeat the ends for which receivers were appointed; and that his duty as receiver would be defeated by judgments at law on garnishment, and the beneficial juris-

diction of chancery in this regard would be defeated.

A more recent decision in Georgia takes the same view of the law. *Marshall v. Lockett*, 76 Ga. 289. See, also, *Wap. Attachm.* pp. 220, 221.

In Iowa, the supreme court held in the case of *Martin v. Davis* (1868) 21 Iowa, 535, that property levied upon while in the hands of a receiver appointed by the court was "in the custody of the law, and not properly or legally liable to seizure by an officer under an execution."

Robinson v. Railway Co., 66 Pa. St. 160, generally recognized as an authority, was where the plaintiff levied upon property of the defendant company, which, however, was mortgaged. A receiver had been appointed before the levy of the execution, but after judgment was recovered. The property levied on was included in the mortgage. The court held that it passed into the custody of the receiver; and to permit it, while in legal custody, to be levied on and sold under the process of another court, would at once raise a conflict of jurisdiction, and interfere with the right of the receiver of the court to manage the property under his appointment. "If the property," say the court, "might be taken piecemeal from the custody of the receiver, the remedy of the creditors under the mortgage would become worthless, or at least greatly imperilled. Ample authority has been cited by the defendants in error. If a creditor believes that the property was not legally mortgaged, or for any good reason should not pass into the hands of the receiver, his duty is to apply to the court having appointed the receiver to ask its discharge out of custody in order that he may proceed against it. For these reasons, we think, the court below was right in setting aside the levy and execution."

We find the argument of confusion and inconvenience of weight with certain courts, notably North Carolina, where it was held in *Skinner v. Maxwell*, 68 N. C. 400, that, "when a court of equity has undertaken to adjudicate upon and distribute a fund among the parties entitled to it, it would be inconvenient if a court of law (or any other court) could by its process interrupt the adjudication and create new rights in the property itself. This rule is not understood as absolutely preventing the acquisition of new rights to the fund in controversy after the commencement of the proceedings. Any person claiming to have acquired such an interest pendente lite, while he cannot interfere under the process of another court, may apply to the court which has jurisdiction of the fund, pro interesse suo, and his claim will be heard. 2 Story, Eq. Jur. §§ 831-833a. The limits of this principle are somewhat uncertain, but it is sufficient for the present case to say that, while property is in the hands of a receiver, no right to it can be acquired by sale under execution. And it

makes no difference that the receiver appointed declined to act; the property was, nevertheless, in the custody of the law."

In a proceeding adjudging respondent guilty of contempt in not paying to the relator certain moneys which he held as receiver under the appointment of the court below, and which the court had ordered him to pay to the relator, but which he continued to hold as garnishee in proceedings taken in a justice's court. Chief Justice Campbell, in *People v. Brooks* (1879) 40 Mich. 335, held that the custody of a receiver is the custody of the court, and that it would lead to great confusion if a receiver were subject to take the funds in his official custody into any other tribunal, which could have no power to discharge him, to settle his accounts, or to punish him for collusion, and that the only practice which would save clashing among courts, and give to every court in equity such control over its own officers as is necessary, until they are finally discharged, was to not permit liens to be interfered with by garnishment or otherwise, without leave.

It was held in the case of *Dugger v. Collins*, 69 Ala. 324, that, when a sheriff has levied upon property in the hands of a receiver, equity will not interpose by an injunction in behalf of the sheriff enjoining a suit at law against him for interference, and that to permit property while in the custody of a receiver to be levied upon and sold under the process of another court would at once give rise to a conflict of jurisdiction, and would seriously interfere with and impair the receiver's right to the management of the property under his appointment. It was urged in the Alabama case that the possession of the property in the hands of the receiver need not be disturbed, just as is urged in the case under consideration by the appellants. But the court declined to follow the argument advanced, and, as against the right to levy and sell lands in the hands of a receiver, cited *Wiswall v. Sampson* and *Robinson v. Railway Co.*, supra. It is to be observed, too, that the court took this view of the law in a case much stronger than the one at bar, for the plaintiff there obtained his judgment before the receiver was appointed, and before the property was placed in his hands. Nevertheless, it was decided he did not acquire a lien by placing execution in the hands of the sheriff until long afterwards.

In *Edwards v. Norton* (1881) 55 Tex. 405, real estate in the hands of a receiver, to hold possession and collect the rents, was decided to be protected from levy of execution. In that case, too, it was urged that a levy on real estate left the possession undisturbed, and that the purchaser took the title of the defendant in execution subject to the possession of the receiver and the result of the suit. The court stated that argument was met by the case of *Wiswall v. Sampson*, supra, and added that they could "see no sufficient reason why the rule should be relaxed

so as to facilitate execution sales of real estate in litigation."

We are not wholly without authority bearing upon the question, in our own supreme court. In *Stebbins v. Savage* (1884) 5 Mont. 253, 5 Pac. 278, an appeal from an order appointing a receiver, Wade, C. J., said: "The appointment of a receiver carries with it a right to the possession of the property described, and the further right not to be interfered with in such possession so long as the appointment remains in force. These are the ordinary powers and rights that belong to a receiver in order to make his appointment effectual, and they would have belonged to him, and he could have possessed and held the property, if they had not been mentioned in the order. * * * He is an officer of the law, and in his hands the property is in the custody of the law. He preserves and protects the property for the benefit of the rightful owner."

The question was discussed in *Jackson v. Lahee* (1885) 114 Ill. 287, 2 N. E. 172. The court said: "The law will not permit that possession to be disturbed without the consent of the court that first obtained jurisdiction to appoint the receiver. It would seem an anomaly that a lien adverse to the rights of the receiver could be obtained, so as to control the distribution to be made. Obtaining a lien implies it may ultimately take the property or funds to which it attaches, and, if that could be done in this case, it would withdraw the same from the custody of the law, or from (what is the same thing) the custody of the receiver having the same in possession."

In *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65, the court of appeals held that a sale of property under levy of execution, where the property was in charge of a receiver, was void, unless authorized by the court which appointed the receiver. The doctrine is again recognized by the court of appeals of New York in *Re Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665.

In a very recent case, in the matter of the application of the Schuyler Steam Towboat Company for dissolution (136 N. Y. 169, 32 N. E. 623), a receiver had been appointed by the supreme court of the state on July 31, 1891. The order appointing the receiver was filed August 1, 1891. August 3d the bond was approved, and August 4th filed. In the afternoon of August 1st the boats belonging to the corporation were libeled, and the United States marshal took possession. The receiver brought suit to restrain the libelants from further steps in the United States court. The court decided that the right of possession was in the receiver from the time of filing and entering the order appointing him; that the property of the corporation vested in him, that the property was in the custody of the law, and no other court could obtain jurisdiction over the property after such appointment, even under process upon which posses-

sion was taken prior to the qualifying of the receiver; that the court had the power to preserve and to protect it, it being in the custody of the law; and that, furthermore, "as was said in *Heldritter v. Oilcloth Co.*, 112 U. S. 305, 5 Sup. Ct. 135, 'when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it.' That dominion was acquired by the order appointing the receiver in this proceeding." *Freem. Ex'ns*, § 129.

No sale of property in the hands of a receiver will be allowed on execution, under another judgment, without leave of court first obtained for that purpose. *High*, Rec. § 422; *Beach*, Rec. § 224; *Daniell*, Ch. Pl. & Prac. § 743; 2 *Story*, Eq. Jur. 833a. Persons claiming an interest in the realty may, doubtless, come into court and be heard in relation to their interests, but they cannot interfere with the possession of the receiver, unless by order of court. *High*, Rec. § 146.

The appellants rely on several cases not in point. In *Bank v. Schermerhorn*, 9 Paige, 372, the creditor who made levy upon the realty had secured judgment apparently before the petition was filed asking for a receiver. The case, too, arose on a question of contempt. Under the facts, which are very dissimilar to those in the case at bar, the court held that there was no contempt committed in levying. The principle sustained in the case goes no further than stated by *High* (section 171), that "where a receiver is in the actual possession of the defendant's real estate, which is subject to a lien of a judgment against the defendant, the levy upon and sale of the defendant's interest in the real estate by a sheriff does not disturb the receiver's possession, and is not a contempt of court." The text of Mr. *High*'s book must be taken as cautiously restricted in its application to cases where the judgment was obtained and lien attached before the receiver was appointed. The exact purport of the opinion is expressly recognized in the Alabama decision cited above. See, also, *Wheeler v. Walton & Whann Co.*, 65 Fed. 720.

Wheaton v. Spooner (Minn.) 54 N. W. 372, also relied upon by appellants, turned upon the right to levy an execution upon a judgment which had been obtained prior to the appointment of a receiver. It was held that a judgment creditor of the party who was the judgment creditor of the syndicate, whose property was in the receiver's possession, could levy by execution upon the judgment, as the judgment belonged, not to the syndicate, but to the judgment creditor, and was subject to his control.

Being impressed with the reasoning of the cases reviewed, and with the justice of the rule as it has been expanded since first enunciated by the English courts, we think it a sound policy to hold that while the defend-

ants' property is in custodia legis, as in the custody of a receiver, there can be ordinarily no interference with the receiver's possession by actual seizure or by sale of the debtor's interest in the corporation's property subject to the possession of the receiver, where the execution has been issued since the receiver was appointed. And we are further satisfied that no such levy can properly be made under an execution issued from the district court of Lewis and Clarke county against property in the hands of the receiver who was appointed by and was subject to the orders of the district court of Gallatin county. The appellants had a right, it would seem, to establish by judgment their debt against the corporation by suit in Lewis and Clarke county, but they had no right to proceed to levy an execution upon the property of the corporation in the custody of the receiver in another judicial district. In an exhaustive and learned opinion of the supreme court of Alabama, rendered in 1891 (*Gay v. Iron Co.*, 94 Ala. 303, 11 South. 353), after carefully reviewing many federal decisions, the principle that no court can interfere with the custody of property held by another court through a receiver, but that all claims on the property in the custody of the receiver must be under the control of the court having such custody, is discussed; and the conclusion reached that, to preserve harmony between courts of concurrent jurisdiction, it is very important that the writs or processes of one court shall not interfere with or disturb the possession of any subject-matter then in gremio legis. See, also, *Dillingham v. Anthony* (Tex. Sup.) 11 S. W. 130.

We do not attach importance to the lack of actual knowledge on the part of the judgment creditor in the suit at law (*Marlow*) of the fact that a receiver had been appointed by the court in the Tenth judicial district. That point might have some bearing in a contempt proceeding, where different considerations control, but not in this action for injunction against an unwarranted levy. The denial of the right to levy the execution is upon the broader grounds hereinbefore discussed. As was said by the vice chancellor in *Evelyn v. Lewis*, 3 Hare, 472: "Whether the party proceeding at law did or did not know that a receiver had been appointed over the property, or however clear the right of the claimant might be, the court would restrain the prosecution of the claim if it were instituted without leave of this court."

Restricting our decision, therefore, to a negative answer to the principal question stated, we think that the district court which appointed the receiver properly restrained the sheriff from proceeding, and the judgment creditor from trying to enforce collection by interfering in any way with the receiver or the property in his custody. The judgment is affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(16 Mont. 271)

STATE ex rel. GRAHAM v. BOARD OF COM'RS OF CASCADE COUNTY.

(Supreme Court of Montana. June 10, 1895.)

JUDGMENT AGAINST COUNTY—ENFORCEMENT.

Comp. St. div. 5, § 751, provides that execution shall not issue on a judgment against a board of county commissioners, but that "the same shall be levied and paid by tax or other county charges," "provided, that execution may issue if payment be not made within 60 days after the time required for the payment of county taxes to the county treasurer." *Held*, that a judgment recovered against a board of county commissioners after the annual tax levy is not entitled to payment until after the next levy.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Application for mandamus, upon the relation of David Graham, to compel the board of commissioners of Cascade county to provide for the payment of relator's judgment. From a judgment for defendant, relator appeals. Affirmed.

Mandamus. Relator applied to the district court for an alternative writ of mandate commanding the board of county commissioners of Cascade county to adjust, settle, audit, and order a warrant drawn for the payment of a judgment duly recovered by relator against defendant in the district court of Cascade county, for \$400 and costs, on November 7, 1894. Relator sets forth that repeatedly since said judgment was rendered he has demanded payment and settlement of the same "according to law," but that the defendant refused to pay or settle said judgment; that there are sufficient funds in the road and general funds of the county treasury unappropriated, and out of which the said board can pay said judgment; and that it is the legal duty of the board to pay the same. The defendant, by answer, denies that there are or were any funds in the treasury of the county at the time of answer (March 29, 1895), unappropriated, as alleged by relator, and denies that it can lawfully pay said judgment out of the road or general funds, or any other funds, before the regular payment of taxes to the said county before December 1, 1895. In further answer defendant pleads that, in case the judgment is a valid one, it has imposed on it the duty of levying taxes to pay the same as other county charges are provided for in their payment, under the provisions of section 751, c. 39, div. 5, Comp. St.; that said judgment had no existence prior to November 7, 1894, and then the levy had been made for all charges against said county for that year; that the next levy has yet to come during 1895, and has not been made, nor will the taxes thereunder be paid before the latter part of the year, and all moneys now in the treasurer's hands have been appropriated for charges against the said county existing prior to the rendition of said judgment, and that under

section 751 of the Statutes, defendant has until the levy and collection of said taxes yet to be collected, or until 60 days after the time in which they should be paid, to discharge said judgment, if it is a valid one. To this answer a demurrer was filed, general and special. The court overruled the demurrer. Relator declined to plead further, whereupon relator's application for a peremptory writ was denied. Relator appeals.

F. C. Park and B. F. Turner, for relator.
H. J. Haskell, for respondent.

HUNT, J. (after stating the facts). This case turns upon the construction of section 751, div. 5, Comp. St. That section reads as follows: "When a judgment shall be rendered against the board of county commissioners of any county, or against any county officer, in an action prosecuted by or against him in his name of office, when the same shall be paid by the county, no execution shall issue upon said judgment; but the same shall be levied and paid by tax or other county charges; and when so collected shall be paid by the county treasurer to the proper person to whom the same shall be adjudged, upon the delivery of a proper voucher therefor: provided, that execution may issue on said judgment if payment be not made within 60 days after the time required for the payment of county taxes to the county treasurer, by the proper officers of said county in each year." We are of opinion that it was proper for the board of commissioners of the county to decline to pay the judgment until the amount thereof was levied and paid by tax, as other county charges are levied and paid, namely, by a levy based upon the amount of property in the county, as returned by the assessor, and a statement of the county expenses for the current year. Where incidental expenses, not especially embraced within the provisions of any particular statute, arise, doubtless they are covered by sums collected in taxes and required to be set apart by the board of commissioners, and known as the contingent or other specific funds of the county. But the payment of a judgment is especially provided for, and the amount thereof should be included in the itemized statement of county expenses for the current year, at the time that the board of commissioners make their annual levy. This method is plain, adequate, and certainly exclusive, where the funds already collected are necessary to pay the ordinary current expenses of the county. It may not be as speedy in this one instance as relator would like to have it, but it is certain, and the delay is compensated for by the rate of interest the judgment bears. The policy of the statute is manifest. If large judgments could be paid at once, before levy by tax, by reason of the commissioners not having provided for such emergencies by their levy, the credit of

the county might be seriously impaired, and creditors whose claims were for ordinary expenses, contemplated when the levy was made, might be unjustly forced into the lists of deferred creditors by the superior claim of a judgment creditor, whose warrant or claim might exhaust the cash funds. The California and Nevada cases cited by appellant are under statutes dissimilar to that of this state. The defense of no funds in the treasury, except such as are necessary to pay the current expenses of the county for the ensuing year, was properly pleaded. High, Extr. Rem. § 352. The judgment of the district court is affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(16 Mont. 294)

REED et al. v. POINDEXTER et al.

(Supreme Court of Montana. June 10, 1895.)

COMPLAINT IN REPLEVIN—AMBIGUITY—INCONSISTENT ALLEGATIONS—RULINGS ON DEMURRER.

1. A complaint in replevin, which in one count alleges that goods sold to C. by plaintiff under false representations were transferred to P. & J. for the benefit of creditors, and in another count alleges that the goods were transferred in payment of a debt due P., is demurrable as being uncertain and ambiguous.

2. Where plaintiff states one cause of action in two contradictory counts, neither the trial nor the appellate court will inquire on demurrer whether either or both of the statements are sufficient.

Appeal from district court, Beaver Head county; Frank Showers, Judge.

Action of replevin by Reed, Murdock & Co. against P. H. Poindexter and others.

The plaintiffs brought this action in replevin, seeking the return of certain personal property. They allege that they sold and delivered the property to the defendant the Poindexter Commercial Company. They allege that said defendant obtained said sale and delivery by false representations as to its solvency. The position of the plaintiffs is that by reason of said false representations the title to the property did not pass to said defendant. There is, in fact, but one cause of action, but the pleader, for some reason, has stated it in the complaint in two counts. In the first count it is alleged that the goods had been transferred by the Poindexter Commercial Company to the defendants P. H. Poindexter and W. A. Jones, and that the said transfer was made as an assignment for the benefit of the creditors of the said Poindexter Company, and particularly said P. H. Poindexter. In the other count in the complaint it is alleged that said goods were transferred by said Poindexter Company to the defendants P. H. Poindexter and W. A. Jones in payment of an antecedent debt owing by said company to said P. H. Poindexter. To this complaint a demurrer was filed. The demurrer was upon two grounds, as follows:

"(1) Because said amended complaint does not state facts sufficient to constitute a cause of action against them or either of them; (2) because the said amended complaint is uncertain and ambiguous, in this, to wit, that two causes of action are therein attempted to be stated, neither of which are sufficiently distinct and separate so as to enable the defendants to determine whether the plaintiff relies upon the one or the other for their recovery." The demurrer was sustained as to P. H. Poindexter and W. A. Jones. Judgment was thereupon entered in favor of said Poindexter and Jones for their costs. The plaintiffs appeal from the judgment.

J. C. Robinson and W. S. Barbour, for appellants. Shropshire & Burleigh and John B. Clayberg, for respondents.

DE WITT, J. (after stating the facts). It does not appear from the record whether the demurrer was sustained upon the first ground or the second, or whether upon both grounds. We are of opinion that the demurrer was good upon the second ground. The complaint was certainly ambiguous. The two causes of action to which the demurrer refers are in fact but one cause of action, differently stated, and contradictorily stated. The plaintiffs sought to follow the personal property into the hands of Poindexter and Jones, who were persons other than the original purchaser of the property. The complaint stated in one place that the property was transferred to said Poindexter and Jones as assignees for the benefit of creditors. Again, the complaint stated that the transfer was made to these persons in payment of a debt due by the Commercial Company to said Poindexter. One of these statements may be true. They are certainly not each true, for the reason that they contradict each other. It is true, as defendants set up in their demurrer, that they cannot determine upon which of these contradictory allegations the plaintiffs rely. One may not set up his cause of action in terms which contradict each other and expect a defendant to answer. We think the judgment must be sustained upon the second ground of the demurrer. We do not think that the district court was required to make any further investigation of the complaint. We are of opinion that that court was not called upon to go further, and determine whether either or both of the statements of the plaintiffs' cause of action were sufficient. In order to obtain a ruling from the district court as to whether plaintiffs had a cause of action, they should have first set up that cause of action in consistent language, and then the court could have determined whether the facts set up were sufficient. We are also of opinion that we are not required to determine whether either of the statements of the cause of action was sufficient. If either we or the district court were required to make such investigation, it would

be in effect saying to a plaintiff's counsel, "You may set up your alleged cause of action in as many contradictory expressions as you please, and get a ruling of the court upon which one is good, and then rely upon the same in your proof." This we decline to do. For all that appears in the record, this is what the district court declined to do; for it appears simply that that court sustained the demurrer without stating upon which ground. The judgment is affirmed, and the case is remanded to the district court, with permission, however, to the plaintiffs to amend their complaint. Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 307)

BRUNELL v. LOGAN et al.

(Supreme Court of Montana. June 17, 1895.)

DISMISSAL OF APPEAL.

Where there is no judgment in the record, and it does not appear that there was a judgment entered which could be supplied under suggestion of diminution, an appeal from the judgment will be dismissed without prejudice.

Appeal from district court, Missoula county; Frank H. Woody, Judge.

Action by Samuel Brunell against Harry Logan and another. Plaintiff appeals. Defendants move to dismiss the appeal on the ground that there is no judgment in the record. Dismissed.

Geo. B. Wilds, for appellant. Beckford, Stiff & Hershey and Webster & Wood, for respondents.

PER CURIAM. A motion is made in this case to dismiss the appeal on the ground that there is no judgment in the record. The record shows that the appeal is prosecuted from the judgment, and also from a special order made after final judgment. An examination of the record discloses the fact that there is no judgment therein contained, and it does not appear that there was in fact a judgment entered which could be supplied under suggestion of diminution of the record. The appeal from the judgment is therefore dismissed, but without prejudice, however, to the taking of another appeal, if the time has not expired for so doing. It consequently follows that the appeal from the special order made after the final judgment must also be dismissed. This order is also made without prejudice to the taking of a second appeal, if the same may at this time be done. Dismissed.

(16 Mont. 308)

STATE ex rel. VICOVITCH et al. v. VOTAW, Justice of the Peace.

(Supreme Court of Montana. June 17, 1895.)

JUSTICE OF THE PEACE—PRACTICE—MOTION FOR NEW TRIAL.

Code Civ. Proc. § 820, providing that in certain cases a new trial may be granted by a

justice of the peace, on motion, within 10 days after the entry of judgment, requires the motion to be made within such 10 days, and the mere giving of notice of the motion within that time is insufficient.

Appeal from district court, Lewis and Clarke county; H. R. Buck, Judge.

Action by O. Hermann against Peter Vovitch and another, of claim and delivery, before A. C. Votaw, justice of the peace. There was judgment for defendants. The district court on certiorari vacated an order of the justice of the peace setting aside the judgment, and defendants appeal. Affirmed.

C. W. Fleischer, for appellants. Henry C. Smith, for respondent.

PER CURIAM. Certiorari. On February 24, 1894, before A. C. Votaw, a justice of the peace, in an action of claim and delivery, wherein one O. Hermann was plaintiff, and relator and one Suttley were defendants, judgment was rendered in favor of the defendants and against plaintiff. February 26th notice of motion for a new trial was served. On March 8th plaintiff filed statement of grounds and affidavit for setting aside the judgment. Thereafter, defendants moved to strike out plaintiff's statement on motion for new trial, on the ground that said statement was not filed within the statutory time. On March 16th, thereafter, the justice issued an order vacating and setting aside said judgment, and granting a new trial in said action, against defendants' objection. The district court held that the justice exceeded his jurisdiction in setting aside the judgment theretofore rendered. Section 820 of the Code of Civil Procedure provides that in certain cases a new trial may be granted by a justice of the peace, on motion, within 10 days after the entry of judgment, etc. It is our opinion that, unless the motion is made within the 10 days after the entry of judgment, the justice has no jurisdiction to act upon it. A notice of motion is not a motion. *Wallace v. Lewis*, 9 Mont. 399, 24 Pac. 22. More than 10 days having elapsed between the entry of the judgment and the filing of the motion, the district court correctly vacated the order of the justice of the peace setting aside the verdict and judgment in the original case tried before the justice. *State v. Case*, 14 Mont. 520, 37 Pac. 95. Judgment affirmed. All concur.

(16 Mont. 318)

NEIMICK v. AMERICAN INS. CO. OF NEWARK, N. J.

(Supreme Court of Montana. June 17, 1895.)

VERDICT—CONFLICTING FINDINGS—FIRE INSURANCE—AMENDMENT OF PLEADINGS.

1. In an action on a fire policy with a clause, "\$1,800 total concurrent insurance permitted," plaintiff alleged that defendant, knowing that prior insurance to the amount of \$1,800 existed on the property, and was about to expire, agreed that the same should be renewed. There was a gen-

eral verdict for plaintiff, accompanied by a special finding that defendant did not agree to an increase of the insurance to the aggregate amount of \$3,600, and that defendant did not consent to the renewal of the old policy. *Held*, that a judgment setting aside the general verdict and rendering judgment for defendant on the special finding was proper.

2. An offer to amend a pleading to conform to the evidence is properly refused after return of the verdict and findings and discharge of the jury.

3. Where the complaint in an action on a fire insurance policy alleges that defendant agreed that additional insurance might be taken, an amendment to the effect that defendant, irrespective of such agreement, knew of the additional insurance on the property before its destruction, and made no objection thereto, being inconsistent with the alleged agreement, is properly refused.

Appeal from district court, Lewis & Clarke county; William H. Hunt, Judge.

Action by George Nelmick against the American Insurance Company of Newark, N. J., on a fire policy. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action on an insurance policy. On the 3d day of June, 1892, the defendant, through its agents, issued its policy to the plaintiff in the sum of \$600. At the same time the same agents issued two other policies for \$600 each, of other companies represented by said agents, to plaintiff, on the same property, making an aggregate of \$1,800 insurance on the property. The policy contained this clause: "\$1,800 total concurrent insurance permitted." The property was totally destroyed by fire on the 6th day of September, 1892. After the fire it was developed that plaintiff had secured other insurance on the property to the amount of \$1,800, making a total insurance thereon of \$3,600. This additional insurance was procured in other companies than those represented by defendant's agents. In his complaint in this suit plaintiff alleges "that prior to and at the time of making the contract of insurance between plaintiff and defendant herein, the plaintiff notified and informed the defendant's said agents of said other and prior insurance, and defendant's said agents consented and agreed that said prior insurance should remain thereon, and plaintiff then and there notified and informed said agents that said other insurance would soon expire, and that he would have, and did have, the same renewed immediately upon the expiration thereof; that the defendant's said agents, at the time said contract of insurance was entered into, knowing of and consenting to all the insurance there was on the said property, and knowing about the renewal thereof, consented and agreed thereto, and took plaintiff's application, received said premium, and issued and delivered said policy, knowing of the existence of said prior and other insurance; and then and there defendant waived any and all the conditions and requirements in said policy relative to other insurance." This allegation is denied by the answer. This seems to be the main, if not the only important, issue raised by the pleadings. The

case was tried with a jury, who returned a general verdict for the plaintiff, and the following special findings of fact: "(1) What was the value of the building at the time of the issuance of the policy sued on, to wit, the 3d day of June, A. D. 1892? Ans. \$2,300. John Steinmetz, Foreman. (2) What was the value of the building at the time of its destruction by fire, to wit, on the 6th day of September, A. D. 1892? Ans. \$2,300. John Steinmetz, Foreman. (3) Was it understood between plaintiff and L. F. La Croix, at the time of the issuance of the three policies by him, aggregating eighteen hundred dollars, that said plaintiff could increase the insurance of said building so that the aggregate amount of the insurance should be thirty-six hundred dollars? Ans. No. John Steinmetz, Foreman. (4) Did Mr. La Croix tell plaintiff that he could renew the three old policies, which were shortly to expire, so as to make the insurance on said building \$3,600? Ans. No. John Steinmetz, Foreman." The court, on motion of the defendant, set aside the general verdict in favor of plaintiff, and rendered judgment in favor of defendant on the special findings. From this judgment, plaintiff appeals.

R. R. Purcell, for appellant. Leon La Croix and C. B. Nolan, for respondent.

PEMBERTON, C. J. (after stating the facts). The appellant contends that the general verdict is not inconsistent with the special findings, and that the court erred in so holding. The plaintiff alleges in his complaint an understanding or agreement with defendant's agents that he might increase his insurance on the property to the sum of \$3,600. This the defendant denied. This issue was included in the special findings submitted to the jury. They found that there was no such understanding, or agreement. If there was no such agreement, plaintiff, it is conceded, could not recover. The general verdict for plaintiff was necessarily inconsistent with the special findings that no such agreement was entered into between the parties. The plaintiff, after defendant had moved the court for judgment on the special findings, asked leave to file amendments to his complaint, to the effect that defendant's agents had knowledge of this additional insurance, irrespective of said agreement, on the property, before its destruction, and made no objection thereto. Counsel for plaintiff contends that there was evidence of such knowledge, and that he was entitled to amend his complaint in conformance therewith. He contends also that this made an issue not covered by the special findings, and on which the jury might have found their general verdict; and, if so, he says the court erred in setting aside the general verdict, and rendering judgment on the special findings. We think this amendment inconsistent with the agreement alleged in the

complaint as a basis of plaintiff's right to recover in the case. And, furthermore, if the plaintiff desired to avail himself of the right to so amend, he should have made his offer at the close of the testimony, and asked for a finding thereon. When he offered his amendment the verdict and findings had been made and returned, the jury had been discharged, and the court was considering a motion for judgment on the verdict and findings. We are unable to discover any abuse of discretion on the part of the trial court in disallowing the amendment. It seems to us, from a careful consideration of the record, that the case was fairly tried on the pleadings and evidence, and a proper result reached. The judgment is affirmed.

DE WITT, J., concurs.

HUNT, J., having presided at the trial of this suit, takes no part in the decision.

(16 Mont. 303)

KENDALL v. O'NEAL.

(Supreme Court of Montana. June 17, 1895.)
AMENDMENT OF ORDER — STAY OF EXECUTION —
FRAUDULENT CONVEYANCE TO WIFE.

1. The error of a clerk in omitting from an order granting a stay of execution the object for which it is granted may be corrected after the expiration of the period for which the stay was granted.

2. A stay of execution, granted to allow time for the preparation and service of a statement on motion for a new trial, begins to run at the expiration of the 10 days which the law allows for preparation and service of a statement after service of notice of intention to move for a new trial.

3. Plaintiff's husband, after marriage, turned over to plaintiff his money and property, of which he had considerable, but she had none; and afterwards he had the management of the business as agent of his wife. The husband denied that the transfer was made to get the property out of reach of his creditors, but qualified it by stating that he would be foolish if he did not protect himself when a certain person threatened to sell him out, and give him no show. *Held*, that the evidence justified the court, on a verdict finding the conveyance free from fraud, in granting a new trial.

Appeal from district court, Choteau county; Dudley Du Bose, Judge.

Action by Amelia R. Kendall against B. F. O'Neal for the conversion of hay. There was a verdict for plaintiff, and from an order granting defendant a new trial plaintiff appeals. Affirmed.

Howard S. Greene, for appellant. Walsh & Newman and Donnelly & Knox, for respondent.

PEMBERTON, O. J. This is an action to recover damages of the defendant for the value of certain hay, which it is alleged he wrongfully took from plaintiff, and converted to his own use. Plaintiff was the wife of Charles O. Kendall at the time of commencing this suit. The defendant was the sheriff of Choteau county, and took the hay, as such sheriff, under an attachment issued in

a suit against Charles O. Kendall to recover a debt due by said Charles O. Kendall. The plaintiff claimed the hay as her separate property. The case was tried to a jury, who returned a verdict for the plaintiff. Defendant moved the court for a new trial, which was granted. From the order of the court granting a new trial this appeal is prosecuted.

The appellant contends that the statement on motion for new trial was not served and filed within the time required by law. The verdict was rendered on the 16th day of May, 1893. Notice of motion for new trial was served on the 25th day of May. On the 17th day of May the court, on motion of defendant's counsel, granted a stay of execution for 30 days. This order did not state the object or purpose thereof. On the 2d day of October thereafter the court amended this order on the minutes so as to read as follows: "In this cause, on motion of defendant's counsel, the court grants a stay of execution for a period of thirty days in which to prepare and file statement on motion for a new trial herein." And on the same day the court granted a new trial. The statement on motion for a new trial was served on the 1st day of July, 1893. The appellant contends that the court had no jurisdiction to grant the second extension. The order of October 2d simply corrected the order of May 17th so as to show what the court meant to do, and did in fact do, by granting the first order. Affidavits were filed to show what were the terms and object of this order, and to show that the clerk omitted to state in the order that the stay of execution was granted for 30 days, to enable defendant to prepare statement on motion for new trial. We think the court had full power to make the record state and conform to the truth, and to correct an error or omission of the clerk, when the mistake clearly appeared. This is evidently what the court did by its order of October 2d. See *Territory v. Clayton*, 8 Mont. 1, 19 Pac. 203. The law gave the defendant 10 days after the service of notice of intention to move for a new trial to prepare and serve statement. This 10 days, and the 30-days extension which the court may grant without the consent of the adverse party, extended the time for filing statement on motion for new trial beyond the 1st day of July, the date on which it was served and filed. We think the statement was served and filed in time.

The appellant contends also that the court abused its discretion by granting a new trial in this case. It will be observed that the plaintiff in this case is a married woman, and claims the hay taken by the sheriff for the debt of her husband as her separate property. It was shown by the evidence in this case that when plaintiff and her husband were married she had practically no money or property of her own; that her husband had considerable property; that after the

marriage the money and property were turned over to the wife by transactions between themselves; that the hay in controversy was cut and made by the use of this property, consisting of teams, machinery, etc., once belonging to the husband; that the husband assisted in the cutting and saving of the hay, for wages, it is said, paid by the wife; that the husband had the control and management of the business as the agent of the wife, as is claimed. These things appear in the evidence of plaintiff offered to show her separate ownership of the property. Under the law it is the duty of the courts to scrutinize with great care transactions of this kind between husband and wife, and only those contracts that are free from fraud, and are absolutely bona fide, should be permitted to stand. In *Lambrecht v. Patten* (Mont.) 38 Pac. 1063, this court, in speaking of the relation of husband and wife, said: "That relation is often a convenient means for the perpetration of a fraud, and, when claims of such indebtedness are made between husband and wife, they must be subjected to the most searching examination, if not, indeed, suspicion." See, also, *Chapman v. Summerfield*, 38 Kan. 610, 14 Pac. 235. We do not think the evidence in this case is free from doubt or suspicion. For instance, on cross-examination the following question was put to C. O. Kendall, the husband: "Q. Now, Mr. Kendall, is it not a fact that all this property that we have been talking about, including stock and house and lot and all, was transferred by you to your wife for the purpose of getting it out of your name, and out of the reach of your creditors?" He answered this question as follows: "To answer your question directly, I say, 'No'; but I will qualify it in this way: that when a man like John Powers tells me that he is going to sell me out, and give me no show, a man is a damn fool for not protecting himself." We think this testimony was sufficient to cast a suspicion upon the bona fides of the whole transaction and dealing between plaintiff and her husband, and to cause the trial court to question whether the jury had rightly scrutinized and considered the evidence in relation to the dealings between them. We are unable to discover that in granting a new trial the court abused that sound judicial discretion which governs in such proceedings. The order appealed from is affirmed.

DE WITT and HUNT, JJ., concur.

(16 Mont. 309)

WATKINS et al. v. MORRIS et al.

(Supreme Court of Montana. June 17, 1895.)

REVIEW ON APPEAL.

A judgment will not be disturbed on appeal when the evidence is sufficient to justify the findings.

Appeal from district court, Lewis and Clarke county; Frank K. Armstrong, Judge.

Action by J. M. Watkins and another against Moses Morris and another for damages for breach of contract. From a judgment for defendants, and an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Henry C. Smith and F. N. & S. H. McIntire, for appellants. Walsh & Newman, for respondents.

PER CURIAM. This action is brought by plaintiffs to recover damages for the refusal of defendants to accept and pay for certain quantities of oats. They allege a contract for the sale and delivery of the oats, and that, by reason of the defendants' failure to receive and pay for the same, they were obliged to sell said oats for the best price they could get. They sue for the difference between the contract price and the price for which they were obliged, as they allege, to sell. The contract for sale was made by telegraph. It is important to note that the whole telegraphic correspondence is couched in language indicating haste and promptness. Such terms are used as "if accepted at once," "immediate acceptance," "at once," "we will make prompt shipment," and "answer quick." The defense set up by defendants was that the plaintiffs did not deliver or offer to deliver the oats within a reasonable time, and that defendants, by reason of such delay, were obliged to supply themselves with oats from other sources. There were three car loads of oats altogether. Two car loads were sent from a point near Spokane, Wash., to Helena, by way of Huntington and Pocatello, Idaho, and Silver Bow Junction, Mont. The other car load, while sent by the Northern Pacific, the more direct route, was consigned to persons other than the defendants, and defendants had no knowledge of its arrival until they had been obliged, as they testified, to rescind the order, and buy oats elsewhere. The court found that the plaintiffs did not deliver, or offer to deliver, the oats to the defendants within a reasonable time. Judgment was rendered for the defendants. We have reviewed the testimony, and are of opinion that the evidence was sufficient to sustain the findings and the judgment of the court. The judgment, and the order denying plaintiffs' motion for new trial, are therefore affirmed.

(16 Mont. 774)

STATE ex rel. MUTUAL BENEFIT LIFE INS. CO. v. FIRST JUDICIAL DISTRICT COURT.

(Supreme Court of Montana. June 10, 1895.)

MOTION FOR RECEIVER—MANDAMUS TO COMPEL HEARING—PRIOR ADJUDICATION.

1. Plaintiff in a foreclosure suit moved for the appointment of a receiver under Code Civ. Proc. § 229 on the ground that the property was

"probably insufficient to discharge the mortgage debt," and at the time set for hearing the motion the parties were given opportunities to introduce testimony as to whether the property was probably insufficient, as alleged by plaintiff and denied by defendant, but no testimony was offered, the question being submitted on the pleadings, and plaintiff's motion was denied. *Held*, that the court did not refuse to determine the motion, and a writ of mandamus to compel it to do so should be denied.

2. The opinion of the district court is not a finding, nor a part of the judgment, so as to require a review thereof.

Mandamus, on the relation of the Mutual Benefit Life Insurance Company, to the district court of the First judicial district in and for the county of Lewis and Clarke, department No. 1. Writ dismissed.

The object of this action is correctly stated in the opening paragraph of the brief of the relator, as follows: "This is an application for a writ of mandamus to compel the district court of Lewis and Clarke county (department No. 1), to assume jurisdiction of, and hear and determine on its merits, an application or motion for the appointment of a receiver in an action now pending in said court in which the relator herein is plaintiff, which action was brought to foreclose a real-estate mortgage." Relator commenced an action in the district court against Peter Winne et al. to foreclose a mortgage. Our statute in reference to receivers provides: "A receiver may be appointed by the court in which the action is pending, or by the judge thereof: * * * Second. In an action by a mortgagee for the foreclosure of his mortgage, and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt." Code Civ. Proc. § 229. It was alleged in the complaint in the action to foreclose that the conditions of the mortgage had been broken, and, furthermore, that the property was probably insufficient to discharge the mortgage debt. That the property was probably insufficient to discharge the mortgage debt was denied in the answer. The plaintiff gave notice that it would move the court for an order appointing a receiver, and that the motion would be made upon the pleadings, and upon oral testimony to be taken and introduced on the hearing of said motion. Thereupon the district court ordered that oral testimony might be introduced upon the hearing of the motion in support thereof and in opposition thereto.

The application for a writ of mandamus sets forth that the court refused to hear testimony or proof in support of the application for the appointment of a receiver, and denied said application. The writ of mandamus was issued from this court commanding the district court to entertain and assume jurisdiction of said motion for the appointment of a receiver, and to hear proof, either oral or by affidavit, and to determine said application

upon the merits, or show cause before this court why it has not done so. The district court makes answer to the writ, and denies that it ever refused to entertain jurisdiction of the application for the appointment of a receiver, and that it ever refused to hear proof upon the application. The answer further sets forth that, at the time set for the hearing, the plaintiff applied for the appointment of a receiver, which motion was oral, and contained no reason therefor, "nor were any reasons at any time given why a receiver should be so appointed, except that it appeared from the pleadings that 'the condition of the mortgage has not been performed,' and the allegation in the plaintiff's complaint, contained in paragraph 19 thereof, 'said property is probably not sufficient to discharge said mortgage debt.' Ample opportunity was given the plaintiff to present any other or additional reasons, if any existed, but no such were offered or presented to the court, the plaintiff relying solely upon the pleadings in said cause." It is further set up in the respondent's answer as follows: "No grounds were presented, save those made in the complaint, or offered by the plaintiff, no offer of proofs upon any ground was made, no witnesses were produced or offered after said motion was made, nor was there any action taken in the matter of application for a receiver, except the argument referred to, and the submission of the same by agreement of counsel to this court, upon the pleadings and argument aforesaid." The action taken by the court appears in its answer, as follows: "That thereafter, and on the 3d day of May, 1895, after due consideration of all of said matters then pending, having theretofore taken jurisdiction thereof, and having heard all that the plaintiff had offered or expressed any desire to offer, and its argument therein, I did, on the 3d day of May, 1895, make the following order, which appears on pages 283 and 284 of the records of said district court, as follows: 'In this case plaintiff's motion for the appointment of a receiver is denied, and it is further ordered that the order heretofore made restraining defendants from collecting the rents, issues, and profits is hereby set aside, to which ruling of the court plaintiff excepted.'" The relator demurs to the answer on the ground that it does not set up a defense to the application for a writ of mandate. This is the matter now for consideration.

McConnell, Clayberg & Gunn, for relator.
A. K. Barbour and J. W. Kinsley, for respondent.

DE WITT, J. (after stating the facts). The writ of mandamus may be invoked to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station. Code Civ. Proc. § 566. The writ of mandamus may require the district court to act. We are of opinion that the answer of the court in this case

shows that the court did act upon the application for the appointment of a receiver. The demurrer confesses that all the allegations of the answer are true. It is therefore true that the court gave all the parties ample opportunity to introduce oral or other testimony upon the point of whether the mortgaged property was probably insufficient to discharge the mortgage debt. It is true that the parties refused to offer any such testimony. Therefore, all that the court had before it was the affirmation of the complaint that the property was probably insufficient to answer the debt, and the denial of this affirmation by the defendants' answer. Upon these pleadings the court acted, and refused to appoint a receiver. It is of course conceded that by this writ of mandate we are not asked to review the exercise of judgment and discretion of the court. As the record is before us, the writ of mandamus must be dismissed. The answer of the court is a complete defense to the application for the writ. Instead of the court's having refused to act, it did act upon what was before it, to wit, the pleadings, and gave ample opportunity to relator to offer any other matter in support of its application, which the relator refused to do. There have been several points argued by counsel, which we do not think are in the case. Nor do we consider it necessary to express our views as to the opinion of the district court which was filed in denying the application for a receiver. The opinion of the district court is not a finding, nor a part of the judgment. *Thorp v. Freed*, 1 Mont. 651; *Fant v. Tandy*, 7 Mont. 443, 17 Pac. 560; *Muller v. Buyck*, 12 Mont. 356, 30 Pac. 386; *Horsky v. Moran*, 13 Mont. 250, 34 Pac. 360. Judgment was upon the pleadings. The court acted. Whether the reasons of the court were right we need not inquire. *Thorp v. Freed*, supra. The result was right. The answer of respondent being confessed to be true by the demurrer, and it being a defense of the application, it is ordered that the writ be dismissed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 224)

MCCOWAN v. McLAY.

(Supreme Court of Montana. June 3, 1895.)
MINING CLAIM—NOTICE OF LOCATION—VERIFICATION—POSSESSION FOR LIMITATION PERIOD—EFFECT—ADVERSE CLAIM.

1. Gen. Laws, div. 5, § 1477, requiring the notice of location of a mining claim to be "on oath," was a proper exercise of the power of the state legislature.

2. Under Gen. Laws, div. 5, § 1477, requiring one who discovers a mining claim to file a declaratory statement of such discovery or location, on oath, describing said claim in the manner provided by the laws of the United States, the statement must be of the discovery or location, as well as of the description of the claim, and an affidavit which merely states that "the de-

scription of said lode" is true is fatally defective.

3. The statement, in a verification of a location notice, that the locators have "fully complied with the requirements" of law and local customs regulating mining locations, is merely a conclusion of law, and does not verify any fact.

4. Rev. St. U. S. § 2332, providing that evidence of the possession and working of a mining claim for a period equal to the statute of limitations of the state shall establish a right to a patent, in the absence of any adverse claim, merely authorizes a patent to issue to an applicant who has held for such period, provided no one files an adverse claim in the land office; and does not give one a right to the claim merely because he has worked it for the statutory time without any adverse claim being made.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by Duncan McCowan against Edward McLay to determine adverse claims to mining premises. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

McConnell, Clayberg & Gunn, for appellant. Toole & Wallace, for respondent.

DE WITT, J. The defendant applied for a United States patent for certain mining premises. The plaintiff filed his adverse claim in the United States land office, and commenced this action, which is commonly known as an "adverse suit." *Davidson v. Bordeaux*, 15 Mont. —, 38 Pac. 1075, and cases cited; *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419. A demurrer to plaintiff's complaint was sustained, and judgment rendered and entered for defendant. Plaintiff appeals.

The plaintiff depended upon the location of the Yellow Jacket claim. He set out the location notice of this claim, and the affidavit verifying the same, in his complaint. One point raised by the demurrer was that the verification of the location notice was insufficient. Our statute requires that the notice of location of a mining claim shall be on oath. Gen. Laws, div. 5, § 1477. That this requirement of our statute is within the power of the state legislature was doubted in *Wenner v. McNulty*, 7 Mont. 30, 14 Pac. 643, but was fully affirmed in *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302, which ruling was afterwards followed as the law of the case on the second appeal of *O'Donnell v. Glenn*, 9 Mont. 452, 23 Pac. 1018, and was followed as stare decisis in *Metcalf v. Prescott*, 10 Mont. 284, 25 Pac. 1037. The Ninth circuit court of appeals of the United States recently encountered this question in *Preston v. Hunter* (not yet officially reported), 67 Fed. —, but passed it without an expression of opinion. We shall not now disturb the law of this jurisdiction in this respect.

The question then presents itself, was the verification of the Yellow Jacket notice of location insufficient? It is as follows: "Territory of Montana, County of Meagher—ss.: John C. O'Brien, James L. Neilhart, and Samuel R. Harley, being duly and severally sworn, depose and say that they are of lawful age, and citizens of the United States;

that they have heard read the above notice of location of fifteen hundred linear feet on the Yellow Jacket lode; that the description of said lode as therein given is true and correct; that they have in every respect fully complied with the requirements of chapter 6 of title 32 of the Revised Statutes of the United States, and the local customs and laws regulating mining locations, and that they are three of the within-named locators." (Subscribed and sworn to.) Does this affidavit verify the notice? Is the notice a declaratory statement upon oath? Gen. Laws, § 1477; *Metcalf v. Prescott*, supra. The notice is a declaratory statement, but the question is, do the locators, or any of them, make the statement under oath? We are of opinion that they do not. They make only one portion of it under oath, and that is that the description of the lode, as given in the notice, is true and correct. There is no oath that any portion of the location notice is true, except this one item, and therefore the location notice is not verified, except as to this one item, unless it can be held that the words, "description of the lode," include the whole notice. But we are of opinion that such construction of these words cannot obtain. The meaning of the words, "description of the lode," we think, is entirely clear. *Webst. Int. Dict.* defines the word "description" as follows: "A sketch or account of anything in words; a portraiture or representation in language." The same authority gives among the synonyms of this word: "Account"; "definition"; "recital"; "narration"; "explanation"; "representation." The *Century Dictionary*, among other definitions of the word, has the following: "Representation by visible lines, marks, colors, etc. The act of representing a thing by words or signs, or the account or writing containing such representation. A statement designed to make known the appearance, nature, attributes, accidents or incidents of anything, as a description of a house or battle." Furthermore, the word "description" in conveyances of real estate and in legal instruments in writing generally has an established meaning. It is the language which depicts the thing under consideration. See *Anderson's Law Dictionary*, under the word "Description." See, also, *Black's Law Dictionary*, under the same head, where the word "description" is defined as: "(1) A delineation or account of a particular subject by a recital of its characteristic accidents and qualities. (2) A written enumeration of items composing an estate, or of its condition, or of titles or documents; like an inventory, but with more particularity, and without involving the idea of an appraisal. (3) An exact written account of an article, mechanical device, or process which is the subject of an application for a patent. (4) A method of pointing out a particular person by referring to his relationship to some other person or his character, as an officer, trustee, executor, etc.

(5) That part of a conveyance, advertisement of sale, etc., which identifies the land intended to be affected." We are therefore of opinion that the word "description," as used in the affidavit under consideration, meant the delineation or account of the Yellow Jacket mining claim by the recital of its metes and bounds, or courses and distances, and its geographical position. See definition from *Black, Law Dict.*, supra. Counsel for appellant contend for a broader definition or use of the word "description" as it appears in the affidavit and in the statute (section 1477). They argue that the words, "description of the lode," refer to the whole location notice, and that when it is affirmed on oath that the "description" is correct it is thereby affirmed that the whole notice is true; that is to say, that the whole location notice is the description of the lode. We cannot consent to this construction. It does violence to all ideas of the meaning of the word "description." We are of opinion that the word is not used in section 1477 in the sense that counsel claims, but that it is employed by the lawmakers in its ordinary and well-known signification. Section 1477 provides that any person or persons "who shall hereafter discover any mining claim * * * shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery or location is made, a declaratory statement thereof, in writing, on oath, * * * describing said claim, in the manner provided by the laws of the United States." The locator, under this statute, was to file in the county in which said location is made a declaratory statement thereof. The word "thereof," as here used, means the declaratory statement of said discovery or location. The declaratory statement on oath must be of the discovery or location, and not simply of the description of the claim. This language seems to be clear, and the intent seems to be plain. A few lines further in the statute it is also provided that the declaratory statement shall also describe such claim in the manner provided by the laws of the United States. Therefore it appears that the declaratory statement shall be of the discovery or location, as well as the description of the claim, and it would be unreasonable to hold that a person taking oath that the description of a claim was correct was thereby taking oath that all other matters set up in the notice of location or declaratory statement were also true. It therefore follows that the location notice of Yellow Jacket lode, being verified as to only one of its items, was not a declaratory statement on an oath of the discovery or location of a claim. It is observed that the affidavit further states that the locators have fully complied with the requirements of law and local customs. This, however, is simply a conclusion of law, stated by the locators, and not a verification of any fact. *Anthony v.*

Jillson, 83 Cal. 206, 23 Pac. 419. We must therefore conclude that plaintiff's location notice was fatally defective.

Plaintiff contends further, however, that even if he had no notice of location at all, he pleads in his complaint that he and his predecessors in interest have been in possession of the premises, and worked them as a mine, for a period equal to the statute of limitations of this state, and that, therefore, he is entitled to prevail in this action. He relies upon section 2332 of the Revised Statutes of the United States, which is as follows: "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim." It is said in *Mining Co. v. Willis*, 127 U. S. 471, 8 Sup. Ct. 1214: "With reference to the third ground of the demurrer, it is only necessary to say that the complaint alleges that a valid and legal location of said tunnel was made by persons under whom the plaintiff claims, and that the plaintiff held possession of the same for more than five consecutive years prior to the ouster by the defendants, and paid all the taxes during that period legally or otherwise assessed upon said property. This, under the laws of Colorado, would give the plaintiff a right to the premises in dispute superior to any other claim except that of the government." But these remarks are not applicable in this case. There plaintiff depended upon a "valid and legal location." Here plaintiff had not a valid location, as we have determined. We are of opinion that the words "adverse claim" in section 2332 are used in the same sense as they are employed throughout the whole of chapter 8, tit. 32, which is the mining law of congress. The signification of those words in the sections of the mining law is a claim filed in the United States land office, opposing an application for patent to mining premises, made by another person. The claimant applies for patent. The adverse claimant opposes him. Each claims the ground which is in controversy. To support our view as to the meaning of the words "adverse claimant" and "adverse claim" we note the following language of section 2325. That section states: "If no 'adverse claim' shall have been filed * * * at the expiration of sixty days, it shall be assumed that the applicant is entitled to a patent, * * * and thereafter no objection from third parties * * * shall be heard." Again, in section 2326, we find the following: "Where an 'adverse claim' is filed * * * it shall be upon oath," etc. Again, in the same section: "It shall be the duty of the 'adverse claimant,' within thirty days," etc. Again, it is stated in the same section "that a failure on his part shall be a waiver

of his 'adverse claim.'" We must therefore conclude that the "adverse claim" mentioned in section 2332 means the land-office adverse claim. Section 2332, in its order in the act, follows the provisions of law as to applying for patent and proceedings under said application, and the filing of adverse claims. The section says: "Where such person or association * * * have held and worked their claims for a period equal to the time prescribed by the statute of limitations," etc. We are of opinion that the words, "such person or association," etc., refer to the persons and associations which have been the subject of treatment in the preceding sections, namely, persons and associations who have complied with the terms of the law, and are applying for a patent for their mining premises. Preceding section 2332, all the details for an application for a patent and adverse claim the same have been provided for. Then comes section 2332, and provides that if such person or association,—that is to say, such applicants for patent,—have held and worked their claims for a period of the statute of limitations, such facts shall establish their right to a patent, in the absence of an "adverse claim." We are of opinion that this section was enacted to meet cases where applicants for a patent have been in possession of their claims for a period of the statute of limitations, but were unable to make full proof of their rights to a patent, as required by the previous provisions of the law; and to excuse their defects in title congress determined that the land office should pass over such defects, and give them their patents, provided no one appeared to contest their applications. It would appear that the section was enacted to prevent an applicant from failing to obtain his patent simply for defects in his claim, when he had held a long undisputed possession, and no one had opposed him. The land office, under such circumstances, was thus authorized to omit some of the strict proof required from an applicant in consideration of there being no opposition to the application. But if an "adverse claimant" did appear, the contest should be referred to a court of competent jurisdiction for determination as in other cases. We are of opinion that the words, "in the absence of any adverse claim," mean that patent shall be issued to such a claimant as is described in section 2332, if no one filed what is known in the land office as an "adverse claim," within the period within which an adverse claimant may file such claim under the mining laws of congress. This view is consistent with the whole scope of the mining law and the practice in the land office thereunder. That such is the construction of the land office is apparent from the rules of that office as to section 2332. After citing that statute, rules 70 and 71 are as follows: "This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years

since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled."

Rule 70. "When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the state or territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim."

Rule 71. We do not think it can be properly contended that the statute means "in the absence of an adverse claim filed within the period of the statute of limitations." If that construction were to obtain, it would be necessary to add words to the statute, and make it read, "in the absence of any adverse claim filed within the period of the statute of limitations." The better view, in our opinion, is that the statute means that patent shall issue to an applicant for patent who brings himself within the requirements of section 2332, if no one appears in the land office to adverse his application. It is clear that plaintiff in this action is not within the purview of section 2332.

There are other points raised on the argument, but our views upon the matters discussed dispose of the appeal. The demurrer was properly sustained. It is ordered that the judgment be affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 286)

BERG et al. v. KOEGEL et al.

(Supreme Court of Montana. June 3, 1895.)

MINING CLAIM—NOTICE OF LOCATION—VERIFICATION.

Under Gen. Laws, div. 5, § 1477, requiring a person making a location of a mining claim to file a declaratory statement thereof on oath, a statement which, on its face, appears to have been verified a year before the location of the mine, is insufficient, in the absence of proof that the affidavit was wrongly dated by mistake.

Appeal from district court, Jefferson county; Frank Showers, Judge.

Action by John Berg and others against Charles Koegel and others to quiet title to a mining claim. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

John S. Miller, for appellants.

DE WITT, J. This is an action brought by plaintiffs to quiet their title in and to certain mining premises against the claims of defendants to the same premises. The plaintiffs were nonsuited, and judgment entered for defendants, from which judgment this appeal is taken. One of the grounds for the nonsuit was the defect in the location notice of the plaintiffs. The location notice was dated January 1, 1891. It was verified, as appears by the affidavit, January 1, 1890. It was recorded January 2, 1891. The testimony shows that the discovery and location was made January 1, 1891. Therefore it appears by the recorded notice that it was verified a year before the discovery and location of the claim. There was no attempt made upon the trial to show that the affidavit was wrongly dated by mistake of the notary. The only testimony upon the subject of when the notice was made out is the testimony of a witness who stated that it was made out the last day of January before he went upon the ground. As he went upon the ground and located the claim in January, 1891, it was probably a mistake of the transcriber when he made the testimony to appear that the notice was made out the last of January. The witness probably said the last of December. But, in any event, the verification itself shows the date one year prior to the location, and the best that the evidence does to help the plaintiffs shows that the verification was made certainly before the location, for the witness says that it was made out and sworn to before the location was made. Our statute (section 1477, div. 5, Gen. Laws) provides that a person making a discovery and location of a quartz lode vein shall file a declaratory statement thereof on oath. A declaratory statement on oath, made perhaps a year, and at least some time, before the discovery and location, is certainly not a declaratory statement of the location. A person surely cannot make affidavit of facts before the facts came into existence. We are therefore of opinion that the testimony of the plaintiffs themselves showed that they had not made or filed a declaratory statement on oath of the discovery or location of their claim. The court therefore properly granted the nonsuit. This decision is made upon the authority of *McCowan v. McLay* (just decided) 40 Pac. 602, to the effect that our statute requiring the location notice to be verified is not in conflict with the laws of the United States upon the subject of the location of mining claims. The judgment is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 322)

ELKHORN TRADING CO. v. TACOMA MIN. CO. et al.

(Supreme Court of Montana. June 17, 1895.)

ESTOPPEL—TO ASSERT CLAIM—FALSE STATEMENT AS TO CORPORATE DEBTS.

One B. was local manager of plaintiff trading company, and was a trustee and the book-keeper of defendant mining company. When the mining company ceased operations, the trustees thereof went to B., to ascertain the amount of its indebtedness to plaintiff for the purpose of preparing the annual report required by Comp. St. div. 5, § 460, making the trustees personally liable for the corporate debts in case of failure to annually publish a report of indebtedness, etc. B. assured the trustees that the mining company owed plaintiff nothing, and that the general indebtedness to others was trifling, and advised the trustees not to make the statutory report, which statements were relied upon by the trustees. It appeared that B. made the statements in order to hold a trustee, who was financially responsible, to the payment of plaintiff's claim. *Held*, that plaintiff was estopped to assert the liability of the trustees for a debt due to it from the mining company.

Appeal from district court, Lewis and Clarke county; H. R. Buck, Judge.

Action for debt by the Elkhorn Trading Company against the Tacoma Mining Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action for debt, brought against the respondents, Tacoma Mining Company and W. R. Rust. The indebtedness is that of defendant the mining company. Judgment was also demanded against defendant Rust on the ground that he was one of the trustees of the mining company, and, as such, neglected to file the annual statement required by the law of this state. At the opening of the trial, the following stipulation was made: "Before the introduction of any testimony, it was stipulated by and between the plaintiff and the defendant in the above-entitled action, in open court, that the plaintiff should recover judgment against the said defendant the Tacoma Mining Company for the sum of \$1,607.11; and that, unless this court should find that the defense of the defendant Rust constitutes a bar to this action as to him, the plaintiff is entitled to recover that amount from the said defendant Rust, as one of the trustees of the said defendant corporation." It was admitted on the pleadings, by Rust, that the Tacoma Mining Company did not in the year 1891 file their annual statement, as required by section 460, div. 5, Comp. St., which is as follows: "Every such company shall, annually, within twenty days from the first day of September, make report, which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital and of the proportion actually paid in and the amount of existing debts, which report shall

be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee, or board of trustees, by virtue of the provisions of this section, for a failure to cause to be published in a newspaper the report in this section mentioned, if within the time herein mentioned said trustee, or board of trustees, or company, shall annually cause said report to be filed in the office of the county clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation." In defense against his personal liability as trustee, defendant Rust pleaded an estoppel. The facts constituting the estoppel were as follows: George J. Bottcher had general charge of the business of the Elkhorn Trading Company, located at the town of Elkhorn. He was treasurer and local manager, and had general local supervision. He had charge of all the accounts. The Tacoma Mining Company was doing business near the town of Elkhorn. Bottcher was also one of the trustees of and a stockholder in the mining company. He kept the books also of the mining company. The financial business of the mining company was transacted through the trading company. All remittances for ores sold by the mining company were sent to the trading company, and placed to the credit of the mining company on the trading company's books. The latter was the disbursing agent of the mining company. In the summer of 1891 it appeared that the mining company ceased operations. The trustees of the mining company went to Mr. Bottcher, at his place of business, for the purpose of making out the annual statement of the mining company, as required by section 460, supra. In order to make out such statement, they inquired of Bottcher what the indebtedness of the mining company was to the trading company. Bottcher informed them that the mining company did not owe the trading company anything whatever, and that the mining company had no debts at all, except \$30, which was due to persons other than the trading company, and that, therefore, it was not necessary to make out any annual statement. Bottcher advised them not to make such statement, for the reason that they owed no debts, except the \$30, and that there was enough money in the hands of the trading company to pay that amount. The trustees of the mining company believed what Mr. Bottcher told them. They had no other means of obtaining the information as to whether the mining company owed the trading com-

pany, Bottcher being the bookkeeper for both concerns. They relied upon Mr. Bottcher's statement, and, so relying upon it, omitted to prepare and file the annual statement. Afterwards, and in November, Bottcher presented to the trustees of the mining company the claim for indebtedness upon which this action is brought. It furthermore appears by the testimony of Smith, one of the trustees of the mining company, that at that time, in November, and after it was too late to file the statement for that year, under the statute, Bottcher told said trustee Smith that the reason he had not presented this statement of indebtedness before was that if the Tacoma Mining Company did not file an annual statement, as required by law, W. B. Rust was the only person responsible in the Tacoma Mining Company, and that he would have to pay the debts, thereby saving the Elkhorn Trading Company. Such is a brief résumé of the facts. The case was tried to the court without a jury. The court found that these facts constituted an estoppel in favor of Rust, as against the plaintiff, and rendered judgment for defendant Rust. From the judgment in favor of Rust, and from an order denying a new trial, the plaintiff appeals.

Geo. F. Shelton and H. N. Blake, for appellant. A. K. Barbour, for respondents.

DE WITT, J. (after stating the facts). It is clear that under section 460, div. 5, Comp. St., defendant Rust, by reason of the neglect of himself and the other trustees of the Tacoma Mining Company to file its annual statement, became liable for the indebtedness here sued upon by the plaintiff. *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18. But, under the facts in this case, may the plaintiff assert Rust's liability? Is not plaintiff estopped? It was clearly within Bottcher's authority, as general manager of plaintiff, to state what the indebtedness was of the mining company to plaintiff. Bottcher was the only person who knew the facts. He kept the books of both companies. (See statement of the case preceding this opinion.)

Some of the general principles of estoppel we find epitomized in *Herman on Estoppel and Res Judicata* (volume 1, § 7), as follows: "(1) If a man, by his words or conduct, willfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist. (2) If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be

acted upon in a certain way, and it is acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts." These are elementary principles. Let us apply to them the facts in this case. The plaintiff acted through Bottcher, its agent. Bottcher acted within his authority. He was cognizant of all the facts, and the only person who knew them. He willfully endeavored to cause the defendants to believe a certain state of things, to wit, that the mining company did not owe anything to the plaintiff. He knew that that statement was false, and it appears in testimony that he said that he made that statement for the purpose of inducing the mining company and its trustees to refrain from filing their annual statement, in order that the plaintiff, of which he was manager, might secure a personal liability against defendant Rust. The defendant Rust believed these false statements. He relied upon them. He acted upon this information and belief. If the trustees of the mining company had not so relied upon this information and belief, they would have filed their annual statement, and then there would have been no personal liability on the part of Rust as trustee. Therefore, applying the rule of estoppel, plaintiff cannot now aver, as against Rust, that there was a debt of the trading company against the mining company. This seems to be a perfectly clear case of estoppel. While it is true that plaintiff has, under the statute, its right of action against defendant Rust, it is also equally true, under the rules of estoppel, that the court will not hear the plaintiff assert it.

It is claimed by the appellant that section 460, supra, is a penal statute, and that the penalty, being incurred, must be enforced. Whatever may be the exact meaning of the expression "penal" (*Gans v. Switzer*, 9 Mont., at page 413, 24 Pac. 18), here the fact is that the person in whose favor the penalty is given by the statute is the person who willfully deceived defendant Rust, and deliberately induced him to place himself in a position where the plaintiff hoped to be able to enforce the penalty. However true it may be that the penalty was incurred, there is no reason for setting aside the well-recognized doctrine of estoppel in such a clear and simple case as this. The plaintiff cannot take advantage of its own wrong, deception, and fraud. This court will not listen to such a proposition for a moment. It is shocking to law and to morals. The judgment is affirmed. Remittitur forthwith.

PEMBERTON, O. J., and HUNT, J., concur.

(11 Wash. 713)

SILSBY et al. v. TACOMA, O. & G. H. R. CO.**HATCH et ux. v. SAME.**

(Supreme Court of Washington. April 17, 1895.)

Appeal from superior court, Thurston county; W. H. Pritchard, Judge.

Actions by John A. Silsby and others and Zephaniah J. Hatch and wife against the Tacoma, Olympia & Gray's Harbor Railroad Company. From judgments for plaintiffs, defendant appeals. Reversed.

Ashton & Chapman, for appellant. Allen & Moore and Chas. H. Ayer, for respondents.

PER CURIAM. The opinion in the case of Kaufman v. Same Defendant (just rendered) 40 Pac. 137, controls the disposition of these cases, and they are reversed and remanded in accordance therewith.

(12 Wash. 118)

PUGET SOUND BRICK, TILE & TERRA COTTA CO. v. SCHOOL DIST. NO. 73, KING COUNTY.

(Supreme Court of Washington. June 13, 1895.)

CONSTRUCTION OF SCHOOL BUILDING — BOND OF CONTRACTOR — EFFECT — LIABILITY FOR MATERIALS.

Defendant school district let a contract for the construction of a building, and took from the contractor a bond, conditioned merely for the performance of the work in accordance with the contract, the latter instrument providing inter alia that the contractor should furnish the materials used, but not expressly providing that he should pay for them. *Held*, that such bond, even with the contract incorporated therein, not being conditioned "to pay" material men, as provided by Gen. St. § 2415, afforded no protection to defendant in an action against him for supplies furnished the contractor.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by the Puget Sound Brick, Tile & Terra Cotta Company against school district No. 73, King county, Wash., to recover for materials furnished for the construction of a school building. From a judgment for plaintiff, defendant appeals. Affirmed.

A. G. McBride and S. H. Piles, for appellant. Chas. F. Fishback, for respondent.

HOYT, C. J. The appellant let a contract for the construction of a school building to one S. E. Clough, and took from him a bond with sureties, conditioned as follows: "The condition of the above obligation is such that whereas, said S. E. Clough has been awarded the contract to construct for said school district a brick school building to be built in said district according to the plans and specifications thereof made and prepared by A. L. Haley, arct., and in accordance with all details: Now, therefore, if said S. E. Clough shall faithfully, timely, and truly do and perform said work, and comply with said contract, plans, and specifications, to which reference is hereby made, and the same made a part of the bond, then the above obligation to be void; otherwise to remain in full force

and virtue." The respondent furnished material to said contractor to be used, and which was used, in the erection of said building, and, not having been paid, brought this action to recover therefor of the appellant. There is substantial agreement between counsel that, if the bond in question was not one upon which an action could be maintained by one who had furnished materials to the contractor, the judgment of the lower court was right, and should be affirmed. It is also practically conceded that such action could not be maintained upon the bond unless it came within the provisions of section 2415 of the General Statutes. The bond provided for in that section is one so conditioned as to require the contractor to pay all laborers, mechanics, and material men, and persons who shall supply such contractor with provisions or goods of any kind, all just debts due to such persons, or to any person to whom any part of such work is given, incurred in carrying on said work; and the question presented for our decision is as to whether or not the conditions of the bond in question so far complied with the provisions of this statute as to bring it within its terms.

Appellant concedes that the bond, if construed independently of the contract to which it referred, could not be held to come within the provisions of the statute. But it is claimed in its behalf that, by the terms of the bond, the contract was made a part thereof, and should be considered in construing it, and that the two instruments, taken together, are sufficient to show an evident intent upon the part of all the parties to comply with the provisions of said section 2415. It may well be doubted whether the contract was understood to be a part of the bond for any other purpose than to ascertain what was to be secured thereby to the appellant: that is, to secure the erection of the building by the contractor in accordance with the plans and specifications referred to in the contract. But, if we should agree with the contention of the appellant that the bond was given to secure the performance by the contractor of every provision of the contract, we should yet be unable to agree with its further contention that the contract in express terms provided for the payment for the materials by the contractor. It is true that it is therein provided that he shall furnish the materials, and it would be fair to presume that that meant that he should furnish them at his own expense, but it could not be inferred from the fact that he was required to do this that he thereby bound himself to pay the persons from whom the materials should be obtained. We are therefore unable to find anywhere in the contract any provision which, if it had been incorporated in the bond, would have sufficiently complied with the conditions required in the statute referred to, to bring it within its terms. We must therefore hold that it was not a statutory bond, and, if it was not, it is clear that the respondent could

maintain no action thereon, as it was in no manner privy thereto. It follows that the appellant had not protected itself as required by the section cited, and for that reason must be held liable in an action by one who had furnished supplies to the contractor for the erection of the building. The judgment will be affirmed.

ANDERS, DUNBAR, SCOTT, and GORDON, JJ., concur.

(11 Wash. 653)

SANFORD v. ROYAL INS. CO.

(Supreme Court of Washington. April 24, 1895.)

**INSURANCE—CONCEALMENT OF FACTS—RELEASE—
FRAUDULENT REPRESENTATIONS—ACTION
ON POLICY.**

1. No written application for insurance having been required, and no questions asked as to incendiariism, the fact that assured made no mention of his apprehension of incendiariism because of an encounter between his clerk and a burglar, and because a merchant doing business in the same block, whose stock of goods had run down, and who was largely indebted, had stored his household goods at a safe distance from his store, is not such a fraudulent concealment as will invalidate the policy.

2. One can sue on a policy without first bringing suit to set aside a release thereof claimed to have been obtained by fraud. Such question may be litigated in the same action.

3. One who sues on a policy need not, before attacking as fraudulent a release thereof, set up as a defense, restore the consideration obtained for the release. It is enough that the judgment provides for such restoration, especially where it is apparent that a tender would have been rejected.

4. A release of a policy by assured, relying on false statements by the insurer's agent as to the law of insurance, will not prevent recovery on the policy.

5. Where a loss under a fire policy has occurred, and the amount has been agreed on, and assured's right to recover is not a doubtful right, a release of the whole claim for a fractional part only is without consideration.

Appeal from superior court, Garfield county; R. F. Sturdevant, Judge.

Action by I. C. Sanford, as assignee of the estate of John Harford and F. G. Harford, partners as Harford & Son, insolvent debtors, against the Royal Insurance Company, on a fire policy. Judgment for plaintiff. Defendant appeals. Affirmed.

B. L. & J. L. Sharpstein (T. C. Coogan, of counsel), for appellant. M. F. Gose, Sander-son Reed, M. M. Godman, and S. G. Cosgrove, for respondent.

GORDON, J. In March, 1893, John Harford and F. G. Harford (father and son) were partners doing business as such at Pataha City, in this state, and on the 23d day of said month insured their stock of hardware, etc., including buildings, for the sum of \$15,300, represented by 10 policies in various companies; the amount of insurance effected in the appellant company being \$2,500, \$1,000 of which was upon building and \$1,500 upon stock. On the 7th day of April of that year said insured property was wholly de-

stroyed by fire. On the 10th day of April following, said firm of Harford & Son, and the individual members thereof, made a general assignment for the benefit of all of their creditors, and respondent, I. C. Sanford, is such assignee. He brought this action upon said policy of insurance. After the usual denials, the answer sets up two affirmative defenses, the first of which is that respondent's assignors, at the time of procuring said insurance, concealed from the appellant and from its agents the fact that said firm and the several members thereof feared damage or destruction of said property by incendiariism, and then "fraudulently represented and stated to the agent of the [appellant] that they had no such fear, when, as a matter of fact, they did at said time so fear the destruction of or damage to the said property from said cause, and that they did thereby, by their said failure to disclose the same, and by the concealment thereof, and by said misrepresentation thereof, fraudulently induce and cause the said policy of insurance * * * to be issued to them; and that it was in and by said policy, and as a part thereof, contracted and agreed that said policy should be void if the insured had concealed or misrepresented any material fact or circumstance concerning said insurance or the subject thereof." The second affirmative defense sets out that on the 17th of April, 1893, and prior to the filing (and prior to making the assignment mentioned in the complaint), the firm of Harford & Son (the insured), "at a time when a controversy and question was pending between [appellant] and said firm as to the liability of the [appellant] under said policy to said firm of Harford & Son, for and in consideration of one dollar paid to said firm, and the further payment to said firm of the premium mentioned in said policy, * * * fully settled and adjusted the said matter, and said considerations were paid and received in full satisfaction and settlement of all demands under said policy, and the said firm then and there, for said consideration, canceled, surrendered, and delivered said policy to this [appellant]." Replying to the matter set up in said affirmative defenses, the plaintiff denied the allegations of the answer concerning fraudulent representation and concealment of fears of incendiariism, and alleged that the appellant so issued and delivered up the policy after a full, true, and complete statement, and with full knowledge of all the facts and circumstances; and, replying to the defense of release and surrender of the policy, alleged that the same was procured by the fraud, deceit, and misrepresentation of appellant, its agent and adjuster, acting in concert with one Whitley, who was the agent and adjuster of some of the other companies which had written insurance upon said stock. The particular circumstances of such alleged fraud and misrepresentation are set out at great length in the reply. There was a trial and verdict for

respondent, and thereafter, appellant's motion for a new trial having been overruled, judgment was entered upon the verdict, from which this appeal is prosecuted.

Numerous errors are assigned by appellant, but there are four principal grounds of contention, the disposition of which must control the cause. They are: (1) That the insured misrepresented or concealed material facts and circumstances concerning said proposed risk at the time application was made for insurance. (2) It is contended that an action could not be maintained for a recovery of the loss under the policy until the release had been canceled by decree in equity. (3) That the release and surrender of the policies could not be attacked for fraud, either in law or in equity, until the respondent had restored to the appellant company the consideration received by his assignors (said consideration being the premium note and a cash consideration of one dollar). And (4) that the evidence upon the trial was not sufficient to avoid the so-called "release."

1. The question of whether the insured had concealed or misrepresented any material fact concerning the insurance or their fears of incendiarism (if such were entertained) was properly a question to be determined by the jury, under correct instructions, which, from an examination of the record, we think were given. No written application for insurance was required or given in this case, and there is nothing in the record at all tending to show that any inquiry was made of the insured, or either of them, as to their fears from incendiary causes. It appears, however, that after the loss occurred, J. L. Fuller, appellant's agent and adjuster, went to Pataha City for the purpose of adjusting said loss, and was so employed for the period of upwards of a week; that while so engaged, and at his instance and request, the younger Harford went before a justice of the peace, and was sworn according to law, to make answers to questions to be propounded to him by the said Fuller, adjuster. In the examination which followed he stated that some time in March, 1893, one Williamson, a clerk of said firm, had been aroused in the night by some one picking at the lock of the outer door of his house; that upon such person (supposed to have been a burglar) opening the door, Williamson had fired upon him, the supposed burglar making immediate flight; that he, Harford, feared that the burglar "might burn us out" in revenge against Williamson, who, he might have believed, was a partner in the business. On said examination the said Harford further stated that he had suspected one K. F. Reynolds, who was doing business in a one-story building situated in the same block, of incendiary intentions. His stock of goods having run down, and he being indebted to said firm of Harford & Son in a large sum of money, and having failed to secure the same, the firm had placed the claim in the hands

of an attorney for collection, and Reynolds' family had left town, with valuables in the way of clothing, and household goods had been stored in a smokehouse situated some distance from the business property, and out of danger; "all of which caused us to suspicion the said Reynolds. For the two reasons above mentioned we feared incendiarism to the extent of causing us to protect ourselves with insurance." The question was then asked: "Did you tell any one of your reasons for fear of being burned out?" Answer. Yes, I told O. S. Williamson, our clerk, and L. M. Carter, the marshal of Pataha City, and to no one else whomsoever." Upon the trial, F. G. Harford testified that prior to the issuance of the policies, and while appellant's agent, King, was examining the premises, and making a survey of the risk, he (witness) informed him of the difficulty occurring between their clerk, Williamson, and the supposed burglar; also mentioning the circumstances surrounding the Reynolds' property; and his testimony in this regard is strongly corroborated by that of the plaintiff, Sanford, who testified that he was present at a conversation between King and one Wills (who was agent for some of the companies having policies upon the same risk). In which conversation King related to Wills that Harford had told him that he was afraid of being burned out, etc. This was prior to the issuance of the policies. It further appears that the witness Sanford informed said adjuster, Fuller, during the time that he was engaged in adjusting said loss, of such conversation between King and Wills concerning Harford's fears of incendiarism. The agent, King, was sworn as a witness, and denied that Harford expressed any fears of incendiarism to him prior to the issuance of the policies, or that he stated any circumstances connected therewith; but he did not deny having the conversation with Wills to which Sanford had testified, nor did he make any explanation of it, nor did the adjuster, Fuller, deny that Sanford had so informed him of it. We are satisfied from an examination of the record upon this question that a full statement of the grounds upon which the younger Harford seemed to entertain some fear of incendiarism was communicated to King, the agent of the appellant, prior to his issuing the policy in this case. Indeed, the condition of the record is such as to admit of little doubt of it. But the same result is reached viewing the evidence in a light most favorable for the appellant. No written application having been required, and no questions asked of the assured upon the subject of incendiarism, the fact that Harford actually entertained such fear, based upon the circumstances already detailed, would not render the policy void. "When no inquiries are made, the intention of the assured becomes material, and to avoid the policy it must be found not only that the matter was material, but also that it was

Intentionally and fraudulently concealed." May, Ins. (3d Ed.) § 207. See, also, 1 Wood, Ins. (2d Ed.) p. 517; *Alkan v. Insurance Co.*, 53 Wis. 136, 10 N. W. 91. We do not think that failure of the assured to volunteer the statement concerning the difficulty which his clerk had experienced with the supposed burglar, or his opinion as to the condition and standing of Reynolds, amounted to such fraudulent concealment as would invalidate the policy. We think the circumstances were not material, nor of a character to justify any well-grounded fear or apprehension, and are inclined to regard them as frivolous and trivial. 1 Wood, Ins. (2d Ed.) p. 216.

2. The next question for consideration is whether the action could be maintained until the release and so-called "settlement" had been canceled by a decree in equity. Upon the proposition here stated the authorities are conflicting. We believe, however, that to permit the action to be brought in the present form, and all of the rights of the parties to be determined and adjusted therein, best harmonizes with the spirit of our code system. The right to do so is upheld in *O'Brien v. Railway Co.* (Iowa) 57 N. W. 425; *Steel Co. v. Copple* (Ky.) 22 S. W. 323; *Butler v. Railroad Co.*, 88 Ga. 594, 15 S. E. 668; *Sheanon v. Insurance Co.*, 83 Wis. 507, 53 N. W. 878; *O'Neill v. Iron Co.*, 63 Mich. 690, 30 N. W. 688; *Bean v. Railroad Co.*, 107 N. C. 731, 12 S. E. 600; *Railway v. Higgins*, 44 Ark. 293; *Lusted v. Railway Co.*, 71 Wis. 391, 36 N. W. 857; *Railway Co. v. Lewis*, 109 Ill. 120; *Railroad v. Doyle*, 18 Kan. 58; *Packet Co. v. Defries*, 94 Ill. 598; *Bussian v. Railway Co.*, 56 Wis. 325, 14 N. W. 452. In the last case cited the court say: "It is claimed by the learned counsel for the appellant that the release given by the plaintiff pending the action was a complete defense to the action, and that there was no evidence in the case which would justify either the court or jury in setting it aside for fraud, misrepresentation, or any other cause. The learned counsel takes the ground that the release can only be impeached by a proceeding in equity, and that if the submission of the question to the jury, was proper for any purpose, it should be held that it was simply for the purpose of aiding the court in the determination of the question of fraud, and that their verdict should have no more conclusive effect than a verdict of a jury upon any other issue of fact in an equitable action. We think the learned counsel is in error in regard to the practice. If the release was obtained by fraud or misrepresentation, then it is void, and that question could always be tried in a court at law before the adoption of the Code. Chitty, in his work on Pleadings, says that to a plea of release it is proper to reply that 'the release was obtained by fraud.'" 2 Chit. Pl. (16th Am. Ed.) 455. Also 1 Chit. Pl. 692, 693, and note d. The supreme court of Missouri divided upon this question in the recent case of *Girard v. Car-*

Wheel Co. (decided June 19, 1894) 27 S. W. 648, a majority of the court holding that resort to equity to cancel the release need not be made prior to maintaining the action at law. From the opinion of Mr. Justice Barclay in that case we quote: "Defendant's first proposition is that this action for damages is not maintainable, because the release has not been set aside by a decree in equity; in other words, it is claimed that the paper in question is a complete defense at law to the cause of action to which it relates, no matter how the paper may have been obtained. This position has been defended with much ability, but no resources of counsel are sufficient to conceal its inherent weakness. * * * The paper in question is, in contemplation of law, nothing more than the form of a contract; and, on finding that the substance which should give life to an obligation is wanting, the court may cast aside the form, and proceed to judgment, notwithstanding the fraud which may have brought the verisimilitude of an obligation into existence. *Hartshorn v. Day*, 19 How. 211. * * * A court of law, upon ascertaining such a fraud, may properly pass over it to the conclusion which it considers to be just; thus, in effect, discarding the fraud as an obstacle to the exercise of its jurisdiction." From the concurring opinion of Mr. Justice MacFarlane in the same case we quote: "This leaves simply the question whether the reply properly put in issue the validity of the release; or, in other words, whether a release of the character of this one can be avoided, in an action at law, on the ground of fraud, charged in the reply to the answer of defendant setting it up in bar of plaintiff's action. Defendant insists that it is a complete bar until canceled by the decree of a court of equity. It is undoubtedly true that fraud was one of the original heads of equity jurisdiction, 'but,' says Blackstone, 'every kind of fraud is equally cognizable in a court of law, and some frauds are cognizable only there; as fraud in obtaining a devise of lands.' 2 Bl. Comm. 431. 'Courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud.' Lord Mansfield, in *Bright v. Eynon*, 1 Burrows, 396. This principle has received recognition and approval by this court from the decision of *Montgomery v. Tipton*, 1 Mo. 446, to that of *Clough v. Holden*, 115 Mo. 336, 21 S. W. 1071. * * * The principal ground of objection urged to the right to raise the question of fraud by reply is that such a course of proceeding permits questions of fraud to be tried by a jury, instead of a chancellor, and the rescission of a release to be obtained upon evidence which would have been insufficient in a court of equity. But this objection can be urged with equal plausibility to pleading fraud by answer, which, it is conceded, may be done. When we keep in view the fact that courts of law have juris-

diction to relieve against fraud, it would seem to follow logically that its jurisdiction may be exercised to relieve against a fraudulent contract pleaded as a defense, as well as against a fraudulent contract which is made the subject-matter of the suit. It would seem wholly unnecessary and oppressive to drive a plaintiff to another jurisdiction for relief against a defense * * * when the forum, having all the parties before it, has concurrent jurisdiction of the same subject-matter." This view is, we think, supported by what is said in the case of *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85, although it must be admitted that upon the question we are now considering the court of appeals of that state have held contrary to the conclusion which we have reached. In that case the learned Chief Justice Denio says: "As the courts of the state are now constituted, they apply legal and equitable rules and maxims indiscriminately in every case. In a suit which could not formerly have been defended at law, but as to which the defendant would have been relieved in equity, he can now have the like relief in the first action. * * * It was always theoretically unreasonable * * * that in one branch of the judiciary the court should hold that the party prosecuted had no defense, while in another branch the judges should decide that the plaintiff had no right to recover. The authors of the Code, aiming at greater theoretical perfection, have abolished the anomaly; and now, when an action is prosecuted, we inquire whether, taking into consideration all the principles of law and equity bearing upon the case, the plaintiff ought to recover."

Under the Code of this state, legal and equitable rights are administered by one court and in one form of proceeding, and we venture to assert that the tendency of modern authority, as a result, we believe, of the extension of the code system, supports the view of this question which we have herein expressed, and which we are constrained to adopt. And this brings us to the third principal contention, viz. that the release could not be attacked for fraud or otherwise until respondent had restored to the appellant the considerations received therefor. This is somewhat intimately connected with the preceding question, and many of the authorities above cited also hold that it is not necessary for a plaintiff to pay back, or offer to pay back, the money received at the time of signing the release as a condition precedent to his right to sue upon his claim for loss or damages, where the judgment sought will accomplish this result. In many of the cases so cited it is held to be sufficient that upon the trial the jury were permitted to give the defendant credit for the money paid at the time the release, so-called, was executed. *Railroad v. Doyle*, supra; *O'Brien v. Railway Co.* supra; *O'Neil v. Iron Co.*, supra.

In *Sheanon v. Insurance Co.*, supra, it is said that: "The \$450 being credited upon the recovery of the full amount, the company cannot complain that said sum was not tendered or paid back before the commencement of the action as a condition of recovery." In *Harris v. Society*, 64 N. Y. 196, the court say: "In *Allerton v. Allerton*, 50 N. Y. 670, this court held that the rule that he who seeks to rescind an agreement upon the ground of fraud must place the other party in as good a condition as that in which he was when the agreement was made, is satisfied if the judgment asked for will accomplish that result, and in such case no offer to return that which was received is necessary. It is true, in the case cited the plaintiff had brought the action claiming that there was fraud, and that the contract was void; but the principle is equally applicable where the defendant asserts that the contract was fraudulent and void. * * * 'The law looks to the result, and not the means.' It was also remarked that the reason of the rule is that the party shall not retain the thing which is the subject of the contract, and, on his action, recover the price paid for it, or retain the price paid, and, on his action, recover the thing; and that this reason is satisfied when the claim made and the judgment sought by the plaintiff will leave with the defendant all that he parted with, and thus put him in as good plight as at the time of the agreement." This view is supported in the more recent case of *Berry v. Insurance Co.*, 132 N. Y. 49, 30 N. E. 254: "One who attempts to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain, either by virtue of the contract sought to be set aside or of the original liability." *Kley v. Healy*, 127 N. Y. 553, 28 N. E. 593; *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. 331. Counsel for appellant, in their very able and exhaustive brief, concede that in suits in equity, where a bill is filed for a rescission, a restoration of the consideration received is not necessary before suit, it being sufficient that such restoration be provided for by the judgment. Such being the rule in equity, it would seem to follow as a result of our holding upon the preceding question that the rule is applicable to the case at bar. The only consideration which appellant claims was paid to respondent's assignors for the release was the premium note and one dollar. Concerning the payment of the "one dollar," expressed in the release, the evidence showed that it was not paid or mentioned in the talk leading up to the settlement, but on the morning following the sum of \$10 was handed to the younger Harford by the adjuster, Fuller, who says that he then told Harford it was the amount due upon the 10 policies. Harford testified that he did not understand that it had anything to do with the surrender of the policies; that the adjusters had occupied their banking office for a period of about 10 days,

having a key to the same during the time that they were at work upon the adjustment of the fire losses, and that he understood that the \$10 was to be considered as compensation for the use so made of their office. But we think it matters little which view is adopted. Before entering judgment in this case the respondent remitted and appellant had credit in the judgment for the full amount of the premium note and the \$10 additional; hence we think that the case falls squarely within the rule announced in the foregoing decisions. Then, too, the attitude of the appellant throughout as well as before the litigation, and its plea of release, indicate very clearly that any tender or repayment would have been useless. "It has been decisively held in other cases that no preliminary tender can be insisted upon as a bar to legal action where the facts show that the tender would have been rejected." *Girard v. Car-Wheel Co.*, supra. See, also, *Deichmann v. Deichmann*, 49 Mo. 107; *Bigelow, Frauds* (1898) p. 424. The evidence shows, and it is admitted by the appellant, that on the morning succeeding the execution of the so-called "release" a demand was made for a return of the policies by the younger Harford. The conduct of the adjuster, Fuller, upon whom this demand was made, was such as to make it clearly apparent that it would have been entirely useless and unavailing to have offered or tendered the premium note. The judgment in this case fully protects the appellant, and that, we think, is the controlling consideration.

3. It is contended that the evidence is insufficient to set aside or avoid the "release." As has been already stated, the agent and adjuster of the appellant had been at the scene of the fire, and consumed several days in examining witnesses and taking preliminary proofs. The value of the property covered by the policy of insurance had been determined and agreed upon. The amount of the loss, and the sum to which respondent's assignors were entitled, if entitled to any sum, had also been determined. It does not appear that up to that time any question had been raised as to the liability of the appellant upon the policy. If any doubt existed in the mind of Fuller upon that question, it had not been communicated to the assured. Concerning the so-called "settlement," John Harford (the father) testified: "We were good friends. They [the adjusters] said they had never been treated so nice. They had never met a family that they got so many accommodations from. The books were all correct. The bills were all there at the office. * * * The next thing I heard of the agents, Freddie came up one night, about eight o'clock, and called me out of bed and said he would like to have me go down to the office. I said, 'Freddie, I can't go down to-night.' He said he was anxious to get through, or something. I said, 'Maybe I will go. Maybe we will get a check for our money.' I

went down. Mr. Whitley was there. Q. Had you seen Mr. Whitley before that time? A. I think that is the first time I ever saw Mr. Whitley. Mr. Fuller said: 'Gentlemen, this is Mr. Whitley. He is from San Francisco. He has come up here with authority to stop all of this adjustment. The company rules your policies null and void.' Said Mr. Fuller, 'You insured your property for fear of being burned out by incendiarism, and you kept it a secret.' I said, 'Kept what a secret?' He said, 'This shooting going on, and a man running out from under the house.' He said it hadn't been told to their agents. If it had been told to their agent before the policy was taken out, then the company would be liable; but, as Freddie hadn't told the agent, the policies were null and void. Freddie said, 'We will think about this two or three days.' Mr. Whitley said: 'You sign these papers to-night. Fix it up, and we will come back to-morrow morning by the time you are in your office, and arrange matters between the companies and yourselves so that it will be satisfactory to all.' The papers were signed under that agreement. The next morning I came to the office. Freddie had gone down before me, and had in the meantime thought about his telling Mr. King about the shooting, and said, 'I will go down and have those policies.' He went down and called Mr. Fuller out. Mr. Fuller says: 'They don't amount to anything. They are signed, and Mr. Whitley has got them and gone.' If Mr. Whitley had come back the next morning, and left those papers in that office, as he should have done, he never would have taken them, and I would have had writings in so many dollars and cents to Harford & Son. Q. Now state, Mr. Harford, whether or not at any time during this adjustment, from the time Mr. Fuller came upon the ground, he mentioned that those policies were null and void, or anything to that effect. A. No, sir. On the contrary, everything was smooth. Q. State whether or not, Mr. Harford, when you were called out of bed, and went down there, that was the first time they told you the policies were void. A. That was the first time." Without setting out all of the evidence as to what occurred at the meeting between Fuller, Whitley, and the Harfords, we think it may be safely said that the evidence shows that Fuller and Whitley acted in the matter for the appellant; that Whitley read from law books, and, among others, from the New York Code; that the question of misrepresentation or concealment was advanced by them for the first time at that meeting; that they represented to the assured that they were their friends, and that they incorrectly stated the law; that it would be useless for them to see a lawyer. From Fuller's testimony we quote: "I told them, in my opinion it would do no good to consult a lawyer in a case of that kind." The assured seem to have had the utmost confidence in Fuller.

Indeed, his conduct towards them during the week preceding the night upon which the release was obtained was of a character to inspire them with confidence, and they seem to have had due regard for his superior knowledge and experience in such matters. But appellant insists that, if respondent's assignors did not know the law, they were at liberty to refuse to entertain the settlement until they had conferred with an attorney; that they ought not to have relied upon the legal opinion of one dealing with them adversely; but, if they chose to so rely, they could not thereby be defrauded. We think that if, by their representations, statements, and conduct, Fuller and Whitley induced the assured to believe that such was the law, when in fact it was otherwise, and under such belief, so induced, the assured were led into consenting to surrender the policies and accepting their premium note in exchange therefor, such surrender and release so obtained ought not to be held to bar their right of recovery. In *Berry v. Insurance Co.*, 132 N. Y. 49, 30 N. E. 254, it is said: "There is no question, of course, but that a court of equity cannot grant relief solely upon a mistake of law. But there was here more than a mistake. There was a surrender of legal rights, intentionally induced and procured by a false representation as to the law governing the case. The defendant must be presumed to have known that it was liable for the whole loss, and by falsely representing that under the law applicable to the case the policy was void, when in fact it was valid, it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject, and to surrender to it his claim. This clearly constituted fraud, and there would be manifest injustice in upholding a settlement under such circumstances." Nor do we think that there was any consideration supporting such release and surrender. *Bank v. Crandall*, 87 Mo. 208; *Mining Co. v. Watrous*, 9 C. C. A. 415, 61 Fed. 163; *Hess v. Culver*, 77 Mich. 598, 43 N. W. 994; *Averill v. Wood*, 78 Mich. 342, 44 N. W. 381. In the case last cited the court say: "To hold that a man cannot be defrauded by false representations because he is presumed to know the law, which presumption is a violent one in most cases, would be to place the ignorant and foolish,—the persons who are generally the victims of fraud,—beyond the protection of the law."

At defendant's request the court charged the jury as follows: "(1) If you find from the evidence in this case that a controversy existed between the firm of Harford & Son and defendant as to the liability of defendant on the policy of insurance mentioned in the pleadings, and while the same was in existence, and before the said firm had made an assignment for the benefit of their creditors, the defendant paid said firm any sum whatever, and that said sum was so paid and received in full settlement of all

liability under said policy, and said policy surrendered, your verdict should be for the defendant. (2) The plaintiff in this case has alleged fraud on the part of the defendant by its agents, and the court instructs you that the burden of proving such fraud is upon the plaintiff, and that upon the question of fraud the plaintiff must prevail, if at all, not only upon a preponderance of evidence, but such preponderance must be based upon evidence that is clear and strong, satisfactory and convincing, and especially so when it is proposed to impeach any written instrument on the ground of fraud by oral testimony of a party to the instrument. (3) The defendant in this case has set up a release and discharge of liability under the policy mentioned in the pleadings, and the court instructs you that such a release, if it was made, cannot be set aside upon any but the strongest and clearest testimony. To infer fraud from anything but the strongest and most satisfactory proof, is to infer a criminal thought or disposition in a man, which is against the presumption of law. (4) A party making a contract of settlement in consideration of one dollar, or for any valuable consideration, cannot avoid the contract upon the ground of fraudulent statements, unless he relied upon such statements, and also had a right to rely upon them." In view of the foregoing instructions (which were certainly as favorable to appellant as the law would warrant), and the evidence submitted upon the subject of the settlement and release, we think the verdict concludes the appellant. But, in another view of this branch of the case, the same result is reached. As already noticed, the amount of the loss had been determined and agreed upon prior to the time of obtaining such release. Hence at that time the appellant was actually indebted in the amount of the loss so determined, or it was not indebted in any sum whatever. In other words, the policy was absolutely valid, and appellant's obligation to pay the amount of the loss as determined by the adjustment was complete at the time of the pretended settlement, or it was invalid, and imposed no obligation whatever. If invalid, it was only so because of the fraudulent representations or concealment of the assured concerning incendiarism. The invalidity of the policy was not assailed or asserted for any other reason. Now, as we have seen, it was not invalid for that reason; so that it manifestly appears that at the time when the appellant's adjuster procured from the respondent's assignors the release and surrender in question, the relation of debtor and creditor absolutely existed between the company and the assured. The demand was neither an unliquidated demand nor could the right to recover be considered doubtful. The adjustment had been completed, and the amount that was payable had been ascertained. "After loss, * * * the obligation of the insurer to pay the loss became abso-

lute. The demand against the insurer then became a mere chose in action for the sum payable pursuant to the contract. The relation between the assured and insurer thus became that of creditor and debtor, and the policy ceased to be significant, except as evidence of the existence and amount of the debt." *Alkan v. Insurance Co.*, supra. "Until a loss has occurred, the liability is contingent; there may never be a liability. But when the loss has happened * * * the liability is fixed. There is now a debt, and no reason is perceived why this, like any other debt, should not be assignable." *Walters v. Insurance Co.*, 1 Iowa, 404. See, also, *Carter v. Insurance Co.*, 12 Iowa, 287. "Whenever the loss occurs, and the company have notice, and are furnished with the preliminary proofs required by the conditions (of the policy), the amount of the loss becomes, by force of the contract, a debt payable to the insured presently or at the time appointed in the policy." *Courtney v. Insurance Co.*, 28 Barb. 116. See, also, *Seyk v. Insurance Co.*, 74 Wis. 67, 41 N. W. 443; 2 Wood, Ins. (2d Ed.) p. 758. It follows from what has been said that at the time when this policy was surrendered and the release executed, the assured were entitled to payment from the company of the amount of the loss. Their right to so recover was not a doubtful right. The amount which they were entitled to recover was not uncertain. The liability to make payment of such amount had become fixed, and as the sole consideration for the release and surrender of the policy which thus entitled them to this large sum of money appellant paid in cash and by note (its equivalent) \$119.75, a fractional part only of what it was actually owing. "The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void." *Association v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84. "A wrongful assertion of a claim is no ground for compromise." *Mulholland v. Bartlett*, 74 Ill. 58. As has been heretofore noticed in this opinion, the adjuster, Fuller had, prior to the time of this so-called "settlement," been informed by Sanford of the conversation between King and Wills, held prior to issuing the policy here sued upon; in which conversation King (appellant's agent) had said to Wills that Harford had told him of his fears of in-

cedendarism. That the agent of the appellant was, prior to the issuance of this policy, so informed by Harford, we have already said the record admits of little doubt; and it further appearing that Fuller had also been advised of such fact prior to his urging the invalidity of the policy, it cannot be said that the assured's right to recover was, at that time, a doubtful right, nor that there was or could be any bona fide dispute concerning it. "Payment by a debtor of a part of his debt is not a satisfaction of the whole, except it be made and accepted upon some new consideration." *U. S. v. Bostwick*, 94 U. S. 53. We deem it unnecessary to multiply authorities upon this proposition. We think that it must be conceded that respondent, as assignee, has no greater rights than the assignors would have had if suit had been brought by them. The assignment was made after the loss occurred, and gave the assignee the right to recover subject to any defense that could have been made had there been no assignment. *Archer v. Insurance Co.*, 43 Mo. 434; *Walters v. Insurance Co.*, supra. But we cannot see how appellant could have been prejudiced by the court's failure to so instruct the jury. We think it was sufficient to give them the law applicable to the case as it was presented by the evidence. Nor do we think that the court's reference to the "facts and circumstances disclosed on the stand by the witnesses" constitutes reversible error. It was immediately followed by and connected with the further statement: "You are the sole judges of the facts. You are impaneled to try the facts. These facts have been given you on the stand through witnesses and exhibits that have been placed in evidence here to enable you to find the facts." So connected, it seems impossible that the jury could have been misled. There is a vast difference between the instruction here complained of, and the one that was adjudged erroneous in *Gottstein v. Commercial Co.*, 7 Wash. 428, 35 Pac. 133, and we think that the reversal in that case was not due to the giving of such erroneous instruction.

The other alleged errors which have been assigned in appellant's brief have been severally examined, and, without entering into a discussion of them in detail, we deem it sufficient to say that we find no error in the record that warrants this court in reversing the judgment. Many intricate questions were presented for ruling upon the trial of this cause in the lower court, and we think the record singularly free from error. The charge of the learned judge was comprehensive and fair. The briefs of counsel in this court have been very able and exhaustive, and, after a painstaking examination of the entire record, we think the judgment appealed from must be affirmed.

SCOTT, ANDERS, and DUNBAR, JJ., concur.

(12 Wash. 45)

DOONAN et al. v. MORRISON et al.

(Supreme Court of Washington. May 28, 1895.)

CONFLICTING EVIDENCE—REVIEW.

A finding on conflicting evidence will not be disturbed.

Appeal from superior court, Snohomish county; John C. Denny, Judge.

Action by A. J. Doonan and another against A. H. Morrison and others to foreclose a lien for labor in clearing land. Judgment for plaintiffs, and defendants appeal. Affirmed.

Hawks & Heffner and A. W. Frater, for appellants. Black & Edwards, for respondents.

GORDON, J. This case was tried in the court below without a jury, and from a judgment in favor of respondents this appeal is taken. It is insisted that the judgment was not warranted by the evidence upon trial, and the only question for our consideration is stated in appellants' brief to be, "Was the work as performed a substantial compliance with the terms of the contract?" We have carefully examined the record sent up, and find that the evidence upon the trial was very conflicting. The learned judge who tried the cause saw the witnesses upon the stand, and could note their appearance and conduct, and their candor or lack of candor in giving testimony. With such circumstances of advantage to aid him in reconciling conflicting testimony and reaching a correct conclusion, he has, by the judgment rendered, answered the above question in the affirmative, and the judgment appealed from is affirmed.

HOYT, C. J., and ANDERS, SCOTT, and DUNBAR, JJ., concur.

(11 Wash. 704)

LOCKWOOD, County Treasurer, v. ALLYN.

(Supreme Court of Washington. June 7, 1895.)

DISMISSAL OF APPEAL—VOID TAX JUDGMENT.

On an appeal from a delinquent tax judgment, a motion was made by respondent to dismiss, under the revenue law of 1893 (section 106), providing that no appeal in such cases should be allowed unless the party appealing first deposit with the county treasurer a sum of money equal to the amount of judgment. It was stipulated that, should the motion to dismiss be overruled, the case should follow the disposition of another case previously decided. *Held* that, since the assessment on which the judgment appealed from in the previous case was rendered was adjudged void, all subsequent proceedings were void, and the statute cited by respondent would not apply.

On rehearing. Denied.

For former report, see 40 Pac. 348.

Hoxle & Richardson, Richard K. Boney, and F. Campbell, for appellant. Marion D. Egbert and Lowen E. Ginn, for respondent.

DUNBAR, J. The respondent in this case, in his petition for rehearing, complains that the court did not pass upon the questions raised in his motion to dismiss the appeal; that the motion to dismiss was based upon the provisions of section 106 of the revenue law of 1893, for failure on the part of the appellant to comply with the law which provides that no appeal shall be allowed from any judgment for the sale of lands or lots for taxes, nor shall any writ of error to reverse such judgment operate as a supersedeas unless the party bringing such appeal or desiring such writ of error shall, before taking such appeal or suing out such writ of error, deposit with the county treasurer an amount of money equal to the amount of the judgment and costs.

We think the strictures of counsel for respondent upon the opinion which was filed on the motion are somewhat justified. What the court should have said, and what it will now say, is that we found in the case of *Lockwood v. Roys* (decided May 11, 1895) 40 Pac. 346, that the assessment was absolutely void. It was stipulated that, if the motion to dismiss in this case should be overruled, the case should follow the disposition of the *Roys* Case; and, inasmuch as the assessment was void, all proceedings thereafter were void, and the statute cited by the respondent would not apply.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

(12 Wash. 42)

WILLIAMS v. GEIGER.

(Supreme Court of Washington. May 28, 1895.)

PLEDGE—INTERMINGLING OF GOODS—PLEDGE'S LIABILITY.

Where a debtor turns over to his creditor a stock of goods under an agreement that when the creditor sold sufficient thereof at the prices fixed by an invoice to pay the debt he would return the balance to the debtor, the creditor, by commingling the goods with his own goods so as to destroy their identity, elects to pay the debtor the invoice price of the stock less the amount of the debt.

Appeal from superior court, Kittitas county; Cartoll B. Graves, Judge.

Action by Emma E. Williams against John Geiger for the value of goods delivered to defendant. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Wager & Graves, for appellant. H. J. Snively, for respondent.

GORDON, J. The complaint in this action alleges that in September, 1893, respondent (plaintiff below), in order to pay an indebtedness of \$193 that she was then owing to appellant, delivered to appellant a stock of goods and some store fixtures, under an agreement that, when appellant should have sold from said stock of goods a sufficient amount to pay such indebtedness at the

prices fixed by an invoice made at the time of the delivery to him, he would reconvey the stock of goods and fixtures to respondent or pay her for the same at the valuation fixed in such invoice, said value being \$522.17. It further alleges that the amount of such indebtedness had been realized by appellant from the sales of said stock prior to the commencement of the action; that demand had been made that he should either reconvey the goods or pay for them, which demand had been refused; and judgment was prayed against appellant for the difference between the value of such goods and fixtures and her indebtedness to him. In his answer appellant admitted the delivery of such property to him, but denied the other allegations of the complaint, and set up an affirmative defense. The respondent having rested her case upon the trial, a motion for a nonsuit was submitted by appellant, and overruled. Thereupon, appellant offering no evidence, a verdict for the respondent was directed by the court, and from a judgment entered upon such verdict this appeal is taken.

The learned counsel for appellant admits in his brief that upon the trial of the case respondent "proved all the material allegations of the complaint, except that appellant had sold from such goods a sufficient amount to pay the indebtedness of \$193" that respondent was owing to appellant. It is insisted, however, that the evidence upon that question is insufficient to entitle respondent to recover. Upon the trial appellant was called as a witness and examined by respondent's counsel, and upon such examination testified that immediately after taking possession of the goods he commingled the same with other goods purchased by him, amounting to about \$700 in value, and thereafter from month to month continued to purchase and add to said stock goods amounting to about the value of \$700 per month; that the goods so added were commingled with the goods received from the respondent, so as to make it impossible to distinguish or identify the same; that his sales from the entire stock averaged from three to four dollars per day from the time of receiving the stock from respondent down to the commencement of this action. He admitted that he kept a cashbook, but claimed he did not know where it was at the time of the trial. It also appeared that, subsequent to taking possession of respondent's goods, and prior to the commencement of the action, appellant had sold to one Thomas Grennan an undivided interest in the entire stock and had entered into a commercial partnership with said Grennan. There was other evidence introduced tending to show the amount and extent of the sales made from the goods in question, and we should not disturb the judgment even if we were restricted in the decision of this case to the sole question of determining whether the sales actually made

by appellant from the goods received by him from respondent were sufficient to pay the indebtedness owing by respondent to appellant at the time that said goods were turned over. But we think that by confusing and commingling the goods received from respondent with other goods so as to destroy their identity appellant elected, to pay respondent for the entire stock received by him from her, at the prices fixed in the invoice, and that the judgment rendered was right. The evidence was sufficient to show his election to pay for the goods in accordance with his contract and the invoice taken. It seems to us that no other conclusion could be reached, because by his own acts he had made it impossible to return the goods remaining unsold after the payment of the indebtedness, and his own testimony satisfies us that the judgment appealed from does him no injustice. The judgment is affirmed.

HOYT, C. J., and ANDERS, SCOTT, and DUNBAR, JJ., concur.

(12 Wash. 46)

HOOKER v. McALLISTER.

(Supreme Court of Washington. May 31, 1895.)

AGISTOR'S LIEN—ENFORCEMENT—DESCRIPTION OF PROPERTY.

1. Gen. St. § 1705, giving a "herder of cattle" and other persons who "shall be intrusted" with the charge or care of "sheep" or certain other animals a lien thereon for services, does not give such lien to one merely hired to take care of sheep, the possession and control of which remain in the owner.

2. An allegation that the defendant owned a certain flock of sheep, giving their number, and that they are within a certain county, and have at all times prior to the filing of the complaint been within the state, is not a sufficient description of the sheep in an action to foreclose a lien for services in taking charge of them.

Appeal from superior court, Klickitat county; Sol Smith, Judge.

Action by Joseph J. Hooker against Donald McAllister to foreclose a lien on a flock of sheep for service in taking charge of them. From a judgment for plaintiff, defendant appeals. Reversed.

Alfred S. Bennett, for appellant. Winthrop B. Presby, for respondent.

DUNBAR, J. This is an action brought to foreclose an alleged lien upon a band of sheep belonging to the defendant. A demurrer was interposed to the complaint, to the effect that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court. The defendant answered, and plaintiff replied, whereupon the defendant demanded a trial by jury, which request was denied by the court. Judgment was rendered in favor of plaintiff, decreeing the amount that was due him for services rendered, and establishing and decreeing a lien upon the sheep to sat-

isfy the judgment. From such judgment and decree, defendant appeals to this court.

This action was brought under section 1705 of the General Statutes of Washington, which provides that "any farmer, ranchman, herder of cattle, tavern-keeper, livery and boarding stable keeper to whom any horses, mules, cattle or sheep shall be intrusted for the purpose of feeding, herding, pasturing, training, caring for or ranching, shall have a lien upon said horses, mules, etc., for such feeding, herding, pasturing, etc., and shall be authorized to retain possession of such property until the amount is paid." It is contended by the appellant: First, that the complaint is insufficient, in that the sheep attempted to be described are not sufficiently described; second, that the section of the statute referred to does not apply to a servant who is employed by the master in the general work of taking care of a band of sheep, and who does not have any other possession of the sheep than the mere possession of a servant possessing and controlling them for the master and constantly under the master's control. The material portion of the allegations of this complaint, so far as they bear upon the questions raised here, is as follows: "(1) That the said defendant is, and at all times hereafter was, the owner of a certain band or herd of sheep; that said band or herd of sheep, on the 27th day March, 1892, numbered about 3,500 sheep; that said defendant during the year 1893 sold about 2,400 of said sheep and their increase, and said band now numbers about 2,400 sheep; which said sheep are now in the county of Klickitat, and at all times herein mentioned have been within the state of Washington. (2) That on or about the 27th day of March, 1892, the said defendant employed said plaintiff to act as herder of said band of sheep at the agreed wages of \$40 per month for each month, except in lambing time, when plaintiff was to receive \$50 per month for the month in which the lambs were being dropped, after the first year; and on or about the 27th day of March, 1892, the plaintiff commenced work for the defendant as such herder, and has since said date continued to herd said sheep at all times except from Dec. 12, 1892, to Jan. 17, 1893, during which time only the plaintiff was absent from said band of sheep." It seems to us that there is no sufficient description of these sheep. It will be seen that all the description there is, is that the defendant was the owner of a certain band of sheep now numbering about 2,400, and that they are now in the county of Klickitat, and at all times prior to the filing of the complaint have been within the state of Washington. The statement that the band, on the 27th day of March, 1892, numbered about 3,500 sheep, and that the defendant, during the year 1893, sold about 2,400 of said sheep and their increase, in no way helps to describe the band as they now exist. It would be impossible

for an officer whose duty it was to foreclose this lien to determine the particular sheep or band of sheep which he was authorized to levy upon from this description. It is urged by the respondent that no more definite description could be given of sheep which had neither earmarks nor brands. It does not appear from this complaint that these sheep were devoid of earmarks or brands, and, if it did so appear, that statement would in itself be a description of a definite character, and one which would help to distinguish them from other bands of sheep with brands or earmarks. It does not even state what kind of sheep these are, whether ewes or wethers, whether old or young. It does not locate them on any particular ranch, or in any particular portion of the county; and, while it is true that it would be impossible to describe a band of sheep with that definiteness which might characterize a description of real estate, yet it seems to us that the mere statement that it is a band of sheep owned by defendant, and that the band is within the boundary lines of Klickitat county, is exceedingly indefinite.

The main question, however, to be decided in this case is the construction of the statute above referred to. We are satisfied, both from an investigation of the statute itself and from the authorities which we have examined, that it was not the intention of the legislature to confer a lien upon persons who were merely hired by the month or day to herd sheep or cattle of any kind, where the possession remained in the owner, and where the owner was responsible for such cattle; but that the statute intended to confer this lien upon agistors,—upon those who took possession of the stock above referred to, and who became responsible for them; and that the word "herder," used in the statute, has reference to that class of persons to whom is intrusted the possession and control of the property mentioned. The connection of the word "herder" here with the other lienors provided for in the statute strengthens this idea. It would not be reasonable to conclude that the word "farmer," used in the statute, would have reference to a person who left his farm and went to work for wages in herding or feeding or keeping cattle; but it evidently means that, where this character of stock is intrusted to a farmer, who takes the same to his farm, and keeps it there, he shall have the lien provided for in the statute. The same with "ranchmen" so mentioned. If any other construction were to be given to it, then it would not be necessary to designate them as "farmers," "ranchmen," "herders of cattle," "tavern keepers," or "livery and boarding stable keepers," but all that it would be necessary to have said, and that which the legislature naturally would have said, was that any person who shall be intrusted for the purpose of feeding, herding, pasturing, training, caring for, or ranching shall have a lien upon the

property mentioned. The very fact that they are mentioned as farmers and ranchmen and tavern keepers and livery and boarding stable keepers shows that the language has a local significance, and presumes an intrusting of the property to these parties mentioned in the statute; and the "herder of cattle" there mentioned, we have no doubt, refers to a person who is in the herding business, who takes horses, mules, cattle, and sheep into his possession, and away from the possession and control of their owner, and is responsible for their safe keeping and safe return at the expiration of the time for which the contract provides, the same as a livery stable keeper is responsible for horses and cattle that he takes into his possession. The idea of bailment no doubt entered into the minds of the legislature, and, in our judgment, this statute was only intended to apply to cases where there was an actual bailment.

It might be urged by the respondent that even with this construction of the statute his complaint was sufficient. But it is nowhere alleged in the complaint that these sheep were intrusted to him for the purpose of herding them, and, construed as we would construe any other pleading, it seems to us that it is an allegation of hire simply. The respondent insists that the phrase "shall be intrusted" has no particular significance, but it occurs to us that it has a great significance; that, in fact, it really determines the nature of the employment for which this lien is given. The cases of *McDearmid v. Foster*, 14 Or. 417, 12 Pac. 813; *Wenz v. McBride* (Colo. Sup.) 36 Pac. 1105; *King v. Canal Co.*, 11 Cush. 231, and *Bailey v. Davis*, 19 Or. 217, 23 Pac. 881,—it seems to us, are conclusive upon this question. It is admitted by the respondent that these cases are in point, but he insists that they were decided under the rules applicable to common-law liens, and not to statutory liens. We fully concur in the sentiment that these statutory liens should be liberally construed; in fact, that is one of the provisions of the statute with reference to them. But a liberal construction of the statute means simply that parties who are entitled to these statutory liens shall not be deprived of them by any technical or strained ruling or construction. It does not mean that by construction the lien must be made to extend beyond the plainly-expressed will of the legislature. It must not be forgotten that this right of lien is a statutory right, and, while the act itself is to be liberally construed, the right itself cannot be extended or enlarged by unwarranted implication.

Even were it conceded that the complaint was sufficient to bring the case within the construction which we have here indicated ought to be placed upon the law, the testimony plainly shows that the respondent in this case was simply hired to do this work as a common servant; that he had no care,

custody, or control whatever over the sheep; that, had they committed any depredations or damaged any one, the appellant, and not the respondent, would have been responsible for such damages; and this, we think, is one of the true tests of distinction in this kind of a case. The herder who takes a band of sheep or cattle or horses into his possession, and is intrusted with their care, custody, and control, and takes them out of the care and control of the owner, whether his compensation be for so many dollars a month or so many dollars a month per head for the stock, is liable for all damages which may occur by reason of the depredations of said stock, or any damages which may occur to the stock, and is responsible to the owner for their safe return. But in this case there was no liability whatever. The respondent's own testimony, as cited by the appellant, plainly shows this, and shows that the defendant had the sheep at his own ranch. We will here insert a brief excerpt from the testimony: "Question. Did not the defendant have them at his own ranch or camp the whole time you were working for him? Answer. He was moving them from one place to another, the same as the rest of them does. Never had any particular place, except in the winter. Q. But he always had a camp where they were brought at night, did he not? A. He did. Q. And in the winter time would take them to a suitable place for the winter? A. Yes, sir. Q. While you were herding, did he have any one else helping with the sheep? A. Yes. Q. Who? A. I could not name them. He never kept a man over a week, except myself. Q. What were those other men doing? A. They were herding and packing and whatever came to hand around the camp. Q. The same as you? A. They was." Thus it will be seen that this particular herder had no more control or custody or possession of these sheep than the other herders who, he says, were employed by the owner of the sheep at the same time that he was herding them; that they were doing just about what he was doing; but that the owner was looking after their interests, providing the herding territory, and taking them to suitable places for the winter. The testimony all the way through shows so conclusively to our minds that this respondent never had these sheep intrusted to him, and that he never had the possession of them that is contemplated by the statute, that it would be useless to discuss it further.

We are satisfied then (1) that the statute does not confer a lien upon a man who herds sheep for wages or by the day or month, and (2) that the complaint did not state facts sufficient to constitute a cause of action. It follows that the demurrer to the complaint should have been sustained, in which event the defendant would not have been entitled to a jury to try the questions which were put in issue by the pleadings. The judgment will therefore be reversed, and the

cause remanded, with instructions to sustain the demurrer to the complaint.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(12 Wash. 53)

STATE v. VOORHIES.

(Supreme Court of Washington. May 31, 1895.)

CRIMINAL LAW—SEPARATION OF JURORS.

Code Proc. § 1311, providing that juries in criminal cases shall not be allowed to separate except by consent of defendant and the prosecuting attorney, does not preclude the court, over defendant's objection, from allowing 11 men in the jury box, each of whom had been passed for cause, but none of whom had been sworn as jurors, to separate during a recess taken to summon an additional venire, where defendant had used only 4 peremptory challenges, and the prosecution none.

Appeal from superior court, Whitman county; E. H. Sullivan, Judge.

Charles A. Voorhies was convicted of cattle stealing, and appeals. Affirmed.

Trimble & Pattison, for appellant. H. W. Canfield, Pros. Atty., for the State.

DUNBAR, J. The appellant, Charles A. Voorhies, was accused of the crime of cattle stealing, by the information of the prosecuting attorney of Whitman county, and upon trial was convicted by the jury, and sentenced by the court to a term of two years' imprisonment in the state penitentiary. The only error assigned in this case is that the court erred in overruling appellant's objection to the separation, during the recess of the court, of 11 persons who had been summoned to appear as jurors. It appears that during the impaneling of the jury, and at the time when 11 men were in the box, each of whom had been passed for cause by the appellant and respondent, the court having ordered an additional venire of 8 jurors to complete said jury, the appellant having used 4 peremptory challenges, and the respondent none, the court, after duly admonishing the said 11 men in the box concerning their conduct, allowed them to separate during a recess of the court. Objection was duly made to this action of the court by the appellant, and exceptions taken; so that the question for this court to determine is, was the appellant in any way injured or prejudiced by the action of the court in allowing the 11 men who had been summoned as jurors to separate during the noon recess of the court?

The appellant contends that this case falls within the provision of the statute, viz. section 1311 of the Code of Procedure, which provides that "juries in criminal cases shall not be allowed to separate except by consent of the defendant and the prosecuting attorney." The case of *State v. Place*, 5 Wash. 773, 32 Pac. 758, is relied upon by appellant as supporting his contention. The court decided that case squarely upon the statute

above quoted, holding that the statute was mandatory, and must be complied with. But in that case it was the jury, after they were sworn to try the case, that separated. The question here is, could the 11 men who had been summoned to act upon this jury, and had only been sworn upon their voir dire to answer questions touching their qualifications, be termed "jurors," under the provisions of this statute? Bouvier defines a "juror" as "a man who is sworn or affirmed to serve on a jury"; the word "juror" coming from the Latin "juro," to swear. And the word "jury" is defined as "a body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them." Plainly, the alleged jury in this case would not come within either of these definitions. But we need not go to the common law or to writers on common law to define this term. It is defined by our own statute. Section 50 of the Code of Procedure provides that "a jury is a body of men temporarily selected from the qualified inhabitants of a particular district, and invested with power (1) to present or indict a person for a public offense [having reference, no doubt, to a grand jury]; (2) to try a question of fact." And section 53 defines a petit jury as "a body of men, twelve in number in the superior court, and six in number in the courts of justices of the peace, drawn by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact." So that it seems plain to us that the 11 men who were in the box at the time the court took a recess were in no sense jurors or a jury, such as was contemplated by the law when it provided that the jury should not be allowed to separate during the trial of the cause. The case of *Nomaque v. People*, 12 Am. Dec. 157, is cited and largely relied upon by the appellant to sustain his contention. There the court said: "On the second point we give no positive opinion; but it certainly was an act of great indiscretion in the court to permit the jurors to go at large after they were sworn, because the reason of the rule in keeping jurors together, and apart from every other person, is as applicable after they are chosen and sworn, and before the trial, as after they are charged with the prisoner." It appears in this case that the jury were actually charged and sworn, which they were not in the case at bar; but the inference drawn from the language of the court in that case by the attorney for the appellant is that the same harm might be done if the jury were allowed to separate before they were sworn to try the case as would be done if they were allowed to separate after they were sworn to try the case. But this doctrine must not be carried to the extreme, or it might be reasoned that the jury must be confined immediately upon their being summoned to try the cause, because it is then known that they are summoned to try the cause, and undue influence

might possibly be brought to bear. Yet the administration of justice must be conducted in a reasonable way, and every conceivable wrong that might be done to a defendant cannot, in the very nature of things, be guarded against. In this instance the venire for the jury was issued on January 19th, and made returnable on the trial of the cause, February 6th. Thus, it will be seen, some 18 days intervened between the issuance of the venire and the trial of the cause. Just when the jurors respectively were summoned does not appear, but it was competent for the officer to have summoned them at any time after the issuance of the venire. Again, it does not follow that a person will be a juror who tries a case because he is summoned as a juror to try such case, or even because, upon his examination on his voir dire, he is passed for cause. It is an indication that he may be on the jury which tries the cause, but it is no proof at all of that fact. In this instance the record shows that the state had all of its peremptory challenges left, and that those of the defense were not exhausted. So that, plainly, the action of the court is not made error by the statute referred to; and, if error at all, it was error at the common law, without reference to the statute. But, as we have before said, even at the common law these men could not be considered jurors; and we think there is no authority which can be cited that will sustain appellant's contention, while the weight of authority even goes further, and holds that it is not error, in the absence of a statute, for the regular jury, to whom the case has been submitted, to separate, unless prejudice can be affirmatively shown to arise from such separation.

A distinction has been made by many of the courts between capital cases and cases of other crimes or misdemeanors; and in some cases it has been held that, on account of the enormity of the crime charged and the importance of the result, it was error to allow the jury to separate during the trial of a capital case. But in *Bilansky v. State*, 3 Minn. 427 (Gil. 313), it was held that the jury should be allowed to separate during the ordinary intervals of adjournment of lengthy trials, even in capital cases, where no special reason existed for denying it, and that such separation was no ground of error unless it be made to appear that improper influences were exerted upon the jury in consequence of their separation. To the same effect are *State v. Babcock*, 1 Conn. 401, and *Adams v. People*, 47 Ill. 376; and, in fact, such is the holding of nearly all of the modern cases. It not only does not appear from this record that there was any showing made that any improper influences had been brought to bear upon these men who were allowed to separate, even conceding that they were competent jurors under the law, but, on the contrary, it does appear from the record that the appellant had no reason to fear that any improper influence would be brought to bear up-

on them, or that they would be subjected in any way to any influence which would be prejudicial to him; for twice during the trial, after the jury had been properly impaneled, he consented to their separation,—once for a noon intermission, after the state had rested its case, and again for the night, after the main portion of the testimony of the defense had been offered. After this manifestation of confidence in the jury on the part of the appellant, we do not think that he can consistently urge here that his rights were in any way imperiled by the fact that a portion of those who were summoned to act as jurors, and who afterwards, as a matter of fact, did so act, were allowed to separate during a noon intermission before the case had been submitted to them, either upon their oath or by the introduction of any testimony. We are satisfied that no injustice was done to the appellant by the action of the court complained of, and the judgment will therefore be affirmed.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

(12 Wash. 61)

MEARS et al. v. STROBACH et al.

(Supreme Court of Washington. June 1, 1895.)

ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

The fact that defendants conveyed to plaintiffs for a money consideration, and on the same day plaintiffs agreed to lease the land to defendants, is only prima facie evidence that there was a loan of money and giving of security for its repayment.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by Elizabeth Mears and another against Paul Strobach and others to recover possession of certain land. From a judgment for plaintiffs, defendants appeal. Reversed.

George Turner and Adolph Munter, for appellants.

HOYT, C. J. This action was brought to recover possession of certain real property situated in Spokane county, on account of the violation by the defendants of the terms of a written lease under which it was claimed they were in possession. In the answer of defendants it was alleged that they did not hold possession of the property by virtue of the lease as such. That the lease set out in plaintiffs' complaint was executed by them as a part of a transaction which was substantially as follows: The defendants desired to borrow of the plaintiffs \$4,000 in money, and to secure the same upon the property described in the lease. That for the purpose of so securing it, it was agreed that they should execute and deliver to said plaintiffs a warranty deed of the property, and should receive from them a lease of the premises at a rate which, after paying inter-

est on prior incumbrances upon said property, would leave in the hands of plaintiffs a sufficient sum each month to pay interest on the money borrowed of them by the defendants. And it was contended on their part that the agreement evidenced by these instruments was in substance a loan of the money by the plaintiffs upon the security of the property, and that the deed, agreement for lease, and lease together should be construed as a mortgage to secure its repayment; while it was contended on the part of the plaintiffs that the transaction was one of purchase by them of the property in question and a lease of the same to the defendants, with the right to purchase for the consideration therein named, upon a compliance with the other conditions named in the lease. Upon this issue the case went to trial, and the result was a finding by the court substantially as contended for by the plaintiffs, on which a judgment in their favor was rendered, from which defendants have prosecuted this appeal.

Appellants advance two propositions by which they seek to show that the findings of fact by the superior court were unwarranted. The first is that the conveyance by the defendants and the agreement for the lease made by plaintiffs, having been executed on the same day, constituted in law but a single transaction, and should be construed together, and, thus construed, conclusively establish the fact that the transaction was one of the loaning of the money and taking security therefor, instead of a transfer of the property so as to vest the absolute and entire title in plaintiffs. The second is, that if such is not the conclusive legal presumption drawn from the fact of the execution of the papers on the same day, the evidence introduced upon the trial so established the fact that such was the intention of the parties that the finding of the court to the contrary, having been duly excepted to, should be set aside by this court. In our opinion, the contention that the character of the instruments will be conclusively established by the fact of their execution on the same day, whether or not they in any manner refer to each other, cannot be sustained. The contrary was held by this court in the case of *Digman v. Moore*, 8 Wash. 312, 36 Pac. 146. In that case it was held that the fact that the conveyance and the agreement to reconvey were made upon the same day would not prevent the one claiming under the deed from showing that in fact the contract was not one for the loaning of money and securing its repayment. It is probable that a prima facie presumption to the effect claimed by the appellants would flow from the facts above suggested, but in our opinion such prima facie presumption could be overcome by satisfactory proof that the contract was not in fact of such a nature. As to the second proposition, we feel compelled to agree with the contention of the appellants.

The exhibits introduced upon the trial prima facie established the nature of the contract as contended for by appellants, and the testimony, when examined in the light of all the circumstances surrounding the execution of the instruments, not only did not overcome the prima facie presumption flowing from such execution, but, in our opinion, tended strongly to establish the contract contended for by appellants. It is true that there was testimony to the effect that the plaintiffs refused to make a loan, and would only consent to advance the money upon an absolute conveyance to them of the property. But this testimony, interpreted in the light of the instruments actually executed, and of the other facts sufficiently proven by the evidence, fails to satisfy us that the transaction was not after all substantially one of lending and borrowing. In our opinion, there was no intention on the part of either of the parties to do more than, on the one part, to secure the loan of the money, and, on the other, to loan it and get proper security for repayment with interest. This being so, the bare fact that they refused to loan the money and take a mortgage only tends to show that they thought they could evade the law requiring the mortgage to be foreclosed before they could get possession of the property, by taking a deed as they did, and giving a lease and an option to purchase to the grantors named in the deed.

The respondents have made no appearance in this court and should not be surprised at a decision adverse to them, unless the record clearly entitles them to an affirmance. Not only is this not the case, but, as before stated, so far as we are enabled to gather the facts from the record and from the brief of appellants, the judgment of the lower court was founded upon an erroneous determination of the facts. It will therefore be reversed, and the cause remanded for a new trial.

SCOTT and DUNBAR, JJ., concur.

(12 Wash. 59)

KOONTZ v. KURTZMAN.

(Supreme Court of Washington. June 1, 1895.)

COUNTY TREASURER—ELIGIBILITY—SUCCESSIVE TERMS.

A person who, by appointment, served two months as county treasurer, and then one term by election, is not ineligible for the following term under the constitutional provision that no county officer shall be eligible to hold his office more than two successive terms.

Appeal from superior court, Franklin county; William H. Upton, Judge.

Proceeding by L. H. Koontz to contest the election of Fred Kurtzman to the office of county treasurer. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Frank H. Rudkin, for appellant. R. Olney, for respondent.

SCOTT, J. This is a proceeding to contest the election of appellant to the office of county treasurer of Franklin county for the term commencing the second Monday in January, 1895. It is contended that he is ineligible to hold the office under the constitutional provision that no county officer shall be eligible to hold his office more than two terms in succession. Appellant served as treasurer of said county, under an appointment by the board of county commissioners, from the 12th day of November, 1892, until the second Monday of January, 1893, and served from said last date for the term of two years by virtue of having been elected to such office. The respondent at the last election received the next highest number of votes. The court decided that appellant was ineligible, and that the respondent was entitled to the office, and this appeal was taken from such decision. We are of the opinion that appellant was not disqualified from holding the second term under the provision aforesaid, in consequence of having served for a part of a term under the appointment by the commissioners. The constitution does not say that no person shall hold a county office for more than four years, but says that he shall not hold it for more than two terms in succession. It interposes a term limit, but not a time limit. The term of office is fixed by law, and is two years, and there may be several different incumbents during a single term. It might have been difficult to have gotten another person to serve as treasurer for the short period of two months for which appellant was appointed, and it was a matter of convenience to appoint him thereto, as he was so soon to succeed to the office. It is quite likely he would not have served if he had supposed it would have barred him from holding beyond one full term. Such a law would be contrary to public policy, and it is evident there was no intention to include a part of a term in the limit provided. There is nothing ambiguous in the language used in the provision, and it construes itself. There was no ground for holding that the respondent was entitled to the office, even if the appellant had been ineligible, under the well-settled law in this country. Reversed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

(12 Wash. 71)

BRADLEY et al. v. G. GOTZIAN & CO. et al.
(Supreme Court of Washington. June 3, 1895.)
CHattel Mortgage — CONSIDERATION — RELEASE
OF MORTGAGE ON HOMESTEAD.

Where a debtor executes a mortgage on his homestead to secure the debt, and the creditor releases the mortgage in consideration of a mortgage on the debtor's stock, the other creditors of the mortgagor cannot set aside the chattel mortgage on the ground that the mortgagee, by securing his debt on the homestead, induced them to extend the credit to the mortgagor,

though, when the chattel mortgage was executed, the mortgagor was insolvent.

Appeal from superior court, Clarke county; Sol Smith, Judge.

Action by Herbert Bradley and others against M. A. Eaton and others. An attachment was issued on chattels covered by a mortgage to G. Gotzian & Co. and from a judgment adjudging such mortgage valid plaintiffs appeal. Affirmed.

Cake & Cake and E. Coover, for appellant H. Bradley. N. H. Bloomfield, for appellants McGraw & Co. E. M. Green, for appellants Tootle, Hosea & Co. C. D. Bowles, for appellants G. H. Porter & Co. Miller & Stapleton, for appellant Sabin. Dell Stuart, for respondent G. Gotzian & Co.

SCOTT, J. The defendants, M. A. Eaton and E. A. Eaton, were husband and wife and engaged in mercantile business at Vancouver, in this state; and, being indebted to Gotzian & Co. in the sum of \$2,000 for goods purchased, executed to said company a mortgage on their homestead there situated. Some two years thereafter the Eatons gave a chattel mortgage upon their stock of goods to Gotzian & Co. to secure this same indebtedness, under and by virtue of an agreement whereby Gotzian & Co. released the mortgage aforesaid upon their homestead. The other parties to this action are attaching creditors, who caused attachments to be levied upon the merchandise after the chattel mortgage thereon was executed to Gotzian & Co. as aforesaid. Judgment was rendered in favor of Gotzian & Co., adjudging their chattel mortgage to be a first lien upon the goods, and the attaching creditors have appealed therefrom.

It is contended that the arrangement entered into between the Eatons and Gotzian & Co. was a fraud upon the other creditors; that Gotzian & Co., having originally taken a mortgage upon the homestead to secure the indebtedness to them, could not enter into the agreement aforesaid and transfer their security to the stock of merchandise, as the Eatons were at that time indebted beyond their ability to pay. It is also contended that the acceptance of this real-estate mortgage was in effect an agreement upon the part of Gotzian & Co. to look to the real estate for their pay, and that the inducement to the other creditors to extend credit to the Eatons was the unincumbered stock of merchandise, and that, having obtained credit from the other parties by virtue of having this unincumbered stock, it would be a fraud on such creditors to permit the indebtedness of Gotzian & Co. to be made from said goods and the real estate exempted. But we are unable to see where there is any foundation for this. It is not claimed that there were any false representations made to these other creditors in any way, and, in fact, it appears that the mortgage aforesaid to Gotzian & Co. was a

matter of record. There was no presumption that the Eatons would permit the homestead to be sold to pay the indebtedness to Gotzian & Co. if they could avoid it. If anything was to be presumed, it was that they would pay it from the proceeds of their business, if possible. It is the settled law of this state that a debtor may prefer one bona fide creditor to another, although such debtor be in failing circumstances. There was nothing to have prevented these parties from selling their entire stock for money, and applying the money in discharge of the mortgage upon the homestead. There could be no fraud in so doing. It is the policy of the law to favor homestead exemptions. The only foundation for appellants' contentions in this action is the fact that this real estate was exempt as a homestead. Otherwise, it is too plain for argument that they could not complain because Gotzian & Co. took other security, or even if they had abandoned their security and made their debt out of other property, so that the mortgaged property would have been left for appellants. Now, can the fact that it was exempt as a homestead render the transaction a fraudulent one? It seems to us clearly not, in reason and under the authorities. *Randall v. Buffington*, 10 Cal. 491; *Palmer v. Hawes* (Wis.) 50 N. W. 341.

A further contention is made that the judgment should be reversed or modified because the court, after directing the payment of the amount due Gotzian & Co., ordered that the balance of the proceeds of the goods, if any, should be applied on the claims of the attaching creditors pro rata, when it should have been paid to them in the order of their levy or according to priority. This seems to have attracted no attention in the lower court, and from the proofs it is quite evident that there will be little or nothing left after paying Gotzian & Co. It was probably an inadvertence upon the part of the court in directing the surplus to be paid as aforesaid, and it does not appear that the court was asked to correct it. Appellants may, upon application to the lower court, have the judgment modified in this particular, but as to Gotzian & Co. it will be affirmed, with costs.

ANDERS and GORDON, JJ., concur.

(12 Wash. 74)

HORTON v. HALEY et al.

(Supreme Court of Washington. June 4, 1895.)

ESTOPPEL—RECITALS IN MORTGAGE—CORPORATE TRUSTEES—INDIVIDUAL LIABILITY ON NOTE.

Where trustees of a corporation signed a joint and several note as individuals, with no agreement that they were not to be individually bound, the acceptance of a mortgage given some time thereafter on corporate property, reciting that the loan was obtained for corporation purposes, and that the note had been signed by the corporate trustees, will not estop the payee from holding the makers of the note individually liable.

Appeal from superior court. Kittitas county; Carroll B. Graves, Judge.

Action by Dexter Horton against Thomas Haley and others. From a judgment for defendants, plaintiff appeals. Reversed.

W. S. Smith, for appellant. E. Pruyn, for respondents.

SCOTT, J. The controversy in this action arises over a promissory note executed by the respondents to the appellant. The respondents were trustees for the Kittitas Agricultural Association, and obtained the loan in question to use for corporation purposes. The note was signed by the respondents individually, and the corporation was not mentioned therein. Some time after the note was executed, a mortgage was given upon the fair grounds belonging to the corporation, to secure its payment. The appellant resided at a distance, and the loan in question was negotiated through an agent at Ellensburg, where the respondents lived. The mortgage recited that a resolution had been passed authorizing the trustees aforesaid to borrow the sum of \$2,500,—that being the amount specified in the note,—and also that the note which it had been given to secure had been signed by all the trustees of the association. The plaintiff brought this action to foreclose the mortgage and recover a judgment against the respondents individually, in case of a deficiency. The court decreed a judgment of foreclosure, but refused to allow a judgment for a deficiency, and the plaintiff appealed therefrom.

It is contended by the respondents that, although the note, upon its face, bound them individually, the plaintiff is estopped from claiming any individual liability in consequence of having accepted the mortgage, which showed that the loan was obtained for the corporation. It is also contended by the respondents that it was understood at the time the loan was obtained and the note executed that the respondents were not to be liable individually, and that making them so liable upon the note was a mutual mistake on the part of all the parties thereto. The testimony is conflicting upon the proposition as to what the understanding was. Shoudy, who was the agent of the plaintiff in making the loan, and Gaby, who was an attorney, acting for both parties, and one of the respondents, testified that it was understood that the respondents were to bind themselves individually, and that they could not obtain the money otherwise. This is strengthened by the fact that the note was executed and the money obtained some time before the mortgage was executed.

A number of other questions have been raised upon the appeal, which will not be considered, as we are satisfied the respondents have failed to establish a defense under the proofs. The case presented here is not so strong in their behalf as was that of

Barnes v. Packwood, et al.,—a portion of these same respondents, heretofore decided by this court,—38 Pac. 857. In that case the note specified that it was for the use of the Agricultural Fair Association. In this case there was nothing upon the face of the note to indicate that there was such a corporation in existence; and the fact that the mortgage was executed some time after, and sent to the plaintiff, and was accepted by him, and that it recites the matters aforesaid, cannot be held to work an estoppel. There was nothing ambiguous about the note. It was joint and several in form, and there was no earmark of any kind to show that the respondents intended to bind some one else than themselves, or that they were acting in a representative capacity only. There was no agreement that they were not to be bound individually, unless the mortgage contained one. It was not at all inconsistent with their action in giving the mortgage that they should also make themselves personally liable upon the note. In the former case this court entered into an exhaustive discussion of the proofs, and, as this case is not as strong a one in favor of the respondents, it is not desirable to set forth the testimony at length. The judgment must be reversed, with a direction to render judgment in favor of the appellant for the amount claimed.

HOYT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

(12 Wash. 84)

WEIR v. RATHBUN.

(Supreme Court of Washington. June 7, 1895.)

CHattel Mortgage—Foreclosure—Parties—
Sale by Mortgagor—Notice of Amount
Due—Judgment.

1. A mortgagor of chattels who sells the mortgaged property is not a necessary party to a suit to foreclose.

2. Where it is apparent, from the price paid by one who purchased mortgaged chattels, that, in his dealings with the mortgagor, he was informed of the full amount due on the mortgage, he cannot, in defense to an action to foreclose the mortgage, set up that a person holding the mortgage as collateral, on being requested by him before he bought the property to show him the notes unpaid secured thereby, showed him only one of several notes unpaid.

3. In a suit to foreclose a chattel mortgage against one who bought the chattels from the mortgagor, plaintiff may have a judgment foreclosing the mortgage, though he cannot claim a personal judgment against defendant.

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Action by Allen Weir against J. C. Rathbun to foreclose a chattel mortgage. Judgment rendered for plaintiff, and defendant appeals. Affirmed.

Phil Skillman and J. C. Rathbun, for appellant. Allen Weir and Troy & Falknor, for respondent.

v 40P.no.9—40

HOYT, C. J. Respondent was the owner of certain personal property. He sold it to one T. A. Crisman, and in part payment therefor took certain promissory notes, made by said Crisman and secured by mortgage upon the property sold. Afterwards, upon the payment of part of the sum secured by the mortgage, some of the property was released. The remainder came into possession of one David Boger, with whom the appellant entered into negotiations for its purchase and, having knowledge that Boger's title was subject to the mortgage to respondent, went to him for the purpose of finding out the amount of the mortgage debt, and was informed that there was about \$230 still unpaid. He was also informed that the mortgage had been assigned to one Springer as collateral security, and that said Springer could inform him as to the exact amount. Before the appellant saw Springer he was told by the respondent that he had just received a statement which showed that there was still due upon the mortgage \$233. Thereafter appellant saw said Springer, and was given information to the same effect by him. Afterwards appellant asked Springer to show him the notes which were secured by the mortgage, and by mistake was by said Springer shown one less note than was then in existence. It appeared from the proofs that it was this mistake of Springer which led to the controversy between the respondent and the appellant, for the reason that appellant claimed that upon an estimate made by him of the amount due upon the notes exhibited, after deducting therefrom the amount of the payments which had been made, as furnished by Springer, there was due and unpaid only about \$25, and that he had at all times been willing to pay that amount; while the amount due upon all the notes, including the one not exhibited to appellant, was about \$233. At the time when these conversations were had between the appellant, the respondent, and Springer, the appellant was negotiating with said Boger for the purchase of the property. The price at which Boger held it was \$600, which he afterwards reduced to \$550; and there was no claim, even in the testimony of the appellant, that at any time did said Boger talk about the value of the property, for the purposes of the trade, as being less than the sum of \$550. The negotiations between the appellant and Boger resulted in a purchase by the appellant, subject to the mortgage, for the sum of \$317. The notes and mortgage were afterwards reassigned by said Springer to the respondent, who, after demand upon the appellant and refusal by him to pay the sum still due, commenced this action to foreclose the mortgage upon the property which had been purchased by appellant. To this suit Crisman, the mortgagor, was not made a party, and for that reason the appellant objected to the introduction of any testimony by the respondent. His objection

was overruled by the court, and this ruling is the foundation of the first complaint made in this court. The pleadings and the undisputed proofs showed that the appellant was the owner of the property, and, under the circumstances of this particular case, sufficiently established the fact that the mortgagor, Crisman, had parted with all his interest therein. This being so, he was not a necessary party to the proceedings to foreclose the mortgage. See *Jones, Chat. Mortg.*, § 783; *Farnsley v. Machine Works*, 90 Ind. 120; *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325.

The second ground upon which appellant claims relief is that the respondent was bound by the declarations of Springer as to the amount due upon the mortgage, and that from such declarations it appeared that only \$25 was still unpaid, and that for that reason the mortgage could not be foreclosed against the appellant for more than that sum. It is not necessary that we should decide as to whether or not the respondent, under the circumstances disclosed by the proofs, was bound by the representations of Springer, for the reason that, in our opinion, such circumstances were brought to the knowledge of the appellant as to give him notice that Boger, the owner of the property, and the respondent were acting upon the supposition that there was still due and unpaid upon the mortgage about \$233; and this being so, he was not in a situation to avail himself of the mistake made by Springer in failing to exhibit one of the notes secured by the mortgage.

The other claim for relief grows out of the form of the decree. It is claimed that, because of the fact that it contains no judgment against any person for the payment of money, it is void under our statute. The form of the action and the parties thereto were such that there could have been no personal judgment for the recovery of the moneys, and the holding that where the mortgagor has parted with his interest he is not a necessary party requires the further holding that there may be a decree of foreclosure which contains no adjudication against any one for the payment of money. This would be the rule in the absence of any statute as to the form of the judgment, and, in our opinion, it is not changed by our statute upon the subject. Such statute, fairly construed, contemplates a decree for the foreclosure of the mortgage, and, in a proper case, for a personal judgment in the same action. But it does not follow that, in a suit in which there can be no personal judgment for want of the necessary parties, there can be no decree for the foreclosure of the mortgage, when the proper parties for that purpose are before the court. The decree will be affirmed.

SCOTT, DUNBAR, and ANDERS, JJ.,
concur.

(12 Wash. 77)

STATE v. MYERS.

(Supreme Court of Washington. June 7, 1895.)

HOMICIDE — TRIAL — EVIDENCE OF ANOTHER'S WHEREABOUTS—REMARKS OF COURT—CHARGE—SECOND CONVICTION — REVERSAL AS AGAINST EVIDENCE.

1. On trial for murder by arson, it was proper to exclude evidence of the whereabouts at the time of the fire of an employé of the burned hotel, who defendant claimed bore him ill will, where there was no evidence to connect the employé with the fire.

2. Where the prosecution sought to establish defendant's guilt by horse tracks leading in the direction of his home, and several witnesses testified to the nature and freshness of the tracks, and, on the cross-examination of such witnesses, defendant produced in court boxes filled with dirt, in which there were impressions of the foot of a horse, and sought to obtain from such witnesses their idea as to the time the impressions were made, and offered the boxes in evidence, defendant was not prejudiced by the remarks of the court in excluding the boxes: "This manufactured testimony, the manner in which it is manufactured, the manner in which it is manufactured in boxes, it is not a fair test, and not one of the tests the law allows as to their being introduced as evidence in themselves;" as the jury could not construe the remarks to mean that all of defendant's evidence was manufactured.

3. A charge that "the law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking the testimony all together, you are satisfied beyond a reasonable doubt that defendant is guilty,"—did not prejudice defendant.

4. Where, after the reversal of a conviction of murder, defendant is tried in a different county from that in which the first trial was had, only an extreme case will warrant the supreme court in reversing a second conviction on the ground of the insufficiency of the evidence to support the verdict.

Appeal from superior court, Garfield county; R. F. Sturdevant, Judge.

Charles E. Myers was convicted of murder, and appeals. Affirmed.

Geo. W. Bailey, M. M. Godman, and S. G. Cosgrove, for appellant. M. F. Gose, Pros. Atty., for the State.

HOYT, C. J. Appellant was accused of the crime of murder in the first degree, committed in the perpetration of arson. The undisputed facts shown by the proofs were to the effect that a certain hotel, situated in the town of Asotin, was destroyed by fire, in which one of its inmates lost his life. The disputed facts which the prosecution sought to prove were that such fire was of incendiary origin, and that the appellant was the incendiary. A verdict of guilty was rendered, and, after a motion for a new trial had been made and denied, judgment and sentence were imposed, from which this appeal has been prosecuted. There was no direct proof connecting the appellant with the commission of the crime, the prosecution relying upon circumstances which it sought to prove to establish his guilt. Upon four assignments of error appellant relies for a reversal: (1)

The rejection of certain testimony offered in his behalf; (2) language used by the court during the progress of the trial which had a tendency to prejudice his case with the jury; (3) an erroneous instruction given to the jury; and (4) the insufficiency of the proofs to sustain the verdict.

The first assignment is founded upon the action of the court in refusing to allow the appellant to introduce proof tending to show where one Murphy, who had been an employé at said hotel, was at the time of and soon after the fire. The fact which it was alleged warranted the introduction of proof of this nature was that Murphy had some ill will towards the appellant, but, in the absence of other circumstances tending in some manner to connect him with the commission of the crime, we are unable to see how his whereabouts could have had any effect upon the question of the guilt or innocence of the appellant. There was, in our opinion, no foundation for the argument of counsel that the answers to the questions relating to the whereabouts of said Murphy could in any manner tend to show that he had committed the crime; and, as this was the ground upon which the admissibility of the testimony was claimed, the court committed no error in rejecting it.

The second exception grows out of the fact that one of the circumstances relied upon by the prosecution to establish the guilt of the appellant was certain horse tracks upon the road and in the trail leading in the direction of his home, as to the nature and freshness of which several witnesses testified. In the cross-examination of such witnesses counsel for appellant had produced in court certain boxes filled with dirt, in each of which appeared an impression of the foot of a horse or other animal, and, as a part of such cross-examination, sought to obtain from such witnesses their idea as to the time when these impressions were made, as relating to the time of trial, after which, as a part of the case of the appellant, a witness was introduced who testified as to when and how the impressions in the dirt in these boxes were made. The boxes containing the dirt with these impressions were then offered in evidence, and the court, in sustaining the objection of the prosecution to their admission, made use of the following language: "This manufactured testimony, the manner in which it is manufactured, the manner in which it is manufactured in boxes, it is not a fair test, and not one of the tests the law allows as to their being introduced as evidence in themselves." And it is claimed that the use of such language was not proper, and had a tendency to discredit the cause of the appellant. If we could agree with the appellant as to what was meant by the court, we might agree with his further contention. He construes the remark of the judge as to manufactured testimony to refer to the course which the defense had taken in conducting

the cause; that it had been engaged in the manufacture of testimony, in the sense that testimony had been offered which had no foundation in fact. But, in our opinion, the language used warrants no such construction. When it is construed as a whole, it clearly appears therefrom that the court was talking about the manner in which the exhibits which it was proposed to put in evidence had been manufactured, and that it was to the fact of such manufacture, and not to the course of the appellant or his counsel in the production of testimony, that the word "manufactured" was intended to apply; and, when so interpreted, the language used had no tendency to influence the minds of the jury.

There was no exception taken as to the action of the court in excluding the boxes from evidence, but, if there had been, it would not have availed the appellant, for the reason that the ruling of the court in excluding them was correct. There was no such connection between the testimony of the witnesses for the prosecution as to the nature of the tracks found in the road and trail, and as to the probable time when they were made, with similar testimony as to the tracks made upon earth placed in the boxes, and impressed with the foot of a horse, as to warrant any testimony being introduced in respect to the latter for the purpose of affecting the testimony of the witnesses as to the former. So that not only were the boxes properly excluded, but the court would have committed no error if it had excluded all the testimony in relation to the tracks upon the dirt therein.

The instruction to which the appellant excepted was in the following language: "The law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking the testimony all together, you are satisfied beyond a reasonable doubt that the defendant is guilty." The objection to such instruction on the part of the appellant is to the use of the words "link in the chain of circumstances," instead of "inculpatory facts." If the latter expression had been used, it is clear from all the authorities, and practically conceded by the appellant, that the instruction would have been unobjectionable. In our opinion, the expression "chain of circumstances," as used in this instruction, conveyed substantially the same idea as would that of "inculpatory facts." If the language of the court had referred to the chain of circumstances necessary to establish the guilt of the defendant, there would have been foundation for the distinction sought to be made by the argument of counsel for appellant; for, where a chain of circumstances is the means by which the guilt of the defendant is to be established, each necessary

link in that chain must be established beyond a reasonable doubt, for the reason that the chain without the necessary links would be incomplete and ineffectual. But such was not the language used by the court. He referred to the chain of circumstances relied upon by the prosecution, and it is clear that such language referred to the inculpatory facts, whether in a chain or group, and stated that each of such facts need not be proved beyond a reasonable doubt. If the court had not in this instruction told the jury that, before they could convict, they must be satisfied beyond a reasonable doubt of the guilt of the defendant, there might have been some reason for the claim that it was misleading; but when taken in connection with such a statement, and with the other instructions given, in which the duty of the jury and the rights of the appellant were fully set out, there is no foundation for such a claim. It would have been better if some other expression had been used than that of "chain of circumstances relied upon"; for the reason that, in the sense which was manifestly intended to be conveyed, the expression "chain of circumstances" was inaccurate. But such inaccuracy furnishes no sufficient ground for reversal when it sufficiently appears that the instructions, taken as a whole, fully protected the rights of the appellant. This conclusion seems to us reasonable from the language used, and it is also well sustained by authority. See *Bradshaw v. State* (Neb.) 22 N. W. 361; *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *People v. Phipps*, 39 Cal. 328; *Faulkner v. Territory* (N. M.) 30 Pac. 905; *Sackett*, Instr. Jur. p. 647, § 34, and cases therein cited.

The other ground relied upon is the insufficiency of the evidence to warrant a conviction. It appears from the record that the appellant was once tried in the county of Asotin, and a verdict of murder in the first degree returned, which the trial court refused to set aside; that, upon appeal to this court, the judgment and sentence imposed upon that trial were set aside for error of law on the part of the trial court. Hence it appears that the verdict which is now sought to be set aside was the second one; that it was rendered by a jury of a different county from that in which the crime was committed, and at a time remote from its commission. When the minds of 24 men, at least 12 of whom were removed from all causes which would tend to influence them, have unanimously come to the conclusion that the evidence established the guilt of the appellant beyond a reasonable doubt, and the trial court, who heard such evidence, has twice refused to interfere with the verdict for the reason that the evidence did not support it, it would be an extreme case which would warrant this court in interfering on that ground; and, from a careful examination of the evidence introduced upon the trial, we are satisfied that such extreme case is not

presented by this record. It may be that the guilt of the appellant is not made absolutely certain; but there were many inculpatory facts sufficiently proven, and the fact that these circumstances convinced so many minds of his guilt beyond a reasonable doubt makes it morally certain that the verdict was what it should have been.

We find no error in the record of which the appellant can complain, and the judgment and sentence will be affirmed, and the cause remanded to the court below, with directions to proceed to appoint a day for the carrying of the judgment and sentence into effect, according to law.

ANDERS, DUNBAR, GORDON, and SCOTT, JJ., concur.

(12 Wash. 88)

SNIVELY v. MATHESON et al.

(Supreme Court of Washington. June 7, 1895.)

NONTRADING PARTNERSHIP—WHAT CONSTITUTES—AUTHORITY OF PARTNER—NOTICE TO THIRD PERSON.

A partnership formed to carry on the business of general contractors and builders being a nontrading partnership, a person who accepts from one of the partners a firm note, signed by him, and secured on the firm's chattels, is charged with notice that under the partnership agreement the partner had no authority to execute the note or mortgage on behalf of the firm.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by H. J. Snively against David Matheson and others to foreclose a chattel mortgage. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Edward Pruyn and Fred Miller, for appellant. Wager & Graves, for respondent.

DUNBAR, J. This action was brought by the appellant against David Matheson and Charles Dickson, copartners under the firm name and style of Matheson & Dickson, to foreclose a chattel mortgage on a certain grading outfit, comprised of mules, scrapers, etc., and given to secure a certain promissory note signed by Matheson & Dickson in the partnership name. G. E. Dickson, who had obtained judgment against the firm of Matheson & Dickson for something over \$600, and who had attached the property embraced in the chattel mortgage given to appellant, was also made a party to the action. The complaint alleges that the defendants, Matheson & Dickson, executed and delivered to plaintiff the promissory note above mentioned, and that they secured the same by the execution and delivery of the chattel mortgage above referred to, and contains the other necessary allegations in regard to the record of the mortgage, etc. The defendant Charles Dickson, one of the firm of Matheson & Dickson, answered separately, and denied the execution and delivery of the note and mortgage by the firm of Matheson & Dickson; denied

the reasonableness of the attorney's fee, which was alleged in the complaint to be \$250; denied that the appellant was the owner and holder of the note sued upon; and affirmatively alleged that the copartnership between him and respondent Matheson was one for the purpose of carrying on a contracting business for work to be performed by men and teams, and for sharing the profits and losses of such work; alleged that by the articles of copartnership entered into between them it was agreed that neither of the parties of said copartnership should have the power to incur any liability without the express consent of the other member thereof; denied any indebtedness on the part of the firm of Matheson & Dickson to the appellant; and alleged that the note and mortgage executed by Matheson to appellant were made without any consideration, and were executed and delivered by Matheson to appellant with the intent and design on the part of said Matheson and appellant to cheat and defraud said defendant, and to cheat and defraud the creditors of said copartnership, and for the purpose of carrying out a conspiracy between said Matheson and appellant to cheat and defraud the said creditors by transferring and disposing of the property of said copartnership to appellant; alleged notice on the part of appellant that said Matheson had no right to incur any liability for the firm of Matheson & Dickson, or to mortgage any of its property; and many other allegations not necessary to mention here. The separate answer of respondent G. E. Dickson simply set up his rights under his judgment and levy, and affirmatively alleged that the property sought to be foreclosed by appellant was all the property of the firm of Matheson & Dickson, and that the said mortgage to appellant was made by said Matheson with intent to hinder, delay, and defraud the creditors of said partnership, etc. The reply of the appellant denied the allegations contained in the affirmative defenses of all of the respondents. Upon the trial of the cause the court found that appellant's mortgage was null and void, and gave him no lien on said partnership property, and denied the foreclosure thereof; but decreed that the lien of the respondent G. E. Dickson on the property described in the complaint, by virtue of the attachment set out in his answer, was a valid and subsisting lien on said partnership property. The pertinent point to be decided in this case is the extent of the power of one partner to bind his copartners to a contract entered into by him alone. It is contended by the appellant in this case that this partnership was a general or trading partnership as distinguished from a nontrading partnership, and some few cases are cited which would tend to sustain this contention. But the overwhelming weight of authority places this partnership in the list of nontrading partnerships. The essential conditions of the articles of agreement are as follows: "That the

said David Matheson and Charles Dickson do hereby associate and enter into copartnership one with the other for the purpose of carrying on the business of general contractors and builders under the firm name and style of Matheson & Dickson, * * * and do hereby agree one with the other as follows, to wit: First. That each party to this agreement shall give his whole time and attention to the business; the said David Matheson to have charge and superintend the outside work of said firm, and the said Charles Dickson to keep all books, and to attend to all other clerical work, and have the purchasing of all materials needed. Second. No contract shall be entered into by either party hereto without the consent of the other, and no stock or materials shall be purchased, or any liability incurred, by either party without the consent of the other. Third. Neither party to this agreement shall indorse or become bondsman or surety on any instrument of writing not connected with the business of the firm during the existence of this partnership. Fourth. Each party shall have an equal interest in said copartnership and the copartnership property and effects, and all profits arising from such copartnership, after deducting all losses and expenses, shall be divided equally between said David Matheson and Charles Dickson, share and share alike." Thus it will be seen that this was in no sense a trading or general partnership, but that its purpose was special, and limited to the business of contracting and building,—a business which in no sense buys or sells merchandise of any character. There is some attempt in the testimony to show that a mercantile business was carried on in connection with the contracting business, but it amounted simply to this: that a very limited amount of goods were furnished by the contractors to the men who were working for them, and the price of these goods deducted from their wages. The trade was limited to their own workmen, and a portion of their wages was paid in these goods instead of with money. They did not represent themselves to be traders with the outside world, or traders in any sense whatever. In fact, it is conceded that they had not been doing business of any kind for a long time prior to the execution of the note and mortgage; that the live stock was out on pasture, and the other stock was stored; and that there was no prospect of any resumption of active business by this firm. So that the question of the power of Matheson to execute this note and chattel mortgage, if discussable at all, must be discussed from the standpoint of a partner in a nontrading partnership.

The general rule is that, so far as a general partnership, or, in other words, a trading or mercantile partnership, is concerned, each partner constitutes the other his agent for the purpose of entering into all contracts for him within the scope of the partnership business. This power rests in the usage of

merchants, and grew out of the necessities of commercial business. Therefore the doctrine of implied liability received the sanction of the law, and has for a long time been, and now is, enforced by the courts. But this implied liability does not extend to partners in nontrading partnerships. In such cases the rule announced above is reversed, and the presumption is that one partner has no power to bind the other partners. Hence, before recovery can be obtained upon a contract entered into by one partner in a nontrading partnership against the other partners, it must be affirmatively shown by the party attempting to bind the noncontracting partners, either that the authority to bind was conferred by the articles of incorporation, or that authority had been specially conferred, or that it had been the custom of such partnership to recognize this right to such an extent as would give innocent dealers a right to rely upon the custom. This doctrine was substantially announced so early as 1829, in *Dickinson v. Valpy*, 10 Barn. & C. 141. In this case the partnership was a mining company, formed for the purpose of working mines. Justice Littledale, in speaking of the subject in hand, said: "In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purposes of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to show that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others by drawing and accepting bills of exchange. * * * One of several persons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted. The object of the persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things in order to raise and put the produce in a saleable state, yet it is not necessary for that purpose that bills of exchange should be drawn. Even if that were necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a farm, it was incumbent on the plaintiff, in this case, to have shown either, from the very nature of this company that it was necessary, or from the practice in other similar companies, that it was usual." Certainly a mining business is as general a business as that of contractors and builders. All the judges concurred, by separate opinions, in this decision, and the gen-

eral doctrine is laid down at length as we have announced it above. *Bates, Partn. § 343*, announces the general rule to be that in nontrading partnerships no authority to sign mercantile paper by one partner is implied, and that it makes no difference that it was for the benefit of the firm. This rule is sustained by the great weight of authority, although the author says that nevertheless there are a number of cases in which mercantile paper has been held binding on such firms. "The test seems to be," says the author, "whether the paper is essential to carry into effect an ordinary purpose for which the partnership was formed. By such test it would seem that a note to pay a debt or to borrow money, even though it be borrowed to pay a debt or make a purchase, may not be binding without proof of assent of the other partners, or a usage of such business." The same rule is substantially announced in *Story, Partn. § 102*. In *Smith v. Sloan*, 37 Wis. 283, which is a leading case, where the court collated the authorities, it was held that one partner in a nontrading partnership cannot bind his copartner by a bill or note drawn, accepted, or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instrument is necessary to the carrying on of the firm business, or is usual in similar partnerships, and that the burden is upon the holder of the note to prove such authority, necessity, or usage. In this case there was no proof of the necessity or of the authority or of the usage. In fact, the giving of the mortgage in question would have more of a tendency to destroy the business than to assist in carrying on the business of the firm, for all the property that was owned by this firm was included in this mortgage. *Deardorf v. Thacher*, 78 Mo. 128, decided that "the members of a firm engaged in the insurance, real-estate, and collecting business have no implied power to bind each other by commercial paper in the name of the firm. Such power can only arise from consent, ratification, custom, or necessity." The court there quotes the case of *Hedley v. Bainbridge*, 3 Adol. & E. (N. S.) 315, where Lord Denman, C. J., said: "No doubt a debt was due from the firm, but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships." In *Pooley v. Whitmore*, 10 Helsk. 629, where a member of a public partnership executed his note for his individual debt, but indorsed it in the firm name to a bona fide holder, it was held

that the firm was not *prima facie* liable upon it; and the distinction between the implied powers of trading and nontrading partnerships was discussed. To the same effect is *Friend v. Duryee*, 17 Fla. 111. *Harris v. Mayor, etc.*, of Baltimore, 73 Md. 22, 17 Atl. 1046, and 20 Atl. 111, 985, is a case that seems to us to be exactly in point. This was a partnership formed for taking and executing contracts for paving and curbing streets, etc., and the court decided that it was not a commercial partnership, and that the individual members thereof had no implied authority to borrow money, and make notes therefor to bind the firm, in the absence of proof to show actual necessity or usage for the exercise of such power in conducting the business. This case reviews the authorities, and is well argued, and the conclusion was reached upon a petition for rehearing; in the former opinion the court having come to the conclusion that the implied authority existed. Our attention was called in oral argument, by counsel for the appellant, to the dissenting opinion of Judge Bryan in this case, as the better reasoning. Judge Bryan had written the former opinion of the court, which was reversed, and still maintained his original views. But, whatever may be the strength of his reasoning, as compared with that of the majority of the court, the majority opinion expresses the decision of the court, and is so in conformity with the great weight of authority on this subject that we feel constrained to follow it, although we do not wish to be understood as impliedly asserting that the argument of the dissenting judge was more cogent than that of the majority. Another well-reasoned case in support of respondents' contention is *Judge v. Braswell*, 13 Bush, 67. This was a partnership formed of several for the purpose of carrying on the business of mining on lands leased for that purpose, with power to purchase the title to mining lands for the purposes of the partnership. The articles prohibited any member of the partnership from contracting any debt on account of the partnership without the consent of all the members. One of the members, without the knowledge or consent of his copartners, purchased mining lands from third parties ignorant of that restriction, and in payment gave drafts in the firm name upon one of the other members, who refused to honor them. In an action by the payee against the firm, held: First, that the partnership was a noncommercial partnership; second, that the power of one partner to bind the copartners rests upon usage alone, and does not apply to noncommercial partnerships, without proof of usage or express authority; third, that there is no implied authority in such partnership to purchase lands for the firm. In that case the court said: "It is contended, however, that, the purchase of lands being within the scope of the partnership, each member had implied authority to make purchases for the

firm, and that, whatever may have been the rights and duties of the partners *inter esse*, and the express limitation upon their power contained in the written agreement between them, third persons, dealing with a single partner, without notice of the private agreement between them, cannot be affected by it. This is undoubtedly true as to commercial partnerships, but it is a rule of the law merchant which has been adopted in the common law, and rests for its support upon the custom of merchants alone, and has no application to noncommercial partnerships." This is a broader case in favor of the doctrine that it was a general mercantile partnership than the one at bar, for there the partnership was organized for the purpose of carrying on a mining business on leased lands, and for the purpose of buying and obtaining title to mining lands; and the power which was exercised by this partner, viz. that of buying mining lands, fell especially within the scope of the partnership business, and yet the court held that it was a nontrading partnership, and that no implied authority existed. We think it is not worth while to discuss the authorities further, for, as we have above stated, while there are some few cases holding to the contrary doctrine, yet the rule, as we have stated it, is sustained by the overwhelming decisions, both ancient and modern. Neither is there anything in the testimony to take this case out of the rule, equitably or legally. There was some attempt to show a custom of this kind in one or two instances, but we are satisfied from the testimony that Dickson gave these orders under a misapprehension of the true state of affairs, and by reason of false representations made to him by Matheson. On all these questions in controversy between Dickson and Matheson it must be noted that Matheson's testimony in many respects is flatly contradicted by the testimony, not only of Dickson, but that by Johnson and Warner, who were disinterested parties. We do not think that the court erred in not allowing the appellant to show that Dickson had no interest in the property mortgaged, under the condition of the pleadings in this case, and in the face of the articles of agreement which were made a part of the pleadings, and which were not denied. Finding no substantial error, the judgment will in all things be affirmed.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

(12 Wash. 99)

BAILEY v. DRAKE.

(Supreme Court of Washington. June 7, 1895.)
NEW TRIAL — EXTENSION OF TIME TO FILE MOTION—POWER OF COURT.

Where, on the hearing of a motion for a new trial, the party opposing the same objected

to its being heard because it was not filed in time, the court was authorized, under Laws 1893, c. 127, § 24, empowering a court to enlarge or extend the time within which by statute an act is required to be done or to "permit the same to be done or supplied after the time therefor has expired," to make an order, to take effect as of a prior date, extending the time within which the motion could be filed.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Alexander S. Bailey against Charles M. Drake. A verdict was rendered for plaintiff, and from an order granting a new trial he appeals. Affirmed.

F. Campbell, for appellant. Hiram F. Garretson, for respondent.

HOYT, C. J. This is an appeal from an order granting a new trial. The verdict which was set aside by said order was rendered on the 1st day of December. The motion for a new trial was not filed until the 4th day of December. On account of the delay in its filing, the appellant objected to its being heard. Upon such objection being made, the court, on motion of the respondent, made an order extending the time in which the motion for a new trial might be filed so as to include the said 4th day of December, and, having done so, proceeded to the consideration of the motion, and, for reasons satisfactory to it, set aside the verdict and ordered a new trial. Appellant relies upon two grounds to reverse the order: (1) That it was beyond the power of the court to extend the time in which to file the motion for a new trial after the expiration of the time fixed by the statute; (2) that if the court had such power it did not exercise it in this case by making an order to take effect from its date, but instead thereof entered an order which by its terms was to take effect as of a prior date. The appellant cites numerous cases to support his first contention, but none of them have any force under our statute, which, unlike those of the states in which the decisions relied upon were rendered, specially confers the power upon the court to enlarge the time for the making of any motion or giving notice thereof, after the expiration of the statutory time as well as before. The language of section 24, c. 127, Laws 1893, upon this subject, is as follows: " * * * And the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice of paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired. * * * " And there can be no escape from the conclusion that the legislature intended by its enactment to confer authority upon the courts to extend the time in which acts of the kind under consideration could be done, after the expiration of the statutory time, as well as before. There is technical force in the other contention of the appellant,

but it has no substantial merit. From what we have said it is clear that the court, upon proper showing, could have extended the time so that the motion could have been filed after the date upon which it was heard, and the fact that, instead of doing so, it assumed to date the order back, so as to make the motion filed before the hearing effectual, had no substantial influence upon the rights of the parties. The appellant did not move the court to strike the motion from the files, but contented himself with a general objection to its consideration, on the ground that it was not filed in time; and since it was within the power of the court to make an order which would have protected the right of the respondent to make a motion for a new trial and have it heard, and since that was all he obtained under the order made, the appellant was not so injured thereby as to be entitled to a reversal of the order. It will therefore be affirmed.

SCOTT, DUNBAR, ANDERS, and GORDON, JJ., concur.

(12 Wash. 106)
PACIFIC COUNTY ex rel. **LOCKWOOD**,
Treasurer, v. **ELLIS**.

(Supreme Court of Washington. June 11, 1895.)

EXCESSIVE ASSESSMENT—REDUCTION BY COURT.

The fact that property has been assessed at an excessive valuation does not render the assessment absolutely void, and, on application for judgment for delinquent taxes, the court may reduce the same, and give judgment for an amount found to be just.

Appeal from superior court, Pacific county; W. W. Langhorne, Judge.

Proceedings by Sumner F. Lockwood, county treasurer, against William Ellis for judgment and sale of property for delinquent taxes. From a judgment dismissing the proceedings, petitioner appeals. Reversed.

Lowen E. Ginn and W. B. Stratton, for appellant. Turney & Welsh, for respondent.

DUNBAR, J. This case arose out of the proceedings on the part of the treasurer of Pacific county to collect the delinquent taxes of 1891 and prior years against the real property in the county. On the 24th day of September, 1894, application for judgment was made to the court below, to which application respondent at said time filed written objections. On the trial judgment was rendered, on November 26, 1894, dismissing these proceedings as to the advertised property of respondent, and denying the application for judgment for the delinquent taxes of 1891 against the property described in the record herein. The findings of the court show that the proceedings in this case were dismissed upon the specific grounds that

the assessment against said property was excessive and void, and that it was void because excessive, and that the court had no power under the revenue laws of 1893 to reduce an assessment where it was found that an overvaluation had been made by the assessor. The substantial findings of the court are as follows: That the above-described lands are not now, and were not at any time during the year 1891, worth any more, nor a greater sum, than \$6 per acre, and that the sum of \$6 per acre was, during said year 1891, a full, fair, and reasonable valuation of said lands. The court then found that certain of the lands had been assessed at \$40 per acre, and certain at \$48.30 per acre; that the valuation, assessment, and equalization of the said lands at the figures above mentioned were far in excess of their real value, and the assessment of improvements on objector's lands was excessive and illegal; that in assessing said lands the assessor did not use or exercise proper judgment, but arbitrarily set down values on each and every acre of said land greatly in excess of their real value; that the state and county taxes for 1891 were based on the aforesaid excessive and illegal assessment; that lands adjoining the above-described lands of objector, and in the immediate vicinity thereof, and of equal value therewith, but belonging to other persons, were assessed by the same assessor for the year 1891 at a much lower figure per acre, and that there was a gross and unjust discrimination in said assessment for the said year 1891 against the objector. The assessment against his real property and improvements thereon for the said year 1891 was not fair, uniform, and just, as contemplated by the constitution and laws of the state of Washington. As a conclusion of law from the foregoing facts, the court found that the tax on the above-described lands for the year 1891 was excessive, and not uniform and just, and was unconstitutional, null, and void, and uncollectible.

It was evidently the opinion of the court that, the assessor having discriminated against the objector and having assessed his property at an excessive valuation, such acts on the part of the assessor rendered the assessment absolutely null and void, and that the court was powerless under the statute to modify such assessment. We do not think that this contention can or ought to be sustained. The collection of the revenues of the government would stand upon an uncertain and precarious footing, if the ascertainment of the fact that property had been assessed at an excessive value would render the assessment absolutely void, so that the real and true amount of taxes due could not be collected. Such, we think, was not the intention of the statute, and this question has already been squarely passed upon by this court in the case of *Benn v. County of Chehalis*, 10 Wash. —, 38 Pac. 1039.

There the court said: "Upon the conceded facts as to the assessment and taxation in question, it would be the duty of the court, when the county at the end of two years asked for judgment for the taxes in question, upon objections by the owner of the property, to reduce the amount thereof, and provide for the collection only of such remainder as under all the circumstances should seem just. The result to the county would be the same as though its proper officers were now required to receive such sum as would be just, and be thereafter prohibited from collecting the remainder; and since that was the object sought by the plaintiff in this action, the granting of the prayer of his complaint, upon the confession of the facts stated therein, was within the jurisdiction of a court of equity." In fact, under the pleadings in the case at bar, the objector should be precluded from raising an objection to paying taxes on the true valuation of his property, as he has stated in his objections to the court that he was then, and at all times had been, ready and willing to pay a fair and uniform tax on the above-described lands, levied on a fair, full, and uniform assessment on the valuation thereof. The court in this instance has found that \$6 an acre on the lands described was a fair valuation for the year 1891. In the case of *Lockwood v. Roys* (Wash.) 40 Pac. 346, decided at the last term of this court, we held that the assessment in that case was absolutely void, because the values of adjoining lots were not attached to each particular lot, but that lots which were not contiguous were lumped together, and valued as a whole; and it is claimed by the respondent here in oral argument that this case falls within the decision rendered in that case, because the land was assessed in a body. But the land in the case in question is farm land, and does not come within the reason of the rule laid down in the other case. Were we to decide this case upon the record as presented to us here, we think we should find that the land assessed, at the time it was assessed in 1891, was of a greater value than the value found by the court. Witnesses who testified concerning the value of this land could scarcely, probably, realize the actual difference in the price of land at the time at which they were testifying, and the price of land in 1891,—could not in fact realize that they were "looking backward,"—and it would be very difficult for them to prevent the present value from influencing their judgment. However, as the court saw all the witnesses and heard them testify, we think we would not be justified in disapproving its judgment on that question. The judgment of the court will therefore be reversed, and the cause remanded, with instructions to the lower court to enter judgment against the objector for the collection of the taxes of 1891 on the basis of the value of \$6 per acre

on the lands described, the appellant to recover its costs.

HOYT, C. J., and ANDERS, GORDON, and SCOTT, JJ., concur.

(12 Wash. 104)

SHUMWAY v. ORCHARD et al.

(Supreme Court of Washington. June 11, 1895.)

**DECREE OF FORECLOSURE—DEFICIENCY JUDGMENT
—APPEAL.**

1. Under 2 Hill's Code, § 628, providing that when there is an express agreement for the payment of the money secured, contained in the mortgage or any separate instrument, the court shall direct in the decree that the balance due after the sale of the mortgaged premises shall be satisfied from any property of the mortgage debtor, a personal judgment for the deficiency can be rendered against the maker of a note secured by mortgage at the time the decree of foreclosure is awarded.

2. An error assigned in appellant's brief, but not supported by argument or authority either in the brief or orally, will not be considered.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Emily A. Shumway, executrix of Alvaro Shumway, against George F. Orchard and others, upon a note and mortgage. From a finding for an amount due and a judgment for plaintiff, defendant Pyfer appeals. Defendants Orchard and wife appeal from the judgment. Affirmed.

John P. Hartman, Jr., and A. R. Hellig, for appellants. Thos. Carroll and Hagerman & Carroll, for respondent.

DUNBAR, J. The main question involved in this case is whether a personal judgment can be rendered against the makers of a note secured by their mortgage upon real estate at the time of the rendition of the decree of foreclosure upon such mortgage, so as to make such judgment a general lien upon all of the property owned by the mortgagors at the time of the entry of such decree or thereafter acquired. It is contended by the appellants that in an action of this kind, to foreclose their mortgage, no personal judgment could be rendered against the makers of the mortgage in the first instance, but only a decree finding the amount due on the debt secured by the mortgage, which should be satisfied, first, by the sale of the mortgaged property, and, if that be insufficient, then by levy upon and sale of such property of the defendant as may be found subject to execution; that the execution issued to enforce the decree gives the officer no authority over the other property of the defendant whatever; in fact, that the court has no power to issue execution to sell any of the defendant's other property until the mortgaged property is first sold; that no deficiency judgment can be rendered before the return of the sale of the mortgaged property, because the court has no way of determining what that deficiency is or may be.

This contention is contrary to the decision of the territorial court in *Hays v. Miller*, 1 Wash. T. 143; but, outside of any influence which that decision might have upon the court as it is now organized, we are of the opinion that the statute, reasonably construed, gives the power to the court to issue judgment for the deficiency at the same time that the decree of foreclosure is awarded in cases where there is an express agreement to pay the sum of money secured by the mortgaged premises. Section 628 of the Code of Procedure provides that, "when there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage, and costs, which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor." It would seem that the enactment of this section was for the express purpose of making a distinction between the power of the court where there was an express agreement to pay in a separate instrument, and where there was no such separate agreement. Section 630 provides, among other things, that "the sheriff shall indorse upon the execution the time when he receives it, and he shall thereupon forthwith proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and costs, upon giving the notice prescribed. * * * And, if any part of the judgment, interest, and costs remain unsatisfied, the sheriff shall forthwith proceed to levy upon any property of the defendant not exempt," etc. It seems to us that this language is plain and unequivocal. If it be the duty of the sheriff forthwith to levy upon other property, when it is ascertained upon the sale of the mortgaged property that a part of the judgment remains unsatisfied, it assuredly precludes the idea of making any return to the court and obtaining a judgment of the court based upon such return. It is not a subsequent execution which the law speaks of in this section, but it is evidently the execution which the sheriff already has in his hands, the only execution upon which he could forthwith make an additional levy. Neither do we think that this is an unwise provision of the statute, as it enables the court in one proceeding to do that which otherwise would necessitate the expense of two. But, whatever may be its policy, we think the statute is not susceptible of two constructions, and that the action of the court was justified by the law governing the proceeding.

Another proposition stated by appellants is that there could be no personal judgment entered in this case against defendant Pyfer. Defendant Pyfer purchased the mortgaged premises from defendants Orchard and wife, and took a deed therefor, warranting the

title except as to certain mortgages, including plaintiff's mortgage. In this deed the following agreement is made: "Which mortgage the said second party hereby assumes and agrees to pay." The appellants insist that the acceptance of this deed by defendant Pyfer did not make him personally liable for the debt, and that, in default of its payment, he could not be sued for the whole of the mortgage. This is alleged as error in the brief of the appellants, but they do not argue it in their brief or orally, devoting the entire argument to the other proposition which we have discussed. Neither do they cite any authority to sustain the position. In the absence of argument or authority, this court will not feel justified in investigating that proposition. The judgment will therefore be affirmed.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

(12 Wash. 101)

PECK et ux. v. STANFIELD et ux.

(Supreme Court of Washington. June 11, 1895.)

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—
REVIEW ON APPEAL.

1. Where the owner of land contracts to convey the same to another, who is in possession thereof conjointly with him, the payment of the price and subsequent surrender of exclusive possession to the vendee, who makes valuable and permanent improvements on the property, are sufficient to take the contract out of the statute of frauds.

2. Points raised in appellant's reply brief, not presented in his principal brief, will not be considered.

Appeal from superior court, Walla Walla county; William H. Upton, Judge.

Action in ejectment by Ebenezer M. Peck and wife against William Stanfield and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

B. L. and J. L. Sharpstein, for appellants. Thos. H. Brents and Wellington Clark, for respondent Sallie Stanfield.

SCOTT, J. This was an action in ejectment, brought by appellants to recover certain real estate claimed to have been purchased of one Page. One of the defenses pleaded by the respondents was that Page had previously contracted to sell the land in question to respondent Sallie Stanfield, in consideration of her agreeing to release a debt she held against him, and she sought a specific performance of that contract. It is conceded that appellants stand in no better position than Page stood, as the respondents were in possession of the premises when appellants purchased, and there was proof also that they had actual knowledge of the agreement. It is contended, however, that the proof of this agreement between Page and respondent

Sallie Stanfield was inadmissible under the statute of frauds, as she had been in possession of the land for some time prior to the making of the agreement, and simply continued in possession; and authorities are cited in support of this contention. We find it unnecessary, however, to examine them under our view of the facts proven. The testimony shows that, although the respondents, who were husband and wife, had been in possession of the land prior to the making of this agreement with Page, and were in possession at the time it was made, they had been and were in possession conjointly with Page, and that, after the making of the agreement, Page surrendered exclusive possession of the premises to the respondents, and this possession, especially coupled with the fact of the payment, and the further fact that the respondents had made valuable and permanent improvements upon the land, was sufficient to take the case out of the statute aforesaid. Pom. Cont., Spec. Perf. § 124, and cases cited. The case was tried to a jury as an action at law, until near the conclusion thereof, when it seems the court took a different view, and considered it as one in equity. The verdict was regarded as advisory only, and findings of fact and conclusions of law were thereafter regularly made by the court. It was contended upon the argument that appellants were entitled to have the judgment reversed, and to a new trial, owing to the action of the court relating to this manner of trial. We do not think appellants can avail themselves of this, as the point is not raised in their principal brief. It is sought to be raised only in the reply brief, and this was too late. Furthermore, no injustice to appellants appears to have resulted from the course taken. The testimony and evidence are all preserved in the record.

Certain questions are raised as to the sufficiency of the pleadings, the instructions of the court, and the admission of evidence which was claimed to be incompetent. We regard them as of no moment under the present aspect of the case, as we are bound to look to matters of substance in an equity cause, rather than to technical rules of pleading, or regarding the admission of evidence. Regardless of the pleadings, it seems that the issues were fully and fairly tried, and the questions as to whether the court erred in instructing the jury, or in admitting some of the evidence, are not important, as the verdict was advisory only, and the evidence was all before the lower court, and is before this court now. The errors complained of with respect to the evidence were only that improper proof had been admitted, not that any proof was offered and excluded. Conceding that some of the proof was improperly admitted, it could make no difference, as there was enough competent evidence introduced to warrant the findings of fact as made by the lower court. These findings also ac-

corded with the verdict and the special findings returned by the jury. Affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

(12 Wash. 65)

HANNEGAN et al. v. ROTH et al.

(Supreme Court of Washington. June 3, 1895.)

RECORD ON APPEAL—SUFFICIENCY OF EXCEPTIONS TO FINDINGS—DEATH OF PARTNER—RIGHTS IN PARTNERSHIP REALTY.

1. The statement of facts will not be stricken from the record for failure to except to any of the matters embraced within it, but only where it is not properly certified, or where it has been certified and settled without notice.

2. Where some of the findings are correct, a general objection to all is insufficient to bring up for review any questions of fact upon which such findings are based.

3. The legal title of a deceased partner to partnership realty descends to his heir, and the interest of the surviving partners is merely equitable.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by William J. Hannegan and others against Charles I. Roth and others to establish plaintiffs' ownership of certain property. From a judgment for plaintiffs, defendants appeal. Reversed.

Black & Leaming and Fairchild & Rawson, for appellants. J. J. Welsenburger and J. R. Crites, for respondents.

ANDERS, J. This action was brought to obtain a decree declaring the respondents to be the owners in fee simple, as tenants in common, of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 28, township 33, of range 3 E., in Whatcom county; and that the defendants have no right, title, or interest in or to the same. The plaintiffs allege and claim title under mesne conveyances, and by operation of law, from one Emma F. Doyle, the grantee from the United States. The defendants deny plaintiffs' title, and set up adverse possession, and also title in themselves, based upon a tax deed executed by the treasurer of the county to S. Baxter and W. P. Jones. Upon the trial the court found as facts and conclusions of law that the plaintiffs had established their alleged title by the evidence, and were entitled to a decree as prayed, and a decree was accordingly entered in favor of the plaintiffs, wherein and whereby it is adjudged and decreed that the plaintiffs are the owners in fee simple of the whole of the above-described premises, and that they and each of them are entitled to the possession of the whole thereof; that the claim and title asserted by defendants, and each of them, are void, and said defendants nor either of them have any right, title, or interest in or to said land, or any part thereof. The tax deed and all mesne conveyances from the county treasurer to the defendants were adjudged void and canceled, and a judgment was entered

against defendants for costs. The defendants bring the case here for review.

Respondents move this court to strike the statement of facts from the record, on the grounds and for the reasons that appellants have not made or taken any proper or legal exceptions to any order, rule, or judgment of the lower court, and have not made or taken any exception to any finding of fact or conclusion of law, in the manner provided by law, nor within the time required by statute. It has been the practice of this court to strike the statement of facts from the record only in cases where the same is not properly certified, or where it has been settled and certified without notice to all parties who are entitled to notice, under the provisions of the statute. As it is not shown or claimed that the statement in this case is not properly certified, or that the necessary notices were not given prior to its certification, it follows that the grounds stated are not sufficient to authorize us to strike out the statement of facts. But it does not follow that the matters stated in the motion should be entirely disregarded. All that was necessary for respondents to do in this instance was to call the attention of the court, in their brief, to the facts alleged in their motion; but, as we regard the substance of the procedure as more important than its form, we have treated the motion as, in effect, an objection to the consideration of the facts embodied in the statement, upon the grounds therein indicated. Considered as objections merely, the points made in the motion are well taken.

To the findings of fact and conclusions of law filed by the trial court, appellants interposed general objections, without specifying any particular part or parts thereof which they claimed were not justified by the evidence. As some of the findings are manifestly correct, a general objection to the whole thereof is clearly insufficient, and this court is precluded from reviewing any questions of fact upon which such findings were based. Sess. Laws 1893, pp. 112, 113, §§ 2, 3, 7; *Id.* p. 130, § 21; *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440. And, this being so, the only question to be determined is whether the conclusions of law and the judgment appealed from are warranted by the facts found by the court.

It is stated, in substance, in the findings of fact, that the land in controversy was purchased from the United States on August 3, 1870, by one Emma F. Doyle, who, on December 13, 1870, conveyed the same by warranty deed to the plaintiff Leroy H. Briggs and to Benjamin Flint and Thomas T. Minor; that, on said last-mentioned date, Benjamin Flint and plaintiff Thomas Flint and Llewellyn Bixby were copartners, doing business under the firm name and style of Flint, Bixby & Co.; that on October 3, 1881, Benjamin Flint, one of the members of said firm, died, and the above-named Thomas Flint and Llewellyn Bixby were the surviving part-

ners of said firm of Flint, Bixby & Co.; that the undivided one-third interest in and to the said land, which stood in the name of Benjamin Flint, was purchased with the money of the firm of Flint, Bixby & Co., and was the property of said firm; that the copartnership affairs of said firm have never been adjusted or settled, and said undivided one-third interest in said land was purchased by Benjamin Flint for said firm, and was firm property; that, by mesne conveyances, the plaintiffs William J. Hannegan and Thomas P. Hannegan have become the owners in fee simple of an undivided one-third interest in and to the said real estate; that the plaintiffs W. J. Hannegan, Thomas P. Hannegan, and Thomas Flint, and Llewellyn Bixby, as the surviving partners of the firm of Flint, Bixby & Co., and Leroy H. Briggs, are the owners in fee simple of the whole of the said premises and property, and are tenants in common of the whole thereof. Some of these matters stated as facts, it will be observed, are really conclusions of law. There are some other findings in the record, but they are not material to the determination of this case; for, if the judgment is warranted by the findings above set forth, it must be affirmed, and, if not, it must be reversed, irrespective of the additional findings made by the court.

It was found by the court, and is conceded, that the legal title to an undivided one-third interest in this property stood in the name of Benjamin Flint at the time of his death, and there is no claim or pretense made by respondents that Thomas Flint and Llewellyn Bixby have any interest in the premises, except as surviving members of the firm of Flint, Bixby & Co. It is claimed, however, by respondents, that the title of Benjamin Flint on his death vested in his copartners, and that the latter, by operation of law, became the absolute owners of his share of the property; and such was the view of the court, as evidenced by its findings. But, whatever may be the equities of these surviving partners in respect to the interest of Benjamin Flint, deceased, in this land, we think they cannot claim a legal title to it simply as surviving members of a firm of which he was also a member. At law there is no survivorship of partnership real property, as the legal title of a deceased partner descends to his heirs at law. Such heirs, however, take the title subject to the debts of the firm, and hold it in trust for the firm. *T. Pars. Partn.* § 274, and note; *Shields v. Fuller*, 65 Am. Dec. 300, note. The interest, then, of the surviving partner in partnership real estate, is, in any event, merely an equitable one, and therefore the interest, if any, of respondents Flint and Bixby in these premises, is an equitable, and not a legal, interest. The court, however, decreed that they were owners in fee, as tenants in common with the other respondents. But, as no one can possibly be an owner of land in fee who has not the legal title, it necessarily follows that the

decree is erroneous. If the interest held by the deceased partner was, in fact, purchased with partnership funds, and for partnership purposes, and was partnership property, the surviving partners, by an appropriate application to a court of equity, can secure a conveyance to themselves of such portion of the premises as they are justly entitled to; and until they do so, or acquire the title in some other way, they cannot maintain an action like the one at bar. They allege ownership in fee, but the facts show that they are entitled, at most, to a mere equitable interest. In this state the surviving members of a partnership are not even entitled to the custody and control of the partnership property, as such property is here subject to administration by the "administrator of the partnership," and he is entitled to the exclusive custody thereof. *Code Proc.* § 947 et seq. The authorities cited by respondents, as sustaining a contrary doctrine, are therefore not applicable under the laws of this state. The judgment is reversed.

SCOTT, DUNBAR, and GORDON, JJ., concur.

(12 Wash. 112)

IRWIN v. OLYMPIA WATERWORKS et al.

(Supreme Court of Washington. June 11, 1895.)

APPEAL — FAILURE TO EXCEPT TO FINDINGS — NOTICE OF FILING FINDINGS — GENERAL EXCEPTIONS.

1. Under Laws 1893, p. 130, § 21, providing that any questions of fact or of law decided upon trials by the court or by referees may be reviewed when exceptions to the findings of fact or to the conclusions of law or both have been taken, and that the evidence of facts shown by the bill of exceptions or statement of facts shall be examined by the supreme court de novo so far as the findings of fact thereon shall have been excepted to, the supreme court cannot review findings of fact or conclusions of law to which no exceptions have been taken.

2. The only effect of not giving notice of filing of findings of fact and conclusions of law, as required by Laws 1893, p. 112, § 3, is to extend appellant's time within which to file his exceptions to such findings and conclusions to five days from the time he receives the notice, but it does not entitle appellant to review on appeal findings of fact and conclusions of law not excepted to.

3. Where, after the judge orally announced his findings of fact and conclusions of law, appellant generally excepted to all of them, and the findings and conclusions were thereafter reduced to writing, and some of them were unquestionably correct, appellant's exception will not be considered on appeal.

Appeal from superior court, Thurston county; Mason Irwin, Judge.

Action by John Irwin against the Olympia Waterworks and others to quiet title. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

W. I. Agnew (T. L. Stiles, of counsel), for appellant. A. F. Burleigh, T. A. Gamble, and Daniel Gaby, for respondents.

SCOTT, J. This action was brought to quiet title to the east half of a certain donation land claim situate in Thurston county, by appellant, who claimed to be the owner in fee. The court found in favor of the respondents, and this appeal was taken. The respondents contend that this court cannot enter into an examination of the evidence introduced in said cause, and that the judgment must be affirmed, because the findings of fact and conclusions of law were not excepted to by the appellant. Appellant contends that respondents are not in a position to urge this objection, for the reason that no notice was served on him, as provided for by section 3, p. 112, Laws 1893, it being contended that the findings of fact and conclusions of law were filed and the decree entered in the absence of appellant, as to which matter the record is silent. In *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440, this court held that there must be exceptions to the findings of fact and conclusions of law presented to this court for review, and we are of the opinion that, under the legislation relating to appeals to this court, especially section 21, p. 130, Laws 1893, which provides that: "Any questions of fact or of law, decided upon trials by the court or by referees, in either legal or equitable causes, may be reviewed, when exceptions to the findings of fact or to the conclusions of law, or both, have been duly taken, by either party and sent up in the record on appeal; and in actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court de novo, so far as the findings of fact or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement,"—we are precluded from entering into any investigation of the findings of fact or conclusions of law made by the lower court, except as the same are excepted to by the party appealing; that such exceptions form the basis of the appeal in that respect, and are necessary to warrant any investigation thereof. The fact that notice of the filing of the findings of fact and conclusions of law was not served on appellant could not operate to change the law regulating appeals in this particular. The only effect that the want of such notice could have would be to extend the time within which the appellant could file his exceptions to five days from the time he received notice. In this case the appellant took notice of the action of the court in the premises by appealing therefrom, and the only question we can consider under the state of the record is whether the decree rendered by the court is warranted by the findings, and we are of the opinion that it is so warranted.

The defense in this case was based upon

two grounds. One was an alleged title derived under and by virtue of a certain execution sale. The appellant has attacked the validity of the judgment upon which the execution was issued, contending that the court never had jurisdiction of the person of the defendant therein. The finding in this respect, however, is as follows: "That on the 3d day of May, 1864, a judgment was recovered against the said Enoch H. Wilson, in the district court of the Second judicial district of the territory of Washington, holding terms at Olympia, W. T., for the sum of four hundred dollars and costs, in a certain action of debt, then pending in said court, wherein one Henry Roeder was plaintiff and the said Enoch H. Wilson and another were defendants, in which action the said Enoch H. Wilson voluntarily appeared, filed his answer, and made defense. That said judgment was so recovered and entered of record on the said 3d day of May, 1864. That afterwards, to wit, on the 25th day of January, 1868, and while said judgment was in full force and wholly unsatisfied, execution was issued thereon to the sheriff of said county, and by him was duly levied upon all the right, title, interest, and estate of the said Enoch H. Wilson of, in, and to said donation claim, and the lands described in the complaint in this action, and the same were duly sold by the sheriff on the 7th day of March, 1868, to Thornton F. McElroy, purchaser at said sale, for the sum of three hundred and fifty (\$350.00) dollars. That said sale was duly reported to and confirmed by said district court, and the proceeds thereof were applied towards the satisfaction of said judgment; and that on the 1st day of June, 1868, the said sheriff executed and delivered his deed to the said Thornton F. McElroy, in pursuance of said sale and order of confirmation, conveying to him, the said Thornton F. McElroy, all right, title, interest, and estate of the said Enoch H. Wilson, of, in, and to the said donation claim described in the complaint. That on the 5th day of February, 1869, the sheriff's deed was duly recorded in the auditor's office of said Thurston county. That neither the aforesaid judgment nor any of the proceedings under the same have ever been reversed, modified, or set aside. That from the date of said sheriff's sale the said Thornton F. McElroy was generally reputed to be the owner of the land in controversy. That at said time, and for a long time subsequent thereto, the land was of little value. That recently, and prior to the commencement of this action, it has greatly appreciated in value." The judgment also recited that the defendant had been duly served. It appeared from the files in the cause, however, that some months prior to the rendition of the judgment there had been an attempted service upon the defendant by publication, which was defective, and no other or different service was shown; and it is contended that the answer could not confer jurisdiction,

as the judgment purported to be one in default for not answering. The finding, however, was sufficient to show a valid judgment, and it was complete in other respects down to a sale of the premises and the confirmation thereof; and, as it was not excepted to, it must stand.

The other ground of defense was based on adverse possession, and as to this the court found: "That the defendants claim title from the said Thornton F. McElroy by mesne conveyances duly executed and recorded, as shown by the copies in evidence, and that ever since the execution of the sheriff's deed (June 1, 1868), the said Thornton F. McElroy, and those claiming under him by deeds of conveyance duly executed and recorded, have been in the actual, open, notorious, and exclusive possession of the east half of said donation claim under color and claim of title in good faith, and have continuously exercised acts of ownership and dominion over the same, holding and claiming the same adversely to all other persons. That during all of the time and times aforesaid, these defendants, and those under whom they claim title, have paid the taxes on said land, and continuously exercised the usual acts of ownership and dominion over the same, to the exclusion of all others. That said acts of ownership consisted in cutting and removing from said land piles, spars, sawlogs, and firewood, constructing roads thereon, paying taxes thereon, selling and conveying portions thereof by deeds duly recorded in the auditor's office of said county, and exercising continuous and exclusive dominion over the same under claim and color of title for more than twenty years prior to the commencement of this action. That during all of the time since June 1, 1868, the east half of said donation claim, and every part thereof, has been in the continuous and uninterrupted adverse possession of the said Thornton F. McElroy, and those claiming under him, by deeds of conveyance duly executed and of record in the auditor's office of the county of Thurston, Washington, and that said lands are now in such adverse possession. That from the date of said sheriff's deed until his death, in 1873, the said Enoch H. Wilson never asserted or claimed any interest, title, or estate in said donation claim, or any part thereof, nor had he been in possession thereof, or paid any taxes thereon, or exercised any acts of ownership over the same. That there is no evidence tending to show that Robert Irwin, who died in 1874, ever asserted or claimed any interest or estate in the land in controversy, or paid any taxes thereon, or exercised any acts of ownership over the same; or that the plaintiff or any of his alleged grantors ever did so." It is insisted that there was no evidence to support this finding, but, in the absence of any exception thereto, we cannot examine the record as to proofs, and must accept the finding as it stands, and this defense was in itself sufficient to author-

ize the rendition of the decree in favor of the defendants.

It was also contended by appellant that he did in fact except to the findings. This contention is based on a supplemental transcript, which the respondents urge we cannot consider; but it is sufficient to say, without determining the regularity of its presentment, that the matters therein contained are insufficient, if admissible, to avoid the objection raised, as it is only claimed thereby, in substance, that at the conclusion of the argument the judge announced orally what his findings of fact and conclusions of law would be, and thereupon appellant's attorney orally took a general exception to all of them. The findings were thereafter regularly reduced to writing, but no further or other exception was taken. Some of the findings were unquestionably correct, and a general objection to all of them was insufficient. *Hannegan v. Roth* (decided June 3, 1895) 40 Pac. 636. The objection of respondents to the consideration of the findings of fact and conclusions of law, except as stated, is well taken, and necessitates an affirmance of the judgment.

HOYT, C. J., and DUNBAR and ANDERS, JJ., concur.

(55 Kan. 378)

WITHROW v. CITIZENS' BANK OF KANSAS CITY.

(Supreme Court of Kansas. June 8, 1895.)

UNRECORDED CHATTEL MORTGAGE — VALIDITY AS AGAINST ASSIGNEE OF MORTGAGOR.

An unrecorded chattel mortgage executed by an insolvent debtor is void as against the claim of an assignee for the benefit of creditors who obtains possession under the assignment of the mortgaged property prior to the recording of the mortgage. *Chapin v. Jenkins*, 31 Pac. 1084, 50 Kan. 385, followed.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. Miller, Judge.

Action by the Citizens' Bank of Kansas City against C. D. Withrow, assignee, and others. From the judgment rendered, defendant assignee brings error. Reversed.

Getty & Hutchings, for plaintiff in error. Scroggs & Gibson, for defendant in error.

ALLEN, J. So much of the facts as are necessary to an understanding of the point decided by this court are as follows: On the 11th day of December, 1889, John Beaton, one of the defendants, executed a chattel mortgage to the Citizens' Bank of Kansas City, Kan., on a stock of merchandise in Kansas City, Kan., to secure the payment of \$4,200 and interest. This mortgage was not recorded until December 16th. On the 14th of the same month, after the execution, but prior to the recording, of the chattel mortgage, Beaton made a general assignment for the benefit of all his creditors to the plaintiff in error, who took immediate possession of the property. The only

question we deem it necessary to consider is whether the assignee can take advantage of the failure of the bank to record its mortgage. The district court held that it could not. There are authorities which sustain its decision. In the case of *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084, decided since the case before us was tried in the district court, it was held that an assignee, as the representative of all the creditors, could attack a chattel mortgage on the ground that it was fraudulently executed by his assignor. It was held in that case that the assignee of an insolvent debtor is not merely the representative of the debtor, but is a trustee, acting on behalf of the creditors. By section 9 of chapter 68 of the General Statutes of 1889 it is provided: "Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated, or if the mortgagor be a resident of this state then of the county of which he shall at the time be a resident." By the deed of assignment the title to the debtor's property vested in the assignee for the benefit of all his creditors in proportion to the amount of their respective claims. The rights of the creditors to a pro rata distribution of the debtor's estate attached when the assignment was made and the property delivered to the assignee. The statute declares the unrecorded mortgage void as against the creditors. It is therefore void as against an assignee who is the representative of all of them. *Brigham v. Jones*, 48 Kan. 165, 30 Pac. 113; *Chapin v. Jenkins*, supra. The judgment is reversed for further proceedings in accordance with the views above expressed. All the justices concurring.

(55 Kan. 381)

WALKER v. COLEMAN et al.

(Supreme Court of Kansas. June 8, 1895.)

REMOVAL OF CAUSES—NEW TRIAL—MISCONDUCT OF JUDGE.

1. The mere fact that the defendant is a United States marshal justifying under a writ of attachment issued from the federal court for this district, does not confer upon him any right of removal of the cause to that court.

2. Where the judge, during the progress of a trial before a jury, assails one of the counsel for defendant with offensive language, and such as to imply that he is an intruder in court, and this hearing of the judge probably had an influence upon the jury prejudicial to the defendant, and the verdict was against him, a new trial should be granted on the ground of irregularity in the proceedings of the court.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob Balderston, Judge.

Action by R. R. Coleman and C. T. Lynch against R. L. Walker. Plaintiffs had judgment, and defendant brings error. Reversed.

The defendants here were the plaintiffs in the court below, and the action was brought to recover the value of a stock of goods alleged to have been unlawfully taken by the defendant below, who is plaintiff in error, and will be hereafter called the defendant. Trial had at May term, 1890. Verdict and judgment for plaintiffs for \$3,896.86 and costs, and the defendant brings the case to this court for review.

The defendant in due time filed an application to remove the cause to the circuit court of the United States for the district of Kansas, on the ground that in taking the stock of goods he was acting as marshal of the United States for the district of Kansas under the orders of the circuit court of the United States for said district, by virtue of an attachment issued from said circuit court in an action wherein Tootle, Hosea & Co. were plaintiffs and T. H. Lynch was defendant, and that all his acts in relation to the taking of the said property were in the strict and direct line of his duties as such United States marshal, and that the suit arises under the laws of the United States by reason of the foregoing facts. The lawyers actively participating in the trial were W. E. Stanley, of Wichita, for the plaintiffs, and George W. Adams, of Wichita, and H. C. Solomon, of Atchison, for the defendant. During the trial the judge took occasion to reprimand the attorneys for the defendant on several occasions. After a question upon the admissibility of evidence as to the value of certain real estate had been argued, the following colloquy took place between the court and counsel: The judge, having an open book in his hand, said: "Here is some good law [reading]: 'A lawsuit is not a game to be won or lost by sharp practice and shuffling devices. The part of judicial investigation is to ascertain the facts, not to suppress them.' Adams: What has that got to do with this case? Court: I read that for the benefit of the attorneys for the defendant. Adams: We object to that, and desire the stenographer to take it down, and note our exception to it. Stanley: I object to that going down in the record. It is not a proper thing to go into the record. It is not part of the case. Court: The gentleman from Hogtown [referring to Mr. Solomon] may do very well up in his town, but it will learn him a few lessons when he comes down here. We can try our lawsuits. Solomon: I suppose I am privileged to come here if I wish to. Court: Yes, but I think you belong in Missouri properly. You should have located in Missouri. There is where you made a mistake. Solomon: I have always lived in Kansas, and have practiced law here for a number of years. Court: You made a mistake. Adams: Mr. Stenog-

rapher, note our exceptions to the remarks of the court. Solomon: I have not had a word to say in court in any part of the case, and have tried to conduct myself courteously with the court. Court: If you kept still, it would not be so bad; but you keep egging him on all the time. I can see. We could possibly get along with him, but you delay the case. Proceed with the case. You will have to show the market value of the property first."

Adams & Adams and H. C. Solomon, for plaintiff in error. W. E. Stanley, for defendants in error.

MARTIN, C. J. (after stating the facts).

1. The application to remove the cause to the United States circuit court for the district of Kansas was properly overruled. The mere fact that the defendant was a United States marshal, justifying under a writ of attachment issued from the federal court, did not confer upon him any right of removal under the several acts of congress relating to that subject. The order of attachment was issued under the laws of the state of Kansas, the federal courts having concurrent jurisdiction with the state courts in certain cases; but no federal question could arise upon the pleadings nor upon the petition for removal, and it was not claimed that the parties to this suit were citizens of different states.

2. The record discloses that the attorneys tried the case with reasonable fairness and courtesy as between themselves, and we see little or no cause for the apparent exasperation of the trial judge against the attorneys for the defendant, and particularly against Mr. Solomon. Mr. Adams took the leading part on that side of the case, and Mr. Solomon had little to say. He resided in a distant place, and the trial judge seems to have considered him in the light of an intruder. Presumably neither Mr. Solomon nor Mr. Adams had any interest in the result of the suit, except such as properly arises from the relation of attorney and client. The rights of the parties to the action were the proper subject of consideration by the court, and those rights ought not to be prejudiced by any ill feeling of the trial judge against counsel. In the case of *Cronkhite v. Dickerson*, 51 Mich. 177, 16 N. W. 371, it is held that "judges must take great care to say nothing in the hearing of the jurors, while a case is progressing, which can possibly be construed to the prejudice of either party," and the judgment was reversed because of an unfavorable suggestion of the trial judge, the reviewing court saying, "It is impossible to tell to what extent the defendant's rights may have been prejudiced by the remarks." And in *Wheeler v. Wallace*, 53 Mich. 353, 356, 361, 19 N. W. 33, it was decided that "error will lie on the demeanor of the trial judge, if it be such as to prevent a fair trial, or prejudice the case upon the facts before the jury," and

that it is improper for him to reflect upon the capacity and memory of counsel to whom clients have intrusted their interests, and the judgment was reversed for this cause among others. "Irregularity in the proceedings of the court, * * * or abuse of discretion by which the party was prevented from having a fair trial," is one of the grounds specified in section 306 of the Code for a new trial, and this was assigned in the motion of the defendant for a new trial, and is renewed in the petition in error here. An examination of the record leads us to the conclusion that the defendant was probably prejudiced by the conduct and bearing of the trial judge towards counsel. We think that some of the answers of the jury to particular questions of fact are against the evidence, and too favorable to the plaintiffs, and this indicates that the jury may have been influenced unfavorably to the defendant by the bearing of the trial judge and his prejudice against counsel. The judgment will be reversed, and the cause remanded to the district court of Sedgwick county for a new trial. All the justices concurring.

(55 Kan. 344)

MISSOURI PAC. RY. CO. v. JOHNSON.

(Supreme Court of Kansas. June 8, 1895.)

PROOF OF AGENCY — DECLARATIONS OF AGENT — INJURY TO PASSENGER—RULINGS ON EVIDENCE.

1. Agency cannot be proven merely by the declarations out of court of the person whose agency is claimed.

2. The declarations of agents and employes, concerning matters as to which they have no authority to speak for the master, and not made in connection with the performance of any duty, or the transaction of any business for the employer, are mere hearsay, and inadmissible against the principal.

3. All disputed questions of fact, in an action to recover damages for personal injuries, are to be tried and determined by the jury. This court does not weigh testimony. Where there is competent testimony tending to establish a defense, and incompetent testimony has been offered by the plaintiff of such character as to be likely to influence the jury, and a verdict is rendered in his favor, a new trial must be ordered.

(Syllabus by the Court.)

Error from district court, Chautauqua county; M. G. Troup, Judge.

Action for personal injuries by William Johnson against the Missouri Pacific Railway Company. Plaintiff had judgment, and defendant brings error. Reversed.

J. H. Richards and C. E. Benton, for plaintiff in error. McDermott & Johnson, for defendant in error.

ALLEN, J. On the 2d of November, 1889, William Johnson purchased a ticket from the Missouri Pacific Railway Company, and took passage on a mixed train from Peru to Sedan. The car in which he was riding was thrown from the track, tipped over, and he was injured. This action is prosecuted to recover damages for the injuries received.

Under the rule declared in *Railway Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45, all that it was necessary for the plaintiff to prove, in the first instance, was that he was a regular passenger in his proper place in the car, that the car was thrown from the track, that he was injured, and the extent of his injury. This is a sufficient showing by a passenger to establish prima facie a want of that high degree of care and diligence which the law imposes on railroad companies in the transportation of passengers. It then devolves on the company to show that the accident could not have been prevented by the exercise of the utmost human sagacity and foresight. *Railway Co. v. Hand*, 7 Kan. 392. In this case the plaintiff went further, and his counsel, in making his opening statement to the jury, said that the plaintiff relied wholly upon the allegation that the defendant was careless and negligent and unskillful in using in said train a defective and unsafe car, and thereby caused the wreck. The specific claim of negligence made by the plaintiff was that a freight car near the middle of the train was so old and rotten that it broke in two in the middle, and caused the derailment of the passenger coach, which was at the rear end of the train. It was claimed that the sills of the freight car were rotten. The plaintiff introduced evidence tending to support his claim. It is an undisputed fact that the freight car did break in two near the middle, and no other cause for the accident is suggested than something connected with this freight car. It was contended, however, by the defendant, that the sills of the car were not rotten, but sound; that the car did not break of its own weight, or because of the small load it contained, but that by reason of some hidden defect, which a careful examination failed to disclose, either the front trucks slipped back towards the middle of the car, or in some other way it was subjected to a violent wrench, which broke it in two. Witnesses on behalf of the defendant testified that they examined the sills, and that they were sound. There was evidence tending to show that the broken car came from Kansas City through Osawatomie; that the defendant employed a number of car inspectors, whose duty and custom it was to carefully inspect the cars passing through Osawatomie; that the numbers of all defective cars were entered on what is called a "Bad Order Book," and such cars were detained for repairs; that the number of this car did not appear on the bad order book. It was also shown that the conductor made such casual inspection of the cars in his train as it is practicable for a conductor to make.

The court, over the objection of the defendant, allowed the plaintiff, while introducing his evidence in chief, to prove that one Colburn had come to him at two different times, and talked about a compromise of his claim for damages; that Colburn said he was ad-

juster for the company. There was no direct evidence that Colburn was the agent of the company, and his declarations as to such agency are mere hearsay. *Railway Co. v. Stults*, 31 Kan. 752. C. F. Day, a witness for the plaintiff, was permitted to testify, over objection, that the conductor of the train, immediately after the accident, said: "If these damned car inspectors would pay attention to their business there would be less wrecks." W. J. Walton, another witness, testified to having hauled a load of stuff from the wreck for one Inglehart, a car repairer of the defendant at Sedan; that Inglehart said the material came from the wrecked car, and also said "that if it had not been for that rotten car, there would not have been any wreck there." The witness also testified to the unsoundness of the material he hauled. John Foster also testified to substantially the same statement having been made by Inglehart. None of these declarations of employees of the defendant were made in connection with the performance of any duty for the defendant. They were not made in connection with the transaction of any business which authorized them to speak on the subject of what caused the wreck. Their statements were, therefore, not binding on the defendant, nor properly admissible in evidence against it. *Railway Co. v. Stults*, supra; *Donaldson v. Everhart*, 50 Kan. 718, 32 Pac. 405; *Railway Co. v. Pointer*, 9 Kan. 620; *Sanborn v. Railroad Co.*, 35 Kan. 292, 10 Pac. 860; *Dodge v. Childs*, 38 Kan. 526, 16 Pac. 815. It is not seriously claimed that this testimony was admissible, but it is urged that the plaintiff proved every fact necessary for him to establish, and that inasmuch as it was not incumbent on him to make proof showing the particulars in which the railway company was negligent, the mere fact of his having offered incompetent testimony for that purpose is not prejudicial to the defendant, and must therefore be disregarded. This claim would be sound if there were no testimony in the case but that offered by the plaintiff. If the plaintiff had sufficiently established his cause of action by competent testimony, the mere introduction of other testimony for the same purpose, which was incompetent, would, of course, be harmless. But in this case the defendant offered testimony for the purpose of overthrowing the prima facie case made by the plaintiff, and if the testimony offered by the defendant was entitled to be given any weight or consideration by the jury, then the incompetent testimony became material, and when thrown in the scale and weighed with the competent was, of course, prejudicial to the rights of the defendant. We cannot uphold this verdict unless we can say that all of the testimony offered by the defendant is clearly insufficient to establish a defense to the plaintiff's prima facie case. It is not for this court to weigh conflicting testimony. No matter how strong or weak the testimony may appear to

us, its force is to be determined by the jury. The defendant in this case offered proof of what it claimed was due diligence in the inspection of the car which caused the accident. Unless we can say, as a matter of law, that all that is proven by the defendant's witnesses utterly fails to show that the defendant used due diligence we cannot hold the admission of this testimony immaterial. Whether the accident was caused by rotten sills in the car was a disputed fact, as to which there was direct testimony on both sides. The plaintiff introduced no evidence tending directly to show any other defect in the car. That offered by the defendant tended to show that there was some other defect in the car which caused the injury, and that such defect could not be readily detected by inspection. The jury have found in favor of the plaintiff's claim that the timbers in the car were rotten. Their verdict for damages is based on this fact. The testimony erroneously admitted tended directly to support this special finding. We are unable to see how we can treat it as of no consequence, nor can we say that the jury must have found, under the defendant's own evidence alone, that there was negligence on its part in failing to detect the defect in the car. Although railroad companies are held to the utmost diligence in providing for the safety of passengers, and are liable for the slightest negligence, the plaintiff's recovery must yet be because of some neglect or fault of the railway company or its employés. Of the facts of the case the jury and not the court are the judges, and in determining those facts only competent evidence should be considered. The judgment must be reversed, and a new trial ordered. All the justices concurring.

(56 Kan. 363)

COOK et al. v. CHALLISS.

(Supreme Court of Kansas. June 8, 1895.)

TRANSCRIPT ON APPEAL.

When a review is sought on a transcript of the record, the clerk of a district court is not authorized to determine what are or what are not "material acts and proceedings of the court," but should make a full and correct transcript of the record and proceedings in the cause, and certify the same as such, and where he has not substantially done so the petition in error will be dismissed.

(Syllabus by the Court.)

Error from district court, Atchison county; R. M. Eaton, Judge.

Action by George T. Challiss against W. W. Cook, T. A. Brace, and others. Plaintiff had judgment, and defendants Cook and Brace bring error. Dismissed.

At January term of the district court, to wit, on March 27, 1890, judgment was rendered in favor of the said George T. Challiss against the said W. W. Cook and T. A. Brace, and others, for the sum of \$5,530

and costs. A case made was prepared by Cook and Brace, but it was never settled nor allowed. The same material, with perhaps something additional, was, however, used as a transcript. The body of the certificate to this transcript is as follows: "I, Charles S. Albright, clerk of the district court within and for the county of Atchison and state of Kansas, do hereby certify the above and foregoing to be full, true, and complete copies of the papers therein mentioned; that the above and foregoing transcript contains a full and complete copy of the petition of the plaintiff in the above-entitled action, together with the exhibits thereof and the indorsements thereon, the process in said cause, being the summons issued against the defendants, W. W. Cook and T. A. Brace, together with the returns of the officers serving same, as indorsed thereon, and all other indorsements on said summons, also the pleadings subsequent thereto, and all orders, judgments, and all material acts and proceedings of the court in said cause, and contains a copy of the motion of the defendants W. W. Cook and T. A. Brace to require plaintiff to separately state and number the causes of action in said petition, and their motion to require plaintiff to make his petition more definite and certain, with the journal entry of the doings of the court on said motion, the amended petition of plaintiff and all indorsements thereon, the judgment of the court in said cause, the motion of the defendants W. W. Cook and T. A. Brace for a new trial, with the indorsements thereon, and the journal entry of the doings of said court on said motion, as fully as the same remain on file and of record in my office."

L. F. Bird and A. F. Smith, for plaintiffs in error. Henry Elliston, for defendant in error.

MARTIN, C. J. (after stating the facts). Section 546 of the Code of Civil Procedure, as amended by chapter 86, § 1, Laws 1870, reads as follows: "The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified, or the original case made as hereinafter provided, or a copy thereof." This section was modified by chapter 185, Sess. Laws 1877, being "An act to reduce the expenses of litigation in the supreme court" whereby it was provided, among other things, "that in all actions hereafter instituted by petition in error in the supreme court, the plaintiff in error shall attach to and file with the petition in error the original case made, filed in the court below, or a certified transcript of the record of said court." Section 1 of said chapter is published as section 546a of the General Statutes of 1889. 2 Gen. St. par. 4647. The certificate of the clerk, appearing in

full in the foregoing statement, although very long, does not literally comply with the requirements of either act. There is no statement that the document certified is a transcript of the proceedings nor a transcript of the record. Counsel for plaintiffs in error refer to section 417 of the Code, which declares what shall constitute the record in a cause, and urge that, as it includes "all material acts and proceedings of the court," and this certificate of the clerk contains these words, this should be deemed sufficient; but that section does not contemplate that the clerk shall determine what acts and proceedings are material. If, in making up the transcript, any such acts or proceedings were omitted, or immaterial matters included, the parties, by suggesting a diminution of the record in due time, would have a right to the correction of the same; but the clerk's certificate should show the fact that the document which he furnishes for the purpose of a review is a full and correct transcript of the record and proceedings of the court in the cause to which it relates. The certificate in this case does not comply substantially with this requirement. The statutes are very plain, and there is little excuse for a failure to comply with them. Enough appears in this case to show that the clerk could not properly certify that this was a full and correct transcript of the record and proceedings. For example, it is disclosed that the defendant C. L. Howe filed an answer, and its purport is perhaps sufficiently recited for the purposes of a case made, but no copy of such answer is given. At September term, on November 2, 1889, the plaintiff was allowed five days to amend his petition, and time was given for answer and reply. On November 6, 1889, the plaintiff filed his amended petition, and on November 27, 1889, the defendants W. W. Cook and T. A. Brace filed their motion to require the plaintiff to make his amended petition more definite and certain, and this motion was overruled December 5, 1889. It does not appear that anything further was done in the case until the date of the judgment, March 27, 1890, but the certificate of the clerk does not exclude the idea that something important may have occurred during this intervening period, unless we concede to the clerk the right to determine and certify what was and what was not material. This court has heretofore required at least a substantial compliance with the statutes relating to transcripts when a review has been sought by that method of procedure. *Moore v. Cutler*, 18 Kan. 607; *Burns v. Burgett*, 19 Kan. 162; *Whitney v. Harris*, 21 Kan. 96; *Eckert v. McBee*, 25 Kan. 705; *Weaver v. Hall*, 33 Kan. 619, 7 Pac. 238; *Nelwander v. James*, 41 Kan. 463, 21 Pac. 573; *Elk Co. v. Scott*, 51 Kan. 139, 32 Pac. 919; *Westbrook v. Schmaus*, 51 Kan. 214, 32 Pac. 892; *Byers v. Lodge*, 54 Kan. 321, 38 Pac. 302. It is now too late to amend

the certificate, more than one year having elapsed. The petition in error must be dismissed. All the justices concurring.

(56 Kan. 331)

KEYS v. LARDNER et al.

(Supreme Court of Kansas. June 8, 1895.)

MORTGAGE FORECLOSURE—PLEADING—AMENDING DESCRIPTION—INTEREST.

1. In an action upon certain promissory notes and two mortgages to secure the same, where the description of the land in the petition and in the mortgages was defective, and a party made defendant as a claimant of some interest in the land filed a motion to require the plaintiff to make his petition more definite and certain by giving a good and sufficient description of the real estate on which he claimed mortgage liens, which motion was overruled, and such party then answered to the effect that he was the owner of a certain tract of about 20 acres, specifically described, and that this tract was not included within the description of the mortgaged land, and the plaintiff filed no reply, and the court treated said answer as a disclaimer, and rendered judgment for the plaintiff on the pleadings, but in the decree of foreclosure so amended the description as to show that the tract was included in the mortgaged land which did not before clearly appear, *held* error.

2. Where a promissory note drawing interest at 7 per cent. provides that upon default of interest the entire principal and interest shall, at the option of the legal holder, become at once due and payable without further notice, and shall bear 12 per cent. after maturity, but a mortgage given to secure the same contains a clause to the effect that in case of such default interest shall be computed at 12 per cent. from date, *held*, that the terms of the note, the principal obligation, govern those of the mortgage, which is merely incidental thereto, and interest must be calculated in accordance with the conditions of the note, and not those of the mortgage; but, if the note becomes due by reason of default and the option of the legal holder, the higher rate is recoverable from the date of the exercise of such option, which may be made effective by the commencement of a suit.

(Syllabus by the Court.)

Error from district court, Lyon county; O. B. Graves, Judge.

Action by Henry Lardner against Francis Yahn, Henry Keys, and others to foreclose a mortgage. From a judgment rendered, defendant Keys brings error. Reversed.

J. G. Hutchison, for plaintiff in error. E. W. Cunningham, for defendants in error.

MARTIN, C. J. 1. The original action was commenced by said Henry Lardner against Francis Yahn and others on certain promissory notes, and to foreclose two mortgages given to secure the same; and Henry Keys, plaintiff in error, was made a party defendant, as claiming some interest in the mortgaged premises, alleged to be inferior and subject to the liens of said mortgages. The premises were described in the mortgages and in the petition as follows: "Com. on the center line of section four (4), Twp. nineteen (19), range eleven (11) east, eleven chains north of the center of said section four (4); thence north, 33½° east, 5 6/100 chains; thence north, 48° east, 1 46/100 chains; thence

north, $67\frac{1}{4}^{\circ}$ east, 3 $39/100$ chains; thence north, 79° east, 1 $70/100$ chains; thence north, 78° east, to the center of the Neosho river; thence down the center of said river to the east line of said section four (4); thence south on said line until it intersects the center of said river; thence down the center of said river to first ravine, to land owned by Albert Childres; thence south in the center of said ravine to the south line of the northeast quarter of said Sec. 4; thence west on said line to the place of beginning,—containing 68 acres, more or less, all in the N. E. $\frac{1}{4}$, 4—19—11." Keys filed a motion to require the plaintiff to make his petition more definite and certain by giving a good and sufficient description of the real estate on which he claimed mortgage liens. This motion was overruled, Keys excepting. Keys also filed a general demurrer which was overruled, and he excepted. He then filed an answer, stating, among other things, that he was the legal owner in fee simple of the following described real estate, lying and situated in the N. E. $\frac{1}{4}$ of said section 4, township 19, range 11, in Lyon county, Kan., described more particularly as follows: "Commencing at the southwest corner of the northeast quarter of said section four (4); thence east eight hundred and ninety-eight (898) feet; thence north to the middle of the Neosho river; thence up said river to the first ravine on the west side thereof; thence angle left $20^{\circ} 34'$ until it strikes the end of said ravine; thence due west one hundred and eighty-seven (187) feet, to a stone; thence south, $25^{\circ} 39'$ west, four hundred and eighty-seven (487) feet, to a stone on the west line of said northeast quarter of said section; thence south on said line, eight hundred and four feet, to place of beginning,—containing twenty acres, more or less;" and that he did not own, or have any right, title, or interest in or to, any other part or parcel of said quarter section; and that the description contained in the petition and in the two mortgages does not embrace and describe the land owned by him or any part thereof. Attached to the answer was a diagram showing the quarter section with the Neosho river flowing first eastwardly across it north of the center, and, returning again, crossing the southerly part of the east line, and flowing westerly and southeasterly out on the south line about 40 rods west of the southeast corner of the quarter section, and showing also the Keys land. No reply was filed to this answer, but on October 16, 1890, the cause came on for hearing on the pleading, no evidence being introduced by either party, and the court found, among other things, that said Henry Keys disclaimed any interest in the mortgaged premises, and he was discharged, with his costs.

We think the court erred in treating the answer of Keys as a disclaimer, for it very plainly appeared that Keys did claim part of the land which the court found to be included in the mortgages. The answer at-

tacked the sufficiency of the description in the petition and the mortgages to include the land claimed by Keys. This description had been before challenged by motion. It was at least defective; so much so that the court did not follow it in the decree of foreclosure as to the south and west lines. Instead of one course from the point of reaching the south line direct to the place of beginning, the court made it read "to the southwest corner of said quarter section, thence north" to the place of beginning. When attention was called to the defective description by motion, the plaintiff ought to have amended his petition by giving a better description, or showing why he could not do so, or setting up some cause for reformation, so that the court might properly make the amendment in the decree. As to motion to make more definite and certain, see *Water-Power Co. v. McMurray*, 24 Kan. 62; *Railroad Co. v. O'Neill*, 49 Kan. 367, 30 Pac. 470. We think the description sufficient as to the place of beginning and the north and east lines, but the remainder is very defective, so as to render plausible the contention of Keys that it did not include his land, or all of it.

2. Keys claims that the judgment was too large on both notes, but as to the first, or \$1,200, note he labors under a misapprehension of fact. He says this note was executed June 30, 1884, and became due June 30, 1889. When it became due it was extended for five years, to bear interest at the same rate. The statute regulating interest was amended May 25, 1889, the rate being lowered, and Keys contends that under the extension the interest was usurious. But the note and the mortgage were executed January 30, 1884, and became due January 30, 1889, and so the extension was made under the law in force when the note was executed. The second, or \$700, note, bearing interest at 7 per cent., contained a clause to the effect that upon default of payment of any interest the entire principal and interest should, at the option of the legal holder, become at once due and payable, without further notice, and should bear interest at 12 per cent. after maturity; and the mortgage provided that, in case of default, interest should be computed at 12 per cent. from the date of the note until paid; and Keys contends that interest was computed from date of default of interest, and not from maturity. If this was so, it was erroneous, for the note is the principal obligation, and the mortgage is only an incident, and the former governs the latter. *Hutchinson v. Benedict*, 49 Kan. 545, 551, 31 Pac. 147, and cases cited. But on a note like the foregoing the option of declaring the whole amount due so as to draw 12 per cent. interest thereafter may be exercised by bringing suit therefor. *Shattuck v. Rogers* (Kan. Sup.) 38 Pac. 280. The judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

(55 Kan. 336)

KANSAS CITY, FT. S. & M. R. CO. v. MURRAY.

(Supreme Court of Kansas. June 8, 1895.)

INJURY TO EMPLOYE—RISK OF EMPLOYMENT—CONTRIBUTORY NEGLIGENCE—WITNESS—PRIVILEGED COMMUNICATIONS.

1. Where a freight train is stopped at a station to take on four cars, loaded with coal, that are standing on a siding at that place, and the conductor, being otherwise engaged, leaves the train in charge of a brakeman, under whose direction the locomotive is cut off and backed in upon the siding, where it is attached to the four cars of coal, and the brakeman then takes a position upon the top of the rear car, ready to give signals to the engineer, and the latter runs the locomotive and cars forward from the siding, and then begins backing them towards the stationary part of the train at a rate of about six miles an hour, and when about 400 feet away from that part of the train towards which they are moving, the engineer, without any signal or necessity, applies the steam jam or brake, causing a sudden stop, and a violent jerk, which throws the brakeman off, and seriously injures him, it cannot be said that the engineer is free from culpable negligence, nor that the risk is one of the ordinary hazards of the business which is assumed by the brakeman.

2. *Railway Co. v. Haley*, 25 Kan. 35, distinguished.

3. The evidence examined, and it is held, that it cannot be said as a matter of law that the brakeman was guilty of contributory negligence.

4. Where a surgeon is called to dress and attend to the wound received by the brakeman, the statements made by the brakeman to the surgeon with respect to the position which he occupied immediately preceding the occurrence of the accident are not confidential or privileged, under the provisions of section 323 of the Civil Code.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action for personal injuries by James C. Murray against the Kansas City, Ft. Scott & Memphis Railroad Company. Plaintiff had judgment. Defendant brings error. Reversed.

Wallace Pratt, I. P. Dana, and Chas. W. Blair, for plaintiff in error. Warner, Dean & Hagerman and I. O. Pickering, for defendant in error.

JOHNSTON, J. This action was brought by James C. Murray against the Kansas City, Ft. Scott & Memphis Railroad Company to recover damages on account of personal injuries alleged to have resulted to him as an employé of said railroad company while in the performance of his duties as such employé, by reason of the fault and negligence of a coemployé. He was employed as a brakeman on a freight train which ran between Ft. Scott, Kan., and Kansas City, Mo., and on August 31, 1889, the train upon which he was working arrived at Miami station, where the Rich Hill branch unites with the main line of the railroad. The train was backed in upon the branch line in order to let a passenger train, which was about due, pass; and the conductor went to the depot to get bills of lading, etc., leaving the train in charge of Mur-

ray. Four cars, loaded with coal, and standing upon a side track, were to be taken into the train at this point, so the locomotive and a car were cut off from the train, and, it being in the nighttime, a red light was placed on the end of the train from which the locomotive and car were taken. In the absence of the conductor, Murray had charge of the train, and under his direction the locomotive and car were run forward some distance and then backed in upon the side track, where a coupling was made with the four cars of coal. The rear car of coal was an open one, loaded above the level of the side and end boards with fine coal; and there was a narrow platform at one end of the car, to which a brake staff was attached. Murray climbed upon the top of the rear car of coal, stationed himself about the center of it, and, with lantern in hand, signaled the engineer to pull out on the main line, which was done. Then, still acting under the directions of Murray, who was acting as brakeman and conductor, the engineer began backing up for the purpose of coupling onto that part of the train which had been left standing 700 or 800 yards from the switch, on the main line. To make this connection, they had to back over a sag, or low place, then up an incline, and as they approached the stationary part of the train Murray was still standing upon the top of the car, ready to signal the engineer when occasion required, and while they were thus running at the rate of about 6 miles an hour, and were yet about 13 car lengths away from the stationary part of the train, the engineer, without any signal from Murray or warning to him, applied the steam jam, with the effect of suddenly checking the train and jerking Murray forward upon the car, and before he could regain his equilibrium the steam jam was again applied by the engineer, causing another jerk, thereby throwing him to the ground, and under the moving wheels of the train, so that he was seriously injured. Testimony was offered in behalf of the railroad company that there was no sudden stop or jerk of the train, but that the engineer, believing that he was close to the stationary part of the train, merely slackened the speed to avoid a collision; and there was also some testimony to the effect that Murray's injury was the result of his own carelessness. The jury, however, found that Murray was in the discharge of his duty, and was using due care, at the time of the injury; that he was thrown from the car by the unnecessary action of the engineer in applying the steam jam or tank brake; that he applied it without any signal from Murray, who was in control of the train at the time, and who had no intimation that the brake was to be applied; and further, that it was not necessary for the engineer, in the discharge of his duty, using ordinary care, to apply the brake at the time he did, in order to prevent a collision with the remaining portion of the train towards which he was

backing. The company was found to be liable to the plaintiff for the injury, and the damages assessed were \$2,500.

It is contended by the company that, taking the testimony of the plaintiff, it fails to show such culpable negligence of the engineer as would make the railroad company liable. It is said that the engineer was not under any duty to give any signal or warning to Murray, and had a right to assume that Murray, who had had considerable experience in the railroad business, would protect himself from the jars and jerks incident to the making up of a train, or to the starting and stopping of a train. It is contended that no preliminary signal or warning to laborers upon the train, to enable them to hold on or secure themselves, is required, and, as the engineer must exercise his judgment with respect to the handling of a train, the company therefore violated no duty towards Murray; and that under the rule of *Railway Co. v. Haley*, 25 Kan. 35, the company cannot be held liable for the injury. We do not think that the rule of the *Haley* Case is controlling in this one. Here, according to the testimony of the plaintiff below, the engineer stopped the train with unusual and unnecessary violence, when he had received no signal to stop, and when it was wholly unnecessary to make any kind of stop. Murray was in charge of the train, acting as conductor, and the engineer should have been governed by the signals which he gave. The engineer applied the brakes, and brought the locomotive and cars to a sudden stop, when they were more than 400 feet away from the stationary part of the train towards which they were moving. Murray had a right to assume that no unnecessary stop would be made until a signal was given, and until they approached closely to that part of the train towards which they were moving. He also had a right to assume that, in the absence of any signal or obstruction upon the track, no sudden stop would be made by the engineer. In the *Haley* Case the injured party was not in charge of the train, but was an employé, engaged in carrying water and tools to other employés upon a construction train, and was picking up a bar near the end of the car, when a sudden stop was made, which threw him upon the track. The engine was reversed by the engineer, and the train stopped, to prevent a collision with cattle which came upon or near to the track; and under the circumstances it was held that the action of the engineer in reversing the engine and stopping the train was necessary, and that the company was therefore not guilty of culpable negligence. In that case it was shown that there was no rule or custom of the company which required that any preliminary signal or warning should be given to laborers upon the train, but Justice Brewer, in a concurring opinion, stated that the existence of such rules or custom is not conclusive on the question of negligence, and

that "it may often be the duty of the courts to pronounce conduct negligent, and grossly so, although sanctioned by the custom of the road and the rules of the company, and forbidden by no statute." In the present case there was testimony that the engineer was not authorized, under the rules of the company, to apply the steam brake and stop the train without a signal from Murray; but, apart from that, it cannot be said upon the testimony offered by Murray that the engineer exercised that degree of care and diligence which an ordinarily prudent person in a like position would have exercised. Neither can it be said as a matter of law that Murray was guilty of contributory negligence because he rode on the top of the coal car, rather than on the narrow platform at the front end of the car. He was in charge of the train, and was stationed on the top of the rear car, so as to enable him to observe the track and the proximity of the other cars, as well as to signal the engineer when occasion required. It may be that the position selected by him was not the safest, but in his choice of positions he was governed by the demand of duty, and it may have been that he was better able to perform the duties required of him in the position taken than he would have been at the other end of the car.

The next contention is that error was committed in the admission of testimony that, under the rules of the company, the engineer was not authorized to apply the steam jam and stop the train without a signal from Murray. The objection was that this was not a proper method of proving the rules, and that they should have been introduced to tell their own story. It does not appear, however, whether the rules were written or printed in whole or in part. If they were written or printed of course they should have been introduced; but, as there may have been rules not committed to writing, it cannot be said that material error was committed in receiving the testimony.

A more serious objection is made to the testimony of Dr. Alkman, a physician and surgeon of Ft. Scott, Kan., to which place Murray was taken after his injury. That witness, after stating that he had examined his wound, and dressed it, was asked if he had any conversation with Murray at the time about how he received the injury, and to give any statements made by him as to the cause of the accident. An objection was made that the question called for a privileged communication, and the court sustained the objection and excluded the testimony. The excluded testimony was important and material to the defense that was being made. It was the theory of the railroad company that Murray was not standing erect upon the top of the car when the brake was applied, but that he was carelessly leaning over the edge of the car, and that the fall and injury were due to his own negligence. They

proposed to prove that while the occurrence was fresh in his recollection, Murray had related the circumstances of the accident to Dr. Alkman, and had told him that he leaned over the edge of the car for the purpose of giving a signal to the engineer, in order that he might get off and make the coupling, when a jar occurred which threw him off. These declarations, if made, were in direct conflict with the testimony which Murray had given, and, if evidence of such declarations is admissible, it might have had controlling influence with the jury. Whether the testimony is privileged and the objection was well-sustained depends upon the statute extending the privilege. It provides that, if there has been no waiver, a physician or surgeon shall be incompetent to testify "concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient," etc. Evidence of statements made by a party out of court are admissible in evidence against him unless they are clearly excluded by the terms of the statute. As we have seen, only two exceptions are made by the statute,—one, of communications made by a patient with reference to his physical or supposed physical disease or ailment; and the other, of any knowledge obtained by a personal examination of the patient. The statute does not cover communications made by the patient other than those that relate to the disease or ailment for which the physician was called to prescribe or the surgeon to treat. The declarations inquired about in this case did not relate to the physical ailment of Murray, but were with reference to the circumstances preceding the injury. They were not of a confidential character, and were not necessary to enable the doctor to prescribe or to perform any professional duty for him as a surgeon. In Michigan it was held proper for a plaintiff's physician to testify that when called in professionally he was told by the plaintiff that she had sued the defendant, and would want him as a witness, since said testimony had no reference to plaintiff's condition. *Cooley v. Foltz*, 85 Mich. 47, 48 N. W. 176. See, also, 19 Am. & Eng. Enc. Law, 147, and cases cited. The exclusion of this testimony was material error, which requires a reversal of the judgment, and a new trial of the case. That will be the judgment of this court. All the justices concurring.

(35 Kan. 293)

STATE ex rel. LITTLE, Attorney General, v. WENTWORTH.

SAME v. HAYES.

(Supreme Court of Kansas. June 8, 1895.)

OFFICERS OF INSANE ASYLUM — TERM OF OFFICE.

Under section 3, c. 113, Sess. Laws, 1879 (paragraph 6188, Gen. St. 1889), which provides that "each insane asylum shall have a superin-

tendent, an assistant superintendent, steward and matron, who shall be chosen by the board of trustees, and shall hold their office for the term of three years," no vacant unexpired or fractional terms are recognized, and such officers, whenever appointed, are entitled to hold their respective offices for the period of three years from the date that the appointment of each takes effect

Allen, J., dissenting.

(Syllabus by the Court.)

Separate original actions in quo warranto on the relation of John T. Little, attorney general, against Lovell F. Wentworth and T. J. Hayes. Judgment for defendant in each case.

On April 1, 1879, Dr. A. H. Knapp was chosen by the board of directors as superintendent of the asylum for the insane at Osawatimie, under the act to organize and regulate the insane asylums of the state, being chapter 113, Sess. Laws 1879, published in Gen. St. 1889, as article 20 of chapter 99, relating to state institutions. The tenure of office of the superintendent is governed by section 3 of the act (paragraph 6188, Gen. St. 1889), which, so far as necessary to quote, reads as follows: "Each insane asylum shall have a superintendent, an assistant superintendent, steward and matron, who shall be chosen by the board of trustees and shall hold their office for the term of three years." On March 6, 1882, Dr. Knapp was again chosen by the board for the term beginning April 1, 1882. No other appointment was made until February 6, 1892, when Dr. L. F. Wentworth, the defendant, was chosen, it being stated in the minutes of the board that his term of office was "to begin July 1, 1892, for the unexpired term ending June 30, 1894." On June 12th, following, it appears from the minutes that Dr. Wentworth was again elected, his term of office to begin July 1, 1892, for the unexpired term of Dr. A. H. Knapp. On July 18, 1894, Dr. C. H. Wetmore was chosen by the board, and he was declared elected superintendent for three years. He immediately qualified and demanded possession of the office, but Dr. Wentworth refused to vacate the same, and this action is brought for the purpose of ousting Dr. Wentworth and requiring him to turn over all books, papers, etc., belonging to the office, to Dr. Wetmore.

John T. Little, Atty. Gen., J. G. Hutchison, L. B. Kellogg, and Madden Bros., for plaintiff. E. A. Austin, Ben S. Henderson, and H. L. Armstrong, for defendant.

MARTIN, C. J. (after stating the facts). The petition alleges that Dr. Knapp vacated the office of superintendent by resignation on July 1, 1892, but this fact is not otherwise directly shown. It seems probable, however, that early in the year he signified his intention of retiring from the office on June 30, 1892, and that Dr. Wentworth was chosen to take the place when it should be so vacated. The state claims that Dr. Wentworth's term expired on April 1, 1894, being 15 years

or five full terms after the first appointment of Dr. Knapp, and that Dr. Wetmore, who was chosen on July 18, 1894, and who on the same day qualified and demanded the office, is entitled to it until April 1, 1897. The defendant contends that, under said section 3 of the act for the organization and regulation of the asylums for the insane, and the terms of his appointment, he has the right to hold the office until July 1, 1895. A construction of said section 3 is necessary to an adjudication of the rights of the parties. It will be observed that this statute makes no provision whatever for the time of the beginning or ending of a term, nor for a vacancy, nor for the filling of an unexpired term, nor for an appointment for less than three years. In these respects, it differs materially in terms from most of our statutes regulating the tenure of public officers. On May 23, 1861, almost at the beginning of our state government, a statute was enacted regulating elections, being chapter 28, Sess. Laws 1861. Sections 39-41 of this act read, respectively, as follows:

"Sec. 39. All vacancies, in any state or county office, and in the supreme court or district courts, unless otherwise provided for by law, shall be filled by appointment from the governor, until the next general election after such vacancy occurs, when such vacancy shall be filled by election.

"Sec. 40. The regular term of office of all state, district and county officers; of the justices of the supreme and judges of the district courts, shall commence on the second Monday of January next after the election.

"Sec. 41. Any of the said officers that may be elected or appointed to fill vacancies, may qualify and enter upon the duties of their office immediately thereafter, and, when elected, they may hold the same during the unexpired term for which they were elected, and until their successors are elected and qualified; but, if appointed, they shall hold the same only until their successors are elected and qualified."

These sections were published as above in chapter 86 of the compilation of 1862. Sections 39 and 41 were re-enacted literally as sections 57 and 59, and section 40 somewhat altered as section 58 of chapter 36 of the General Statutes of 1868. No change has since been made and the sections appear, respectively, as paragraphs 2718-2720 of the General Statutes of 1889. In *Bond v. White*, 8 Kan. 333, which involved the right to the office of sheriff, said sections 57 and 59 were declared constitutional, and we have no doubt of the correctness of that decision as applied to county officers. Whether the sections intended to, or do, cover all cases of judicial vacancies provided for by section 11 of article 3 of the constitution, we need not now inquire, but they were treated as valid, and as constituting rules of construction, in *Hagerty v. Arnold*, 13 Kan. 367, 381 et seq.; *State v. Mechem*, 31 Kan. 435, 436, 2 Pac.

816; and *State v. Foster*, 36 Kan. 504, 13 Pac. 841. *Hale v. Bischoff*, 53 Kan. 301, 36 Pac. 752, was a contest for the office of assessor of a city of the first class,—a place filled by appointment, it being expressly provided by the statute that, "in case of any vacancy in any appointive office the mayor, by and with the consent of the council, shall fill such vacancy for the unexpired term for which his predecessor was appointed." Sess. Laws 1881, c. 37, § 81; Gen. St. 1889, par. 635. The foregoing authorities are all cited by the state to aid us in the construction of a statute essentially differing from the statutes which were controlling in those cases, for, as we have already seen, the section under consideration does not recognize any such thing as a vacant, unexpired, or fractional term, nor the appointment of any person for a shorter term than three years. *State v. Thoman*, 10 Kan. 191, required an interpretation of sections 5 and 13 of article 3 of the constitution, the former fixing the term of office of the district judges at four years, and the latter regulating their compensation, in connection with chapter 52, Sess. Laws 1867, creating the Sixth, Seventh, Eighth, and Ninth judicial districts. Under this statute, Goodin was elected judge of the Seventh district in 1867. He was re-elected in 1871, although the statute of 1867 was silent upon the subject of the recurrence of the election for judges. In the five original districts created by the constitution, the judges were elected in 1860, 1864, and 1868, and the salaries having been raised, the question arose as to the validity of the election of 1871, and it was held that the constitution fixes the term at four years, and it was not in the power of the legislature to increase or extend that term, either directly or indirectly, and the first election for judge being in 1867, the next was properly held in 1871. *Peters v. Board*, 17 Kan. 365, followed the authority of the *Thoman Case*, holding that the judicial elections in the Ninth district were properly held in 1867, 1871, and 1875, and this notwithstanding chapter 117, Sess. Laws 1872, purporting to fix the time of the judicial elections in the new districts in 1872 and every four years thereafter, the act being inoperative and void as in conflict with section 5 of article 3 of the constitution. The cases of *Odell v. Dodge*, 18 Kan. 446; *Commissioner v. Nelson*, 19 Kan. 243, and *Morgan v. Commissioners*, 24 Kan. 71, are to the effect that in the organization of new counties the first or special election for officers is provisional only, and the offices are held temporarily until filled at the next general election. It is difficult to discover wherein these cases throw any light upon the construction of the statute now under consideration, and yet these are all the Kansas authorities cited by counsel for the state.

We cannot give this act the interpretation suggested on the part of the state, which would, in our opinion, violate, rather than carry into

effect, the will of the legislature, as expressed in plain words. If this were allowable on any supposed ground of public policy, as to the terms of these officers, yet we could not find any ground on which to base an argument that the public interest would be in any way promoted by the creation of fractional terms by judicial construction. We are aware of no reason that would forbid the appointment of officers for the Topeka and Osawatomie asylums at different times, nor that would require the choosing of the four officers of either institution at the same time. The statement of facts shows that the board of trustees have not kept the triennial terms distinct, nor uniform, even, as to the Osawatomie asylum. The circumstance that where the legislature has seen fit to recognize vacant fractional terms, it has expressly provided for the filling of the places for the unexpired terms, furnishes a strong reason for holding that where they have not done so it was intended and deemed best that the officer at whatever time appointed, should hold his office for the term prescribed by the statute; and that if he should vacate the place before the expiration of that time, this should not shorten the term of the next incumbent. In other words, when one goes into office by virtue of an appointment under this statute, he has a right to fill it for the prescribed period, but if he quits, his term ends, and a new one begins when the appointment of his successor takes effect. And this doctrine is sustained by the great weight of authority. Throop, Pub. Off. §§ 319, 320, and cases cited. In *People v. Green*, 2 Wend. 266, 273, under a constitutional provision that sheriffs should be chosen "once in every three years, and as often as vacancies shall happen," it was decided that a sheriff elected in September, 1826, to supply a vacancy occasioned by the death of his predecessor, who took his office January 1, 1826, would hold the office for three years. In delivering the opinion of the court, Marcy, J., said: "Green was elected, as I understand the provision, to fill the vacant office, and not merely to serve out the vacant term of his predecessor. I am inclined to think that a diversity of opinion on this subject has arisen from different applications of the term 'vacancies,' in the section of the constitution which we are now considering. It has been sometimes applied to the office, as contradistinguished from the term of service, and at others to the term of office. I understand it as applicable to the office alone. When Green came into office, he took it with all the rights, powers, and incidents belonging to it, under any circumstances, one of which was a tenure of three years." See, also, *People v. Coutant*, 11 Wend. 132; *Marshall v. Harwood*, 5 Md. 423-431; *Sansbury v. Middleton*, 11 Md. 296, 297; *Crowell v. Lambert*, 9 Minn. 283 (Gil. 267); *Whipper v. Reed*, 9 Rich. (S. C.) 5; *Ex parte Meredith*, 33 Grat. 119; *Keys v. Mason*, 3 Sneed, 6; *Brewer v. Davis*, 9 Humph. 208-213; *Banton v. Wilson*,

4 Tex. 400. The Virginia Case is very instructive, reviewing many of the authorities. It should also be added that the case cited from 11 Wend. 132, was afterwards affirmed by the court of errors (Id. 511), Chancellor Walworth delivering the opinion of the court. The fact that the board made the appointment of Dr. Wentworth "for the unexpired term ending June 30, 1894," is of no consequence, for, under the authority of *Hale v. Bischoff*, supra, he will hold until July 1, 1895. Judgment in favor of the defendant.

JOHNSTON, J. I concur in the result.

The case of *State ex rel. Little v. T. J. Hayes* will be disposed of in the same manner. He was appointed steward for the same asylum February 6, 1892, but the record does not show when his appointment was to take effect. On July 18, 1894, W. H. Wilson was appointed, but as the term of Mr. Hayes did not expire until February 6, 1895, or at a later date (depending upon the time when his appointment became effective), there was no vacancy at the time of the appointment of Mr. Wilson, and judgment must be rendered in favor of the defendant.

ALLEN, J. (dissenting). I am unable to reconcile the conclusion reached in this case with the prior decisions of this court. It seems to me that no sound distinction can be drawn between the case presented by an appointment made at a time prior to the expiration of a regular three-years term, and that of an election to the office of judge of the district court, either after a vacancy has been filled by appointment until the next general election, in accordance with the provisions of the constitution, or where an election is held on the happening of a vacancy. The case cited from 33 Grat. 119, is to the effect that an election of judge would be for the full term, and not merely for the unexpired term; but this court, in the cases of *State v. Thoman* and *Peters v. Board*, cited in the opinion, adopted the other rule, and in the latter case held that the legislature could not even by a statute provide for a change of the regular succession of terms of office, though a judge had held over his term of four years because of a failure to elect a successor. The cases mentioned applied the rule which had been declared in *State v. Cobb*, 2 Kan. 32, with reference to the terms of office of the justices of this court to judges of the district court. The constitution provides that a judge of the district court "shall hold his office for the term of four years." The only provision for filling vacancies is to fill them until the next regular election. The judge who is elected at that election would appear to have as strong a claim to hold for four years by virtue of the provisions of the constitution as the superintendent of the asylum can possibly have under the statute under consideration. But this court held, in the cases cited, that there was

a regular succession of terms, and that the judge elected when there was an unexpired term to fill held only for the balance of his predecessor's term. The case of *Hagerty v. Arnold*, also cited in the opinion, as well as a number of cases since decided, applies the same rule to county officers. Some of the authorities from other states, cited in the opinion, hold the reverse under similar statutes. It can hardly be seriously contended that the legislature can change a rule established by the constitution, and the power to do so was very emphatically denied in the *Peters Case*. If the question were a new one in this state, perhaps the arguments in favor of the rule announced in this case might appear as weighty as those opposed to it. As applied to the particular officers whose terms are under consideration, I perceive no special objection to the conclusion reached. It does seem to me, however, that a well-defined and steadily maintained rule for the construction of statutory and constitutional provisions with reference to the succession of terms of office is broken down by this decision, and that hereafter we shall be at sea, without any reliable compass for our guidance in determining the tenure of a considerable class of public officials, and that it is far better to adhere steadily and consistently to the rule already adopted, especially in view of the fact that it has seemed to work satisfactorily in the past. In the case of *Hale v. Bischoff*, though not necessarily involved in the decision, the rule that terms of office follow each other in regular succession, in the absence of express provision to the contrary, was recognized as the settled law of this state. Some force is attributed to the want of any provision in the statute under consideration for filling vacancies. The statute does not in express terms provide for any appointment but the first. The power to appoint after the expiration of the first term must be inferred. It seems to me that, with equal ease, we may infer the power to fill a vacancy.

(65 Kan. 308)

STATE ex rel. DAWES, Attorney General, v. BRIDENTHAL.

(Supreme Court of Kansas. June 8, 1895.)

STATE BANK COMMISSIONER—APPOINTMENT—TERM OF OFFICE.

In 1891 an act of the legislature was passed providing for the organization of banks, the regulation of the banking business, and authorizing the appointment of a bank commissioner. The act was passed in the closing days of the legislative session, and did not take effect until a few days after the legislature had adjourned. It provided that the governor should appoint, by and with the advice and consent of the senate, a bank commissioner, whose term of office should be four years and until his successor was appointed and qualified, but made no provision for the filling of vacancies that might occur in the office. On March 21, 1891, J. was appointed by the governor, and the senate not being in session, the appointment was not confirmed. He qualified and took possession of the office and continued to perform all the duties thereof until

his successor was appointed and had qualified. At the next session of the senate, in February, 1893, B. was appointed and his appointment was confirmed by the senate. *Held*, that the appointment of J. was only provisional and temporary, and the commencement of the official term began to run from the appointment of B., and that he is entitled to hold the office for four years from the time of that appointment. *Johnston, J., dissenting.*

(Syllabus by the Court.)

Original action in quo warranto on the relation of F. B. Dawes, attorney general, against John W. Bridenthal. Judgment for defendant.

F. B. Dawes, Atty. Gen., D. M. Valentine, and J. W. Ady, for plaintiff. David Overmyer and G. C. Clemens, for defendant.

JOHNSTON, J. This is a proceeding in quo warranto, brought by the attorney general in the name of the state, against John W. Bridenthal to determine his title to the office of bank commissioner and to oust him therefrom. The facts in the case, about which there is no controversy, are stated in the plaintiff's petition, and the questions for determination arise upon a demurrer of the defendant to the petition. It appears that the legislature of 1891, shortly before their final adjournment, enacted a law providing for the organization of banks and the regulation of the banking business, and it contained the following provision: "The governor shall appoint, by and with the advice and consent of the senate, a bank commissioner for the state of Kansas, whose term of office shall be four years and until his successor is appointed and qualified." Laws 1891, c. 43, § 21. This act, although approved March 10, 1891, did not take effect until March 21, 1891, and at that time the legislature had adjourned, and there was no session of the senate to confirm an appointment made after the law became operative until the next regular biennial session, which convened in January, 1893. On March 21, 1891, the day on which the act took effect, Governor L. U. Humphrey appointed as bank commissioner Charles F. Johnson, who, it is admitted, was duly qualified and eligible to take and hold the office under the provisions of law, and a commission as bank commissioner under the seal of the state was issued to him. The appointment was not confirmed by the senate, but immediately upon receiving his commission Johnson duly qualified as bank commissioner, took possession of the office, and continued to exercise all the duties and prerogatives thereof until February 13, 1893. On February 8, 1893, Governor L. D. Lewelling, who had succeeded Governor Humphrey, instead of renewing the appointment of Charles F. Johnson, and sending his name to the senate, nominated and appointed for the same office John W. Bridenthal, a citizen and elector duly qualified and eligible to take and hold the office to which he was appointed. That nomination and appointment

were submitted to the state senate then in session, and were by the senate, on the 13th day of February, 1893, confirmed. Whereupon the governor issued to Bridenthal a commission, and he immediately took possession of the office, and has ever since exercised all the duties and prerogatives of the same, and still retains possession of the office, exercising its duties and privileges, and receiving the emoluments thereof. The message of the governor nominating and appointing John W. Bridenthal to office is as follows: "I have this day appointed John W. Bridenthal as bank commissioner of the state of Kansas, and respectfully request his confirmation by your honorable body. Very respectfully, L. D. Lewelling, Governor." After the appointment and confirmation of Bridenthal, he qualified in the manner and form prescribed by law. Four years from the time that Charles F. Johnson was appointed, the senate of the state not being in session, Governor E. N. Morrill appointed to the office of bank commissioner C. S. Jobes, a citizen and elector who was duly qualified and eligible to take and exercise the duties of the office of bank commissioner. There is no claim that Bridenthal has resigned or been removed, nor that he has forfeited or surrendered the office. His claim is that he was the first person regularly appointed to the office, and that in the absence of any provision fixing the beginning of the term, he was appointed for a full term of four years, which will not expire until February, 1897. The state contends that it was the duty of the governor to fill the office immediately after the law became effective, and that having filled it, the first term began with the appointment of Johnson in 1891, and that as the term could not, under a constitutional limitation, be longer than four years, the term ended on March 21, 1895, when it became the duty of the governor to make another appointment for the second term.

There is no statute which fixes the time for the beginning or ending of the official term, and no provision with respect to the filling of vacancies in the office or term, nor is there a statute in regard to the appointment of a bank commissioner, the duration of the term, or the tenure of office, other than that which has been quoted. It provides, as we have seen, that the term shall be four years, "and until his successor is appointed and qualified." It was well argued that the legislature cannot by any method extend the fixed term of an office which is limited by the constitution. Under section 2 of article 15 of the constitution it is provided that "the tenure of any office not herein provided for may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment, but the legislature shall not create any office the tenure of which shall be longer than four years." It seems to be conceded by the parties that

the legislature did not intend to enlarge the term, or extend it beyond the fixed period of four years. It is said that the hold-over provision was not intended to enter into or to be descriptive of the term, but upon grounds of public convenience and necessity, and in order to prevent an absolute vacancy, the law will recognize the incumbent as an officer *de facto* until his successor is appointed and qualified. It is the opinion of the court that, as a "term" means a fixed and definite period of time, the time definitely fixed in the law at four years is the term of office, and that the hold-over provision, whatever view may be taken of the same, does not invalidate or destroy the entire section with reference to tenure. The appointing power would in any event have the right to fill the office at the end of four years, and the right to exercise that power returns to the appointing power at intervals of not more than four years.

Then we have the remaining question of when the term begins. In the absence of a statutory provision upon that subject, it has been held that where a statute authorizes the appointment of an official and declares the tenure of the office, and is silent on the point as to the beginning of the first appointee's term, the commencement of the official term begins to run from the date of the first appointment. *Hale v. Blachoff*, 53 Kan. 301, 36 Pac. 752. The statute authorizes the governor to appoint a commissioner, but expressly provides that it shall be done by and with the advice and consent of the senate. No provision is made with respect to the first appointment, in case there is no senate in session, nor for making an appointment to fill a vacancy which occurs when the concurrence of the senate cannot be obtained. The constitution provides for only biennial sessions of the legislature, and all know that an extra session of that body is rarely called or held. The law providing for the regulation of banks and the appointment of a commissioner was enacted for a public purpose and from a supposed public necessity. It was manifestly the intention of the legislature that it should become operative at once, and, whether it went into effect before or after the adjournment of the legislature, that a commissioner would be appointed to execute and carry out its requirements. It was finally passed and approved in the closing days of the legislature, and was not published until several days after the final adjournment. The language and nature of the act indicated an expectation on the part of the legislature that the act would go into immediate effect, and that an officer would be appointed to execute its provisions. Evidently the legislature did not intend that the office should remain vacant for two years after the act went into effect, and as a matter of necessity must have intended that the governor, who by the terms of the act

is authorized to appoint, would supply not only the original vacancy but any other vacancy that might occur when the legislature was not in session. It is true that officers are to be chosen or appointed in the manner prescribed by law. It would seem from the language of this act, as well as from the powers conferred upon the governor by the constitution and laws, that he would be warranted in filling the original or other vacancy in the office when the senate was not in session and had no opportunity to unite in making the appointment. It is contended by the state, and apparently conceded by one of the counsel for the defendant, that this is an implied executive function of the governor, but it is further contended in behalf of the defendant that it is only a temporary or provisional appointment, warranted only by the necessities and conveniences of the public. It is claimed by the defendant, and a majority of the court are of the opinion, that no regular appointment could be made which would fix the beginning of the first regular term, except by the concurrent action of the full appointing power. It is said that the appointment first made by the governor was only to fill what has been termed an original vacancy, and is a mere temporary appointment, depending upon inference and implication rather than upon any express provision of law, and is only justified by necessity, and because the law abhors an actual vacancy. It is treated as an exceptional vacancy, which forms no part of a regular term, and that under the decisions of this state the making of such an appointment is only a temporary provision to continue until the regular term commences. *Hagerty v. Arnold*, 13 Kan. 367, and cases cited. There are numerous authorities, which it is unnecessary to cite, holding that officers must be chosen in the manner prescribed by the law, and the view of a majority of the court is that, the legislature having declared that the appointing power resides in the governor and the senate, there was no regular appointment for the term mentioned in the statute until the choice was made by those whom the statute invested with the power of appointment. As the commencement of the official term is to be fixed by the appointment, it is held to mean a full legal appointment, and not a mere special or temporary appointment made to fill an original vacancy, and it is said that if any other view is taken it would be within the power of the governor to make every appointment at a time when the legislature was not in session, and in that way the senate would be entirely deprived of any participation in the choice of a bank commissioner, and thus defeat the manifest purpose of the legislature as to the method of choosing that officer. The conclusion is that, as the appointing power defined by the statute consists of the governor and the sen-

ate together, and as the governor and senate did not act jointly until February, 1893, at the time when the defendant was appointed and confirmed, it follows that he was the first commissioner regularly appointed for a full term, and that the term for which he was chosen will not expire until February, 1897.

The writer is unable to concur in this conclusion, and his views, very briefly stated, are as follows: When the office of bank commissioner was created, it was ipso facto vacant, and there being no senate to advise and consent, it was the duty and within the power of the governor to fill the office by appointment. Whether this is to be treated as an exceptional and temporary provision, and whether or not it is justified on the mere grounds of public convenience or necessity, it must be conceded that the appointment of Charles F. Johnson on March 21, 1891, was legally made, and invested him with all the powers which he could have exercised if there had been a confirmation. There were no limits on his power, and his duties and responsibilities were the same as if the choice of the officer had been shared by the senate. He was lawfully in office, his right and authority were recognized by all the departments of the government, and he exercised the duties of the place with the general acquiescence of the people of the state. Having been legally appointed and lawfully invested with the office, and it having been decided that, where the law is silent about the commencement of a term, a legal appointment fixes the beginning of the first term, it is the opinion of the writer that the first term of the office commenced upon March 21, 1891. Under the ordinary practice, this appointment entitled Johnson to hold the office until the senate convened, at which time it was the duty of the governor to renew the appointment to the senate and obtain the concurrence of that body. The person then appointed and confirmed would serve out the unexpired portion of the four-year term. Under the other theory, if the appointment of Johnson had been renewed according to the usual practice, and the appointment confirmed, he would have been entitled to hold the office until 1897, a period of about six years. In the opinion of the writer, Bridenthal was chosen to fill out Johnson's unexpired term, and his right to the office terminated on March 21, 1895. As the majority of the court hold that his term does not expire until 1897, judgment will be awarded in favor of the defendant.

ALLEN, J., concurs. JOHNSTON, J., dissents.

MARTIN, O. J. I concur; but, after deciding that the four-years term is not vitiated by the provision for holding over until a successor is appointed and qualified, I

would prefer to place my concurrence upon the ground that this statute does not recognize any vacant, unexpired, or fractional term, and each incumbent appointed by the governor with the advice and consent of the senate is entitled to hold for the full term of four years. In respect to terms, the statute is like that under consideration in *State v. Wentworth* (decided at the present term) 40 Pac. 648.

(55 Kan. 386)

CHICAGO, B. & Q. R. CO. v. CLERK OF NORTON COUNTY et al.

(Supreme Court of Kansas. June 8, 1895.)

RESTRAINING COLLECTION OF TAXES.

A court of equity will not interfere by injunction to prevent an injury which is merely theoretical in its nature, and an error committed by the taxing officers of a county, which does not injure or affect the party complaining, is no ground for equitable interference with the collection of the taxes.

(Syllabus by the Court.)

Error from district court, Norton county; A. C. T. Geiger, Judge.

Action for an injunction by the Chicago, Burlington & Quincy Railroad Company against the clerk of the county of Norton and others. Defendants had judgment, and plaintiff brings error. Affirmed.

W. F. Guthrie, for plaintiff in error. C. D. Jones, for defendants in error.

JOHNSTON, J. The Chicago, Burlington & Quincy Railroad Company owns and operates a railroad in Norton county, and in the year 1894 the railroad property was assessed by the state board of railroad assessors. The other property within the county was assessed by the local assessors, and the assessment so made was subsequently equalized by the county board of equalization. Immediately after the board had completed its labors, the county clerk prepared an abstract of the assessment rolls of the county, and forwarded it to the state auditor, who laid the same before the state board of equalization. In equalizing the valuations in order to determine the amount of state taxes which each county should contribute, the state board of equalization ordered a reduction of 21 per cent. of the assessed valuations of Norton county, but the valuation of railroad property was found not to be excessive, and was allowed to remain as it was originally assessed by the state board of railroad assessors. A certified report of the action of the state board of equalization was made to the county clerk of Norton county, and at a meeting of the board of county commissioners on August 20, 1894, the county clerk presented the report of the action of the state board of equalization, when it was determined to adopt the reduced valuation as a basis in making the levies for all purposes, and the county clerk was directed to reduce the valuations on the tax rolls as a basis for

local levies. This order, however, had not been entered of record at the time this proceeding was begun. In October the railroad company brought an action against the county clerk and county treasurer to enjoin them from using the reduced basis in the collection of taxes, alleging that the reduction was unauthorized and illegal, and, if used, would result in an increase of the taxes upon railroad property. The court denied the injunction, and the railroad company complains.

The state board of equalization has undoubted power to correct errors in the valuation of property, and, in order to equalize, may increase or diminish the assessments made by the assessing officers of the several counties of the state. It is the duty of the auditor to report the action of the state board to the county clerks of the state, and the statute provides that "whenever the valuation of any county is changed by the state board of equalization, the board of commissioners of such county are authorized to use the valuation so fixed by the state board as a basis in making their levies for all purposes." Gen. St. 1889, par. 7014. There is no complaint that the action of the state board was illegal or inequitable, and it is conceded that it was within the discretion and power of the county commissioners to accept the reduced valuation, and adopt it as a basis in making county and all other local levies. It is contended, however, that while the county commissioners are authorized to adopt the valuation made by the state board, they must take it exactly as it was fixed by that board, and any deviation from that basis rendered their action illegal. If that be true, in what way was the railroad company injured? It is true, a reduction in the valuation of property other than railroad property correspondingly increases the burden to be placed upon railroad property. A reduction of 21 per cent. however, was authorized by statute, and is confessedly proper and legal. The county commissioners, it appears, ordered a reduction of only 20 per cent. The reason for making a 20 per cent. reduction is not shown, but it is intimated that it was done because there would be less difficulty in the making of computations, and in extending the changed valuation upon the tax roll. However that may be, it is clear that the railroad company has no cause for complaint. The slight departure from the basis fixed by the state board resulted to the benefit of the company. If the county commissioners had heeded the objection of the company, and had corrected the error by making a reduction of 21 per cent., it would have enhanced the rate and amount of taxes to be charged against railroad property. It is not charged or shown that there was any bad faith or partiality in the action that was taken, and the mistake does not prejudicially affect the railroad company. An error in the assessment is no ground for interrupting the tax machinery of the county at the instance of a taxpayer

who is not injured by the error. It is not enough that the taxing officers have violated or are about to depart from the strict rules of law in the performance of their duties, nor will a court of equity interfere by injunction to prevent a mere theoretical injury. The plaintiff is not authorized to institute proceedings for the protection of the public, and an injury which does not seriously affect nor injure it furnishes no ground for equitable interference. The judgment of the district court will be affirmed. All the justices concurring.

(55 Kan. 358)

CITY OF GENESEO v. GENESEO NATURAL GAS, COAL, OIL, SALT & MINERAL CO. et al.

(Supreme Court of Kansas. June 8, 1895.)

CONSTITUTIONAL LAW—MUNICIPAL DEVELOPMENT OF MINERAL RESOURCES—BONDS—RECOVERY OF PROCEEDS.

1. Chapter 114 of the Laws of 1887, entitled "An act authorizing counties and incorporated cities of the second and third class to encourage the development of the coal, natural gas and other resources of their localities by subscribing to the stock of companies organized for such purposes," is unconstitutional and void.

2. A subscription made by the city of Geneseo to the capital stock of a corporation organized for the purposes of prospecting for, developing, and operating natural gas, coal, oil, salt, and other minerals, is invalid, and although bonds are issued, and accepted in payment for such capital stock, does not render the city a stockholder in the corporation.

3. The city, having issued its bonds to the defendant corporation, which, it is alleged in the petition and admitted by the demurrer, are valid obligations of the city, may recover from the defendant corporation the proceeds of such bonds illegally issued to pay the city's subscription to the capital stock of the company, and wrongfully converted by the defendants to their own use.

(Syllabus by the Court.)

Error from district court, Rice county; J. H. Bailey, Judge.

Action by the city of Geneseo against the Geneseo Natural Gas, Coal, Oil, Salt & Mineral Company and others. Defendants had judgment on demurrer to the petition, and plaintiff brings error. Reversed.

Clark & Green, for plaintiff in error. A. M. Lasley and Sam Jones, for defendants in error.

ALLEN, J. The district court sustained a demurrer to the plaintiff's petition, on the ground that it did not state facts sufficient to constitute a cause of action, and, the plaintiff not desiring leave to amend, judgment was entered in favor of the defendants. The plaintiff alleges error in sustaining the demurrer. The petition is very long. It alleges that the plaintiff is a city of the third class; that the Geneseo Natural Gas, Coal, Oil, Salt & Mineral Company is a corporation organized under the laws of Kansas; that the other defendants are the directors and officers of the defendant corporation; that the plaintiff, by authority of the voters

of the city, conferred at a special election held on the 7th of March, 1888, subscribed for 30 shares, of \$100 each, of the capital stock of the defendant corporation, and issued its bonds for \$3,000 in payment therefor; that the defendant corporation received and sold said bonds, and that the same are now outstanding and a valid indebtedness against the plaintiff; that none of the other stockholders have ever paid anything on their capital stock; that the directors have applied the proceeds of the plaintiff's subscription to uses not authorized by the charter of the corporation, and that the directors and officers have grossly abused their trust; that a portion of the proceeds of the bonds issued by the plaintiff is still in the possession of the treasurer of the company; and that he threatens and is about to pay out the remaining funds belonging to the defendant to the officers thereof on invalid claims for salaries. The petition concludes with a prayer for an accounting by the officers of the corporation; for an injunction against further wrongful disposition of the funds; for a receiver to close up the affairs of the corporation; that the directors be required to refund the moneys they have misappropriated; that the assets of the corporation may be distributed equitably among the stockholders; and, finally, for a judgment against the defendant for \$3,000. In support of the ruling of the court, it is argued on behalf of the defendants that the alleged subscription by the plaintiff to the capital stock of the defendant company was made without authority of law, and is therefore void; that the plaintiff, therefore, is not a stockholder, has no interest in the defendant corporation, and, cannot question the action of the directors, nor bring them to an accounting; that the bonds issued by the city are void, and the subscription was therefore without consideration. A copy of the charter of the company is attached to the petition, which shows "that the purposes for which this corporation is formed are to prospect for, develop, and operate natural gas, coal, oil, salt, and other minerals."

We agree with counsel for defendants in error that the legislature did not and could not confer authority on the city to subscribe to the capital stock of this company. The charter provides for a capital stock of \$50,000, divided into shares of \$100 each. The business contemplated by the charter is not merely supplying a public want, or performing a public function by the city authorities. In the case of *State v. City of Hlawatha*, 53 Kan. 477, 36 Pac. 1119, we held that authority had been given by the legislature to cities of the second class to provide for lighting the streets, and that they might purchase electric plants to carry out that purpose. This corporation, however, seems to be formed for the purpose of carrying on the business of mining gas, coal, oil, salt, and other minerals. It is not form-

ed merely to supply a public need of the city, but contemplates carrying on a private business for profit. The main purpose of the corporation would seem to be to produce minerals for sale on the market at a profit. Cities are organized for public purposes, not to enter into private business ventures. In this case the subscription was but for a small portion of the capital stock in a corporation, the business of which would be controlled by directors chosen by vote of the stockholders. It would be, in effect, placing the interests of the public in charge of private persons whose interests might lead them, as it is charged in the petition has been done in this case, to abuse their trusts, and misapply the funds of the corporation. The only statute which it is claimed authorizes such a subscription is chapter 114 of the Laws of 1887, which, so far as it attempts to authorize cities to become shareholders in companies organized for the purposes of mining coal, etc., to be placed on the general market for profit, is void under the principles declared in former decisions of this court. *McConnell v. Hamm*, 16 Kan. 228; *Blain v. Society*, 21 Kan. 558; *Railroad Co. v. Smith*, 23 Kan. 745. See, also, *National Bank v. City of Iola*, 9 Kan. 689; *Association v. Topeka*, 20 Wall. 655.

It is claimed by the defendants that, the act authorizing the subscription being void, bonds issued under it are void and worthless; that the plaintiff's subscription was without consideration; and, therefore, that the plaintiff has no interest in the corporation, nor claim upon it. On the other hand, the plaintiff insists that the defendant corporation, having received and sold the bonds, and accepted the city's subscription to its capital stock, is estopped from denying the plaintiff's rights as a stockholder. We do not wholly agree with either of these contentions. The petition does not set out the form of the bonds issued. It may be, for anything appearing in the record, that the bonds are unobjectionable in form, and purport to be issued for a lawful purpose, and that, under the decisions of the supreme court of the United States, they might be held, if in the hands of bona fide purchasers for value, without notice of any infirmity, to be binding obligations. It may be that they contain no reference to the statute referred to. It is alleged in the petition that they are valid and binding obligations on the city. It is possible that this averment may be true. We must assume in considering the demurrer that it is true. If so, the city has a valid claim against the corporation for the proceeds of the bonds. Its claim is not as a stockholder, but as a creditor of the corporation, entitled to receive the proceeds of bonds issued without lawful authority, which have come into the hands of the defendants. While there is a great deal of surplusage in the petition, and very much relief is asked which the court cannot give, there are yet

sufficient averments to show a cause of action in favor of the city for the bonds wrongfully issued, and wrongfully converted by the defendants to their own use. The judgment must be reversed, with directions to overrule the demurrer. All the justices concurring.

(55 Kan. 389)

STATE ex rel. LITTLE, Attorney General, v. REGENTS OF UNIVERSITY et al.

(Supreme Court of Kansas. June 8, 1895.)

QUO WARRANTO—REGENTS OF THE UNIVERSITY—WRONGFUL EXCLUSION OF STUDENTS.

1. An action in the nature of quo warranto may be maintained in the name of the state by the attorney general, to oust the board of regents of the university of Kansas from the exercise of corporate powers in excess of those conferred on it by law. The board of regents is such a corporation as is subject to the control of this court in such an action.

2. Admission into the university is made free by statute, and the board of regents has no power to collect a fee of five dollars, or any other fee, for the use of the library, or to exclude students from the use of the library for the nonpayment of such fee.

3. The assumption by the board of the power to collect such fees, and to exclude students from the library for the nonpayment thereof, is an unwarranted assumption of corporate powers, from the exercise of which they will be ousted by this court in a suit brought in the name of the state by the attorney general.

(Syllabus by the Court.)

Original action in quo warranto on the relation of John T. Little, attorney general, against the regents of the university and others. Judgment for plaintiff.

John T. Little, Atty. Gen., and Morton & Clark, for plaintiff. D. M. Valentine and J. W. Green, for defendants.

ALLEN, J. This action is prosecuted in the name of the state, on the relation of the attorney general, against the regents of the university, the chancellor, and the treasurer, to oust them from the exercise of the power, which it is alleged they have usurped, of charging the students who are residents of the state an annual library fee of five dollars, and a graduating fee of five dollars, and of excluding such students who fail to pay the library fee from the use of the books. It is alleged that the university is a corporation, and that enforcing the payment of such fees by residents of the state is an assumption of unwarranted corporate powers by the regents; that the statute makes admission to the university free to all residents of the state. It is admitted that the regents have been collecting such library fee, and claim the right to do so, and also the right to exclude students who refuse to pay from the use of the library. But it is contended that the exercise of this assumed power cannot be inquired into by an action in the nature of quo warranto, for the reason that the state university is not a corporation, or, if a corporation in any sense, then only a quasi cor-

poration, whose doings cannot be inquired into in an action of this kind. It is contended that the jurisdiction of this court of original proceedings in the nature of quo warranto is confined to such cases as were regarded as proper ones for the exercise of the jurisdiction of the courts by proceedings in quo warranto at the time of the adoption of the constitution; that the jurisdiction of the court cannot be extended by legislative enactment to cases of a different nature. It is claimed that quasi corporations are creatures of the law, established for the purposes of government, and while they have some of the attributes of corporations, yet that they are not such corporations as those over the actions of which the courts exercise their supervisory power by actions of this nature. In the fourth subdivision of section 653 of the Code it is provided that this action may be maintained "when any corporation do or admit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or when any corporation abuses its power or exercises powers not conferred by law." In *State v. City of Topeka*, 31 Kan. 452, 2 Pac. 593, it was held that, "whenever a municipal corporation usurps any power which might be conferred upon it by the sovereign power of the state, but which has not been so conferred, such corporation may be ousted from the exercise of such power by a civil action in the nature of quo warranto in the supreme court." In that case judgment was entered ousting the city from the assumed power of raising a revenue from the sale of intoxicating liquors by granting licenses or permits therefor.

Is the university such a corporation as is referred to in the statutory provision above quoted? The present state university is the successor of the Lawrence University of Kansas, incorporated under an act of the territorial legislature approved January 29, 1861. This act provided for the establishment of a private corporation. Under subsequent legislation the school was taken in charge by the state, and is now a public institution, established and maintained under the following provision of the constitution (article 6, § 7): "Provision shall be made by law for the establishment at some eligible and central point of a state university for the promotion of literature, and the arts and sciences, including a normal and an agricultural department. All funds arising from the sale, or rents of lands granted by the United States to the state for the support of a state university, and all other grants, donations or bequests either by the state or individuals for such purpose, shall remain a perpetual fund, to be called the university fund, the interest of which shall be appropriated to the support of the state university." Article 6 of the constitution treats of the subject of education. In the section quoted it not only authorizes, but it requires, special legislation for the establishment of a university. The

legislation must be special, because but one university is contemplated. It is claimed that section 1, art. 12, of the constitution, which treats of corporations, and provides that "the legislature shall pass no special act conferring corporate powers," would render void a special act conferring corporate powers on the university, and that the legislation with reference to the university can only be upheld on the ground that it is a quasi corporation, and not a corporation proper. It is conceded by the very learned counsel for the defendant that universities are generally corporations proper, but it is claimed that our state university, while a valid public institution, cannot be a valid corporation because of section 1, art. 12. We think this section has no application to legislation with reference to the university. It is in the article which treats of corporations in general. The section of the constitution first quoted, however, is in the article treating of the subject of education, and applies specifically to the establishment of a university. It directs the establishment of such an institution, leaving the legislature free in determining as to particulars. It is true that there is no express grant of authority to make it a corporation, but in view of the fact that such institutions are generally corporations, and of the difficulty, if not utter impracticability, of establishing a school authorized to receive donations, and to hold extensive properties intended for the use of each succeeding generation, without conferring corporate powers, we think it clear that the framers of the constitution meant to and did authorize the establishment of the university as a corporate body. We do not deem it necessary at this time to enter into a consideration of the question whether an action in the nature of quo warranto may be maintained against a quasi corporation, such as a county, township, or school district, for the purpose of ousting it from the exercise of powers it has unlawfully assumed. Section 6, c. 258, Laws 1880, provides that "the board of regents shall be a body corporate under the name of 'The Regents of the University of Kansas,' and as such may sue, and be sued, make contracts, and hold and transfer property both real and personal for the university. They shall provide a seal with their corporate name, which shall be used to attest all contracts in writing obligating the university." It is only necessary for us to hold, and we do hold in this case, that this act makes the board of regents such a corporation as will be restrained and held within the bounds of its lawful authority by the exercise of the original jurisdiction of this court in quo warranto. We are unable to mention another corporation in whose keeping interests are confided which it is more appropriate to protect by the exercise of the powers of the court than those confided to the regents. The education of the youth by the public is, of all the powers exercised by the state, of the most certain

and unalloyed benefit to the people. The university crowns the great public-school system.

A further objection is made to the prosecution of this action in the name of the state, on the ground that the imposition of a library fee on students in the university is in the nature of levying a tax; that it affects not the state, but the individual students; that they have an adequate remedy, if the tax be unlawful, by injunction; and that the attorney general may not use the name of the state merely for the purpose of protecting their private interests. The fee imposed is not a tax, within the ordinary meaning of the term. It cannot be collected in the ordinary manner of collecting taxes. It is not expressly provided for by any law of the state. It is at least doubtful whether the students are so united in interest that they could join in an action to restrain the collection of the fee. Whether they could do so or not, however, we are clearly of the opinion that the conduct of the university is a matter of state concern; that the public maintains the institution, not for the special advantages conferred by it on particular individuals, but for the great advantage accruing to the state by reason of the maintenance of a great institution of learning within its borders, and the diffusion of knowledge and advancement of the people in literature and art. All its people gain through the instrumentality of this great institution. It is to attain these public ends that the state lavishes money, raised by taxation, on the institution. It is because of the interest of the state in the education of its youth that the university was created at all. Having created a university, the state is directly concerned in its being conducted in accordance with the provisions of law. It is directly concerned in the education of the students. It is directly concerned when the youth of the state are, for any unwarranted cause, excluded from it. The legislature has undertaken to open the way to a higher education to the poorest of the youth of the state. Whenever the board of regents places any unwarranted obstacle in the way of the accomplishment of that end, they affect and oppose the public interest.

This disposes of the objections to the form of the action. But little need be said on the merits of the case. Section 11, c. 258, Laws 1889, which was in force at the time the action was brought, reads: "Admission into the university shall be free to all the inhabitants of the state, but a sufficient fee shall be required from nonresident applicants, to be fixed by the board of regents, and no person shall be debarred on account of age, race or sex." Notwithstanding the apparently plain provisions of this section, it is contended that the board of regents may yet collect a reasonable fee for the wear and tear of the books; that the word "free" must be taken with qualifications; that in the nature of things there must be rules and regulations; that each and

every student cannot be permitted to occupy the chancellor's seat at his desk, or any other place in the university he may choose, at his own sweet will, but that the regents and the chancellor have a right to make proper regulations; and that the fee imposed is no more than is reasonable to preserve and protect the library. We fully agree with so much of the claim of the learned counsel as asserts the right of the regents and the chancellor to make all necessary and proper rules and regulations for the orderly management of the school, the preservation of discipline therein, and the protection of its property, but that it may require the payment of money as a condition precedent to the use of the property of the state is another and a different claim, with which we do not agree. If the regents may collect five dollars for the use of the library, why may they not collect also for the use of the rooms of the building and of its furniture? Why may they not impose fees for walking in the campus, or for the payment of instructors? All these things have cost money. There are expenses incurred by the state on behalf of the students in connection with every department of the school. If they may collect for one thing, it is not apparent why they may not collect for another. It is suggested that supplies are furnished in the laboratories for the use of students, which are destroyed, that vessels and implements may be broken, and that the students should certainly be required to pay for these things. No question of that kind, however, is now presented, and express provision therefor is made by chapter 226, Laws 1895. The library is provided for permanent use. Each volume with proper care may be used by a great number of students, and for a long term of years. The library as a whole is subjected to wear and tear, but only in the same manner as furniture and other properties furnished by the state. The buildings, furniture, library, and apparatus, as well as the services of the faculty, are furnished and paid for by the state. These, we hold, under the provisions of the statute quoted, are free to all residents of the state who are entitled to admission into the university. The regents have no power to raise a fund to be managed and disposed of at their discretion by charging fees for the use of the library, or under any other claim for any other purpose, unless expressly authorized to do so by law. Judgment of ouster will be entered in accordance with the prayer of the petition. All the justices concurring.

(55 Kan. 381)

STATE v. BAKER.

(Supreme Court of Kansas. June 8, 1895)

Appeal from district court, Labette county; J. D. McCue, Judge.

Frank Baker, having been convicted on a criminal charge, appeals. Appeal dismissed.

J. H. Morrison, for appellant. F. B. Dawes, Atty. Gen., for the State.

PER CURIAM. There is nothing filed in this case calling for consideration. The clerk of the district court of Labette county certifies to a bill of exceptions in the case, but no duly authenticated transcript is filed. The appeal must therefore be dismissed. *State v. Fink*, 49 Kan. 577, 31 Pac. 144, and cases therein cited.

(55 Kan. 349)

STATE v. YOUNG.

(Supreme Court of Kansas. June 8, 1895.)

HOMICIDE—ATTEMPT TO PRODUCE ABORTION—VALIDITY OF STATUTE—STATEMENTS BY DECEASED—ADMISSIONS BY CODEFENDANT.

1. An intention to kill is an essential element of murder in the second degree in this state, and where it is not alleged or proven that the killing was purposely done, a conviction for murder in the second degree must be set aside.

2. In this state there are no common-law offenses, and there can be no convictions except for such crimes as are defined by statute.

3. Section 15 of the crimes act, which provides that "every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be guilty of manslaughter in the second degree," is inoperative and invalid, as it undertakes to establish a degree of felonious homicide where neither the death of the child nor the mother results from the acts committed, and where there may be no killing or homicide.

4. The testimony in the case examined, and held to be sufficient to warrant instructions upon the degrees of homicide provided for in sections 12 and 27 of the crimes act.

5. Statements by the deceased, made some time before the commission of the alleged offense, to the effect that the defendant and her husband wanted her to have an abortion produced, but that she had determined to prevent them from accomplishing their purpose, were inadmissible, and statements made to others after the alleged abortion had been produced, and which did not characterize or explain the act, were incompetent, and should have been excluded from the jury.

6. Evidence of statements made by one who was charged with being a co-conspirator with the defendant in the commission of the offense, but who was granted a separate trial, and where the statements purported to have been made in the absence of the defendant, after the offense had been completed and the alleged conspiracy consummated, was inadmissible.

(Syllabus by the Court.)

Appeal from district court, Cowley county; A. M. Jackson, Judge.

R. M. Young, having been convicted of murder in the second degree, appeals. Reversed.

At the September term, 1894, in the district court of Cowley county, R. M. Young was prosecuted upon an amended information in which it was alleged "that on the — day of May, 1894, at and within the county of Cowley and state of Kansas, one A. R. Wilcox and R. M. Young did unlawfully, maliciously, willfully, feloniously, and of their malice aforethought, administer to one Carrie B. Wilcox medicines, drugs, and substances, a more particular description of which is unknown to your informant, and did unlawfully, maliciously, willfully, felonious-

ly, and of their malice aforethought, employ at and upon the body of the said Carrie B. Wilcox a certain instrument, the name and description of which is unknown to your informant, she, the said Carrie B. Wilcox, being then and there a woman pregnant with a quick child, and with the intent then and there to destroy said child, the same not then and there having been necessary to preserve the life of her, the said Carrie B. Wilcox, and the same not having been advised by a physician to be necessary for that purpose, and by means and in consequence of the administering to the said Carrie B. Wilcox of the said medicines, drugs, and substances, and by means and in consequence of the said use and employment of said instrument by the said A. R. Wilcox and R. M. Young, to and upon the person of the said Carrie B. Wilcox, she, the said Carrie B. Wilcox, then and there being greatly wounded and diseased of her body, and from then until the 13th day of May, 1894, did languish, and on the said 13th day of May, 1894, in the county and state aforesaid, she, the said Carrie B. Wilcox, of the mortal wound and disease aforesaid, died; and so the county attorney saith that the said A. R. Wilcox and R. M. Young, in the manner and by the means aforesaid, she, the said Carrie B. Wilcox, did unlawfully, feloniously, maliciously, willfully, and of their malice aforethought, kill and murder." A motion to quash the information because of defect in form and insufficiency in the facts stated was made and overruled. Upon the trial objections were made to the admission of testimony and to the instructions to the jury, and after the defendant had been found guilty of murder in the second degree, motions for a new trial and in arrest of judgment were made and overruled. The defendant appeals.

Pollock & Love and S. R. Peters, for appellant. F. B. Dawes, Atty. Gen., S. E. Fink, and Beekman & Swarts, for the State.

JOHNSTON, J. (after stating the facts). It is strongly urged by the appellant that he was tried and convicted for an offense not charged in the information, or, in other words, that the facts averred in the charge are insufficient to constitute murder in the second degree. The jury were instructed that "there was no evidence in this case which tends to show that the defendant is guilty of murder in the first degree, or manslaughter in the first, second, or third degree. The court will therefore not submit for your consideration these degrees of the offense charged. You may, however, if you deem the evidence sufficient, convict the defendant of either murder in the second degree, manslaughter in the fourth degree, or of a misdemeanor under section 44 of the crimes and punishment act, as heretofore given to you, or acquit him altogether in case the evidence is insufficient to satisfy your minds that he is guilty of either one of these degrees of the

offense charged." The attention of the jury was directed to sections 12 and 14 of the crimes act, each of which describes acts which constitute manslaughter in the first degree, and the court informed them that these sections were inapplicable to the facts in the case and to the charges made, and also called attention to section 15 of the crimes act, which provides as follows: "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be guilty of manslaughter in the second degree." In respect to this section the court stated that it was inoperative, and for that reason it would not be submitted for the consideration of the jury. From the language of the information it would seem that the pleader had drawn it under section 15 upon the assumption that it was operative, and that one who committed the acts there prohibited, committed them in the perpetration of a felony, and that as the death of the woman resulted from the perpetration of such felony, it constituted murder, under section 6 of the crimes act. The court has, however, as we have seen, advised the jury that under the testimony there could be no conviction of murder in the first degree or of manslaughter in the first, second, or third degree. We think that the court rightly held that section 15 is without application or force. It appears to be an attempt to define and establish a degree of felonious homicide where there may be no killing or homicide. The section, supposed to be complete in itself, omits one of the essential elements of homicide, namely, that the death of the child or mother should ensue from the means employed. If the medicine administered or instruments employed on a woman pregnant with a quick child should be used or employed with intent to destroy the child, and when it was not necessary to preserve the life of the mother, or had not been advised by a physician to be necessary for that purpose, and no injury resulted to the mother or to the child, it cannot be possible that the person charged could be convicted of felonious homicide. It was probably not the purpose, nor was it competent, for the legislature to make that a degree of felonious homicide which in truth and in fact is not homicide, and where the acts prohibited and proposed to be punished do not result in death. This section, although it has stood upon the statute book from the beginning, has never been challenged nor construed. In *State v. Watson*, 30 Kan. 281, 1 Pac. 770, it was held that a person prosecuted under section 15 might be convicted of a misdemeanor under section 44, but the acts charged were sufficient to constitute a mis-

demeanor, and they fairly fell within the terms of section 44. It does not appear that attention was called to the defect in section 15, and under the circumstances there was no necessity to determine whether it authorized a conviction for felonious homicide. The section was apparently taken from the Missouri statute, and the language of both is substantially the same, except that the following words, found in the Missouri statute, are omitted from ours: "If the death of such child or mother thereof ensue from the means so employed." This section was intended to be complete within itself, and to define a degree of homicide. We cannot extend the statute beyond the natural meaning of the words employed, nor interpolate into it language necessary to create the offense of felonious homicide. As was said in *State v. Chapman*, 33 Kan. 136, 5 Pac. 768, "the omission is one for which the legislature is responsible. It was probably a *casus omissus*, which the legislature may, but the court cannot, supply."

The important question for consideration is whether the information warrants a conviction of murder in the second degree. It will be observed that it does not allege an intent to kill, or even to injure, Carrie B. Wilcox, and also that it does specifically charge that the drugs and medicines were administered, and the instruments were employed upon her, for the purpose and with the intent to destroy a quick child, with which she was pregnant. It will be further noticed that although the information charges the acts to have been done with intent to destroy the life of the child, there is no averment that the child was injured or destroyed. Manifestly, there was no purpose to prosecute the defendant for the killing of the child, and it is not charged that there was an intent on his part to kill the deceased. Under our statute the intent to kill is an essential ingredient of murder in the second degree. Section 7 of the crimes act, under which the defendant was convicted of murder in the second degree, reads: "Every murder which shall be committed purposely and maliciously, but without deliberation and premeditation, shall be deemed murder in the second degree." The preceding section of the statute defines murder in the first degree, and then provides that a killing purposely—that is, with an intent to kill, and maliciously, but without deliberation and premeditation—is murder in the second degree. In Ohio they have a statute similar to ours, which provides "that if any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and on conviction thereof shall be imprisoned in the penitentiary and kept at hard labor during life." In interpreting this statute the supreme court of that state held that the intent or purpose to kill, although

not essential to constitute murder at common law, was made one of the ingredients of the crime of murder by the statute of Ohio, and that to convict of murder in the second degree the state must allege and prove a purpose or intent to kill. *Fouts v. State*, 8 Ohio St. 98; *Robbins v. State*, Id. 131; *Jones v. State* (Ohio) 38 N. E. 79. We think this the correct view of the statute, and the manner in which homicides are graduated by the statutes tends to confirm the interpretation. The intent with which the killing is done fixes the degree of the homicide, and determines the measure of punishment. In some of the states the statutes, after defining murder in the first degree substantially as ours does, provide that all other murders or killings which would have been murder at the common law shall constitute murder in the second degree. Our statute, however, places a limitation on this classification by providing that every murder, other than those of the first degree, committed purposely and maliciously, shall constitute murder in the second degree. This qualification clearly makes the purpose to kill an essential ingredient of murder in the second degree.

It is argued that the facts stated in the information were sufficient to constitute murder at the common law, and portions of the charge given to the jury appear to assume that murder at common law and in this state is one and the same thing, and that an unintentional killing may constitute murder in this state. As some of the authorities cited show, murder in Kansas is materially different from murder by the common law of England. In Kansas, there are no common-law offenses, and there can be no conviction except for such crimes as are defined by statute. The defendant therefore cannot be prosecuted for or convicted of any other than a statutory crime, and the jury should have been so advised.

The mere fact that the defendant did not intend to kill the deceased will not necessarily relieve him from punishment for felonious homicide. The testimony tends to prove that he unlawfully produced an abortion upon the deceased. If the act resulted in killing her, and it was not his design to effect death, and it was committed in such a way that it would have been murder at common law, then he may be convicted, under section 12 of the crimes act, for manslaughter in the first degree. That section provides that "the killing of a human being without a design to effect death by the act, procurement or culpable negligence of another while such other is engaged in the perpetration or attempt to perpetrate any crime or misdemeanor not amounting to a felony in cases which would be murder at common law, shall be deemed manslaughter in the first degree." The testimony in the case appears to be sufficient to have warranted an instruction upon this degree of homicide, and also under section 27 of the

crimes act, which provides that "every other killing of a human being by the act, procurement or culpable negligence of another which would be manslaughter at common law, and which is not excusable or justifiable, or is not declared in this article to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree." *State v. Spendlove*, 47 Kan. 160, 28 Pac. 994. The court rightly submitted section 44 of the crimes act, which provides that if the defendant purposely produced an abortion when it was not necessary to preserve the life of the woman, and when no advice by a physician that it was necessary for that purpose had been given, he should, upon conviction, be adjudged guilty of a misdemeanor.

Error is alleged in the reception of testimony over the objection of the defendant. A witness was permitted to give the statements of the deceased, made some time before the commission of the alleged offense, to the effect that the defendant and her husband wanted her to have an abortion produced, but that she had determined to prevent them from accomplishing their purpose. This testimony was clearly inadmissible, and was of a prejudicial character. Testimony of statements made by the deceased some time after the commission of the alleged offense was erroneously admitted. If the statements had been made at the time the act was done, or during the performance of the operation, they might have been admitted as part of the *res gestae*, but statements made to others after the act had been completed, and which do not characterize or explain the act, are incompetent. They could not, and appeared not to, have been received as dying declarations, and in no view of the case were they admissible.

Evidence of statements made by Arthur Wilcox, who was a codefendant, and who was charged with being a co-conspirator of the defendant Young, was improperly received. The statements purported to have been made in the absence of the defendant, after the abortion had been produced and the alleged conspiracy consummated. Evidence of declarations made under such circumstances is clearly inadmissible, and it was of such a character as to be prejudicial. *State v. Bogue*, 52 Kas. 79, 34 Pac. 410.

For the errors mentioned the judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(66 Kan. 323)

STATE v. CONWAY.

(Supreme Court of Kansas. June 8, 1895.)

BURGLARY—ALIBI—BURDEN OF PROOF.

1. Where there is testimony that the accused was so far removed from the place of the crime at the time of its commission as to make it impossible that he could have committed it, the court should instruct the jury upon the law of alibi.

2. In a prosecution where the personal presence of the accused is necessary to a conviction, that fact must be established by the state by evidence that will convince the jury beyond a reasonable doubt. The attempt of the accused to prove an alibi does not shift the burden of proof from the state, and, if the evidence introduced by the accused is such as to raise a reasonable doubt of his guilt, he is entitled to an acquittal.

3. An instruction which inferentially places the burden upon the accused, or requires the jury to believe the proof of the alibi before they can acquit, is held to be erroneous.

(Syllabus by the Court.)

Appeal from district court, Atchison county; W. D. Webb, Judge.

James Conway, having been convicted of burglary and grand larceny, appeals. Reversed.

W. P. Waggener, for appellant. F. B. Dawes, Atty. Gen., and C. D. Walker, for the State.

JOHNSTON, J. James Conway was convicted of the offenses of burglary and grand larceny, and the punishment adjudged was imprisonment at hard labor in the penitentiary for the term of six years. In his appeal he assigns the rulings of the court upon the instructions as error, and the transcript contains sufficient of the evidence to present the errors complained of. It is first contended that the refusal of several instructions that were requested upon the subject of circumstantial evidence was prejudicial error. While the charge of the court did not call special attention to circumstantial or any other particular kind of evidence, it is true that the instructions given were so broad and general as to cover all the testimony that was offered. In view of the fact, however, that the testimony was largely circumstantial, the court might properly have laid down the rules of law governing that class of evidence, and thus have assisted the jury in correctly applying the law to the facts of the case. Whether the omission of this duty is of itself a sufficient ground for a reversal, it is not important to decide. The principal complaint is based upon the charge of the court with respect to the defense of an alibi. Testimony was offered tending to show that the defendant was at another and different place when the crime was committed, and did not know of or participate in the same. The court refused to give an instruction to the effect that the defendant is not required to prove the defense of an alibi beyond a reasonable doubt to entitle him to an acquittal; that it is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged. The court, in its general charge, stated that some evidence had been given tending to show that the defendant was not present at the time the offense was committed, but was at his home, in bed, several miles away from the scene of the crime, and knew nothing of it until after it was committed, and did not

knowingly participate in the fruits of the crime, and then stated, "If this is true, the defendant, James Conway, should be acquitted." Where there is testimony that the accused was so far removed from the place of the crime at the time of its commission as to make it impossible that he could have committed it, the court should inform the jury as to the law of alibi. *State v. Johnson*, 40 Kan. 266, 19 Pac. 749. It is a legitimate defense, and the instructions requested to the effect that the accused is not required to establish the defense beyond a reasonable doubt, or even by a preponderance of the testimony, to entitle him to an acquittal, correctly stated the law. In a case where the personal presence of the accused is necessary to a conviction, that fact must be established by the state by evidence that will convince the jury beyond a reasonable doubt. The burden of proof is upon the state, and is not shifted because of the attempt of the accused to prove an alibi; and if, by reason of the evidence relating to that question, the jury should doubt the guilt of the accused, he is entitled to an acquittal. As we have seen, this view of the law was withheld from the jury, and the error was emphasized by the charge of the court that if the claim made by Conway that he was several miles away from the scene of the crime, and did not participate in it, is true, he should be acquitted. This instruction, in effect, required the jury to believe the proof of alibi before they could acquit him, while, as we have seen, the defendant is not obliged to absolutely show the truth of the claim, nor are the jury required to believe that the proof establishes alibi, in order to acquit. The evidence may be such as simply to raise a reasonable doubt of guilt, and in that event the defendant may be acquitted. *State v. Child*, 40 Kan. 482, 20 Pac. 275. The judgment must be reversed, and the cause remanded to the district court for a new trial. All the justices concurring.

(55 Kan. 326)

STATE v. CHINAULT.

(Supreme Court of Kansas. June 8, 1895.)

CRIMINAL PROSECUTION — CONFLICTING JURISDICTION — SEPARATE CHARGES IN DIFFERENT COURTS.

1. Where two informations charge the identical assault on the same person, but differ as to the intent with which the assault was made, one charging it to have been with intent to kill, and the other with intent to rob, a conviction or acquittal under one information will be a bar to a trial under the other.

2. Where two courts have concurrent jurisdiction of a criminal cause, the court first acquiring jurisdiction of the offense and of the person of the defendant retains jurisdiction until the final determination of the case to the exclusion of the other.

3. The defendant was arraigned and placed on trial in the district court of Wyandotte county, charged with assault with intent to kill. For sufficient cause the jury was discharged, and the case continued to the next term of the court. An information was then filed in the court of common

pleas, charging the defendant with the same assault with intent to rob. He was thereupon placed on trial in the court of common pleas, and convicted. *Held*, that the court of common pleas was without jurisdiction; that, the prosecution in the district court not having been dismissed, but being pending therein, the district court still retained jurisdiction to try the defendant for the offense charged.

(Syllabus by the Court.)

Appeal from court of common pleas, Wyandotte county; F. P. Anderson, Judge.

Levi Chinault was convicted of an assault with intent to rob, and appeals. Reversed.

F. E. & J. A. Smith and W. H. Littick, for appellant. F. B. Dawes, Atty. Gen., Samuel C. Miller, and I. F. Bradley, for the State.

ALLEN, J. The defendant was charged by information, by the county attorney of Wyandotte county, with assaulting one Charles Reese with a deadly weapon, with intent to rob him. The defendant thereupon filed his plea in abatement, alleging that he had been once placed in jeopardy for the same offense; that on the 11th day of October, 1894, he was placed on trial in the district court of Wyandotte county, on an information charging the identical offense alleged in the information in this case; that after the jury had been impaneled and sworn, and witnesses for the state had testified, the jury was discharged by the court on account of the illness of the wife of one of the jurors, and the case continued to the next term of the court, and that said case is now pending, undetermined, in said district court. To this plea the county attorney answered, admitting the commencement of the former trial, but alleging that after a legal determination by the court of the fact of the sickness of a juror's wife, and that an accident and calamity required the discharge of the jury, the case was continued to the next term of the court. The answer admits that the charge pending in the district court was for assault with intent to kill, and that it is still pending in said court. To this answer the defendant demurred. His demurrer being overruled, he was placed on trial in the court of common pleas, and convicted.

While the plea alleges former jeopardy, and is insisted on as a bar to any further prosecution, it also fairly presents the question whether the court of common pleas had jurisdiction to try the defendant. It appears that the prosecution was first instituted in the district court for this identical assault, but that in the information in that case it was alleged to have been made with intent to kill, while in this case the intent is alleged to have been to rob. Both informations charge offenses under the same section of the statutes, viz. section 38 of the act regulating crimes and punishments. Both informations refer to the same acts, the only difference being that a different criminal purpose is attributed to the defendant. We think under this section the substantive offense is the as-

sault. The intent with which it was committed characterizes it, and determines its degree of criminality. Only one prosecution can be maintained under this section for the same assault, whatever the purpose of the defendant may have been. The case presented, then, is one of a criminal prosecution pending in the district court of Wyandotte county on a charge of assault with intent to kill, and another prosecution, subsequently commenced in the court of common pleas of the same county, charging the identical assault with the intent to rob. The jurisdiction of the court of common pleas to try the defendant was duly challenged. Had it jurisdiction to try the case? The district courts of the state are courts of general original jurisdiction for the trial of criminal causes. By chapter 92 of the Laws of 1891, the court of common pleas of Wyandotte county was established. By the fourth section of the act it is provided: "That all indictments and informations which shall have been filed in criminal actions or proceedings in said county between the first day of July and the 1st day of December, both inclusive, in each year during which said court shall be in existence, shall be filed in the said court of common pleas, and shall be triable therein, and said court shall have exclusive jurisdiction of such actions." It would seem from this section that it was the intention of the legislature that prosecutions should be instituted in the district court during the first half of the year, and in the court of common pleas during the last half. There is no provision in the statute for transferring criminal causes from either court to the other. It follows, therefore, that when a criminal action is rightly instituted in either court, that court will retain jurisdiction until the case is finally tried and determined. Thus, while there is a division of time for commencing prosecutions, the jurisdiction for their trial and determination is concurrent. May the state, then, having instituted a prosecution in one court, institute another prosecution for the same offense in the other court, without dismissing the action first brought? In Whart. Crim. Pl. & Prac. § 441, it is said: "Where a concurrent jurisdiction exists in different tribunals, the one first exercising jurisdiction rightfully acquires the control to the exclusion of the other. Hence where, after indictment, but before trial, a justice of the peace took jurisdiction of the same offense before whom the offender was tried and sentenced, the court held that the conviction and sentence were no bar to the indictment. The same position applies to prosecutions for piracy, in which the sovereign who first tries the offender absorbs the jurisdiction." Bishop, in his Work on Criminal Procedure (section 315), says: "Two or more courts may have concurrent jurisdiction of an offense, in which case the one wherein proceedings are first instituted will retain it to the end, and the other is not authorized to interfere." The same principle

is declared in *State v. Tisdale*, 2 Dev. & B. 159; *Mize v. State*, 49 Ga. 375; *Burdette v. State*, 9 Tex. 43. Under these authorities, the jurisdiction being in the district court, the court of common pleas had no jurisdiction to try the defendant, and the conviction obtained is without warrant of law. The district court, however, has never been deprived of its jurisdiction of the case, and the proceedings in the court of common pleas, being without jurisdiction, constitute no bar to a trial in the district court. We also think the record shows that there was sufficient cause for discharging the jury and continuing the case, and that the plea of former jeopardy is not good. The judgment is reversed. All the justices concurring.

(55 Kan. 317)

HOUSEHOLDER v. MORRILL, Governor.
(Supreme Court of Kansas. June 8, 1895.)

MANDAMUS TO GOVERNOR.

1. The governor of this state, acting as governor, is not an officer inferior to this court, and cannot be compelled by mandamus to perform a duty not strictly ministerial.

2. Mandamus will not lie to compel the governor to revoke an order suspending a member of the board of trustees of charitable institutions, based on charges preferred which the governor deems worthy of credit.

(Syllabus by the Court.)

Original action by M. A. Householder for mandamus to E. N. Morrill, governor. Heard on motion to quash. Motion granted.

W. C. Webb, for plaintiff. F. B. Dawes, Atty. Gen., and A. A. Godard, for defendant.

ALLEN, J. It is alleged in the alternative writ of mandamus issued in this case, that the plaintiff was, on the 4th of March, 1893, duly appointed by the governor as one of the trustees of the benevolent and charitable institutions of the state; that he was confirmed by the senate, and duly commissioned as such trustee for the term of three years commencing on the 1st of April, 1893. It further appears from the writ that charges were preferred against the plaintiff, and a committee of members of the legislature was thereupon appointed to investigate said charges in accordance with the provisions of chapter 239 of the Laws of 1889, and that the governor served the notice on the plaintiff stating that by authority of law he was suspended as a member of the board of charities; that by reason of such order of the governor the plaintiff has been prevented from discharging his duties as such trustee; and it is alleged that such suspension was without lawful warrant or authority. It is contended that chapter 239, *Id.*, has no application to members of the board of charities (1) because the constitution creates the office of trustees of benevolent institutions, and provides for the impeachment of the governor and all other officers under the constitution. It is contended that, as there is no other provision in the consti-

tution for their trial for misdemeanors in office, impeachment is the only remedy. (2) It is claimed that, even if the constitutionality of the act be maintained, it does not in terms apply to members of the board of charities, but only to the officers directly in charge of the several institutions, such as the superintendent, steward, etc. The view we take of this case renders an examination of the questions most discussed by the learned counsel for the plaintiff unnecessary. The only relief sought by the writ is that the governor be commanded to rescind or revoke his order suspending, or purporting to suspend, the plaintiff as trustee of the charitable and benevolent institutions. Section 638 of the Code of Civil Procedure reads: "The writ of mandamus may be issued by the supreme court or the district court, or any justice or judge thereof, during term, or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion." The governor of Kansas, as governor, is in no sense inferior to this court. He stands at the head of the executive department, as this court stands at the head of the judicial department. It is true that it has been held that where a purely ministerial duty is imposed on the governor, which might as well have devolved on any inferior officer, the performance of that duty may be compelled by mandamus. *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162. It was said in the opinion in that case: "The only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus are such acts only as are in their nature strictly ministerial, and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." By the provisions of the statute under which the governor assumed the right to act, he must first determine, before taking any steps whatever, whether the charges are worthy of credit or emanate from a reliable and trustworthy source. This requires the exercise of judgment and discretion, and, therefore, is not a purely ministerial act. *Martin v. Lacy*, 39 Kan. 703, 13 Pac. 951; *Insurance Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265. In this case the governor has unquestionably acted as governor, and not as a mere ministerial officer. There is no statute making it his duty to revoke the order complained of, even if made without authority of law. If the court were to assume the power to compel him to revoke his order and restore the plaintiff to his office, it would do so because it determined that it was his duty

as governor to reinstate the plaintiff. This is all we deem it necessary to decide in this case. It will be time enough to consider other questions when they are necessarily involved in the disposition of the case before us. The writ does not state a cause of action and will be quashed. All the justices concurring.

(55 Kan. 371)

**CHASE, Warden of State Penitentiary, v.
BOARD OF DIRECTORS OF STATE
PENITENTIARY.**

(Supreme Court of Kansas. June 8, 1895.)

MANDAMUS—SETTLEMENT WITH WARDEN OF PENITENTIARY.

The warden of the penitentiary cannot, by mandamus, compel the board of directors of that institution to examine the adjusted bills and accounts of the warden incurred in carrying on the business of the penitentiary and indorse the warden's report or statement of the same, the duty of the board in the premises being to the public rather than to the warden.

(Syllabus by the Court.)

Original action by Seth W. Chase, warden of state penitentiary, for mandamus to the board of directors of the state penitentiary. Judgment for defendant.

Waters & Waters and Frank Herald, for plaintiff. F. B. Dawes, Atty. Gen., and A. A. Godard, for defendant.

MARTIN, C. J. It is stated in the alternative writ that the plaintiff was duly appointed warden by the governor, by and with the advice and consent of the senate, for the term of four years from and after May 1, 1893; that the plaintiff duly qualified and took possession of the office on that day; that his successor has never been appointed and qualified, and he has not been removed by the governor for cause, and he is the only person at the present time acting as warden, or who claims any right to act as warden; that the governor, on March 21, 1895, attempted to suspend him and to appoint M. H. Markum as his successor, but the said M. H. Markum refused to take charge of said office and so informed the governor, and no one has appeared to whom the plaintiff could have turned over and delivered the possession of the penitentiary. It is further claimed that the attempt to suspend the plaintiff is no valid reason for the board of directors to refuse to examine and audit his accounts as provided by law, and the governor has no authority to suspend him pending an investigation, which has not yet been completed, and the results of which are not known, for the reason that this action on the part of the governor was taken under the provisions of chapter 239 of the Session Laws of 1889, and that the latest expression of the legislature on the subject as to the penitentiary is in chapter 152 of the Session Laws of 1891. It is further claimed that it is necessary, in order to conduct the

business concerns of the penitentiary, that the defendant, the board of directors, should at the close of each month indorse all the monthly accounts of the penitentiary as reported to them by the warden, and that by reason of the failure and refusal of the board to so indorse the accounts and statements for the month of March, 1895, the warden was not able to make his monthly settlements and pay the said accounts, and that on May 9, 1895, the board will meet at the penitentiary in its official capacity. The writ commands the board of directors, immediately upon its receipt, to examine all statements of the warden with all persons or corporations with whom he has had dealings on account of the penitentiary for March and April, 1895, and that such statements be indorsed by the board as provided by law, or to show cause to the court, on or before May 10, 1895, why defendant should not be required to do as commanded. The defendant board duly filed an answer to the alternative writ.

Counsel for plaintiff say in their brief: "This action is brought for the sole purpose of compelling the defendant to properly conduct the business concerns of the penitentiary by the proper officer and in the interests of that institution, and we respectfully submit that this is a proper case for the speedy allowance of a peremptory writ in order that the affairs of the penitentiary may not suffer, but be continued in a proper manner." Assuming, without deciding, that the defendant board ought to examine all adjusted bills and accounts of the plaintiff, incurred in carrying on the business of the penitentiary, and indorse the plaintiff's report or statement of the same, as contemplated by section 14, c. 152, Sess. Laws 1891, yet we do not think that the plaintiff is the proper party to compel the board by mandamus to perform its duties to the public. The board is the governing body of the penitentiary. The warden is the chief executive and administrative officer under the direction of the board. That the warden should take the board to task for any supposed disregard of its duties is at least unseemly. Any corrective or visitorial proceeding ought to be initiated by the state, through its appointed agencies. Although the plaintiff may be warden de jure, yet in this proceeding he stands in no better position than a private citizen, and cannot champion the rights of the public. Many cases decided by this court might be cited to justify our conclusion, but we deem the following sufficient. *Bobbett v. State*, 10 Kan. 9; *Turner v. Commissioners*, Id. 16; *Reedy v. Eagle*, 23 Kan. 254; *Adkins v. Doolen*, Id. 659, 666; *Nixon v. School Dist.*, 32 Kan. 510, 4 Pac. 1017; *Ralston v. Railway Co.*, 53 Kan. 337, 338, 36 Pac. 712. Peremptory writ denied, and judgment for defendant. All the justices concurring.

(55 Kan. 367)

LYNCH v. CHASE.

(Supreme Court of Kansas. June 19, 1895.)

**WARDEN OF PENITENTIARY—REMOVAL FOR CAUSE
—CONSTITUTIONAL LAW.**

1. The office of warden of the state penitentiary is created for the public convenience, and the incumbent of the office is the mere agent of the public, who, by virtue of his appointment, acquires the right to exercise the functions of the office and receive the prescribed compensation until the end of his term, or until such time as there may be a resignation or forfeiture of and removal from the office in the manner provided by law; but he has no property or vested right in such office.

2. It is within the power of the legislature to provide a summary method of removing incompetent and unfaithful officers, and to that end it may confer authority upon executive or administrative officers.

3. While the proceeding to remove from office for cause involves the examination of facts and the exercise of judgment and discretion by the executive officer, his action is not judicial in the sense that it belongs exclusively to the courts.

4. Chapter 239 of the Laws of 1889, providing for the investigation of the affairs of state institutions and the conduct of officers connected with the same, is not superseded or repealed by any of the provisions of chapter 152 of the Laws of 1891, being an act in relation to the state penitentiary.

5. The title to the act constituting chapter 239 of the Laws of 1891 is broad enough to cover the provisions of the act authorizing the investigation of state institutions and the conduct of the officers in charge of the same.

6. A committee appointed under the provisions of that act has authority to investigate charges duly preferred against the warden of the penitentiary when the legislature is not in session, and where, upon sufficient notice, a hearing is had, and a report made finding that the charges are sustained and cause for removal exists, the governor, under the law of 1891, is authorized to act upon the findings, and report and remove the warden from his office.

7. In a summary proceeding for the removal of officers under the statute, the same formality and precision are not required as in a trial before a court; and the accused cannot claim the benefits, incidents, and common-law rights pertaining to such a trial, nor has the doctrine of res adjudicata any application in such proceedings.

(Syllabus by the Court.)

Original action in quo warranto by J. B. Lynch against Seth W. Chase. Judgment for plaintiff.

F. B. Dawes, Atty. Gen., for plaintiff.
Frank Herald and Waters & Waters, for defendant.

JOHNSTON, J. This is an original proceeding in quo warranto to determine who of two contending persons is entitled to the office of warden of the state penitentiary. No controversy exists as to the facts upon which the title to the office depends, and, to facilitate the trial and secure an early decision, the facts have been embodied in the pleadings of the parties, upon which the case has been submitted. J. B. Lynch, who brings the action, concedes that Seth W. Chase, the defendant, was duly appointed to the office for a term of four years, which

began on the 1st day of May, 1893, and ends on the 1st day of May, 1897; but he claims that Chase has been legally removed from the office, and that he (Lynch) has been duly appointed in his stead. It appears that on March 9, 1895, written charges were presented to Governor E. N. Morrill, calling in question the official conduct of Seth W. Chase as warden, upon the grounds of inefficiency, immorality, misconduct, and inattention to the duties of his office. The governor, deeming the charges worthy of credit, and that they emanated from a reliable and trustworthy source, requested Lieutenant Governor James A. Troutman, and Speaker of the House of Representatives Charles E. Lobdell, to meet with him on March 18, 1895, and, in pursuance of that request, they did meet on the day named at the executive office, and proceeded to select a committee of five members of the legislature, consisting of Senators J. W. Parker, of Johnson county, and Edwin Taylor, of Wyandotte county, and Representatives E. F. Caldwell, of Douglas county, H. J. Bone, of Clark county, and T. P. Wilson, of Barber county, to inquire into the truth of the charges presented to the governor, and to examine into the official conduct of Seth W. Chase as warden of the state penitentiary. After due notice had been given to the warden of the charges, and of the time and place of a hearing upon the same, the committee organized and proceeded with the investigation, which continued from day to day for several weeks. Testimony was offered to sustain and also to refute the charges against the warden, who was present in person and by counsel throughout the investigation, and such witnesses as he desired were subpoenaed to testify in his behalf before the committee. On May 31, 1895, the investigation having been completed, the committee filed its report and findings with the governor, together with the testimony which had been taken. A majority of the committee found that several serious charges, involving official misconduct and inefficiency, were sustained by the testimony; and four members of the committee joined in recommending that he be removed from office and dismissed from the public service. The governor also examined the testimony in the case, and, upon consideration thereof, found that the charges had been proven, and that the defendant was guilty of inefficiency, inattention to duty, immorality, misconduct, and corruption in office. The governor thereupon determined that there was sufficient cause to remove the defendant from the office of warden, and a removal was accordingly ordered. Due notice of this order was served upon Chase, and immediately thereafter the governor appointed and commissioned J. B. Lynch as warden, who at once qualified in the manner required by law, and on June 7, 1895, demanded from Chase the possession of the office and institution. The demand having been refused, the

present proceeding to obtain possession was begun by Lynch.

The decision of the controversy depends upon whether the proceedings for the removal of Chase were legal and effective. It must be conceded that an arbitrary removal from the office at the will or pleasure of the governor is not permissible. The tenure of the office is fixed by law at four years, and there is no statutory provision which can be construed as an authority to remove at pleasure. The statute providing for the appointment of a warden, and fixing the tenure of the office, also provides that the governor may remove him from office for cause. Laws 1891, c. 52, § 3. Where there is no term or tenure fixed by the constitution or the statute, or where the office is to be held during the pleasure of the appointing power, the power of removal is discretionary and without control. But it is well settled that where an officer is chosen for a definite term, and provision is made for his removal for cause, the causes for removal must be alleged, the party notified, and a hearing had. *State v. Mitchell*, 50 Kan. 289, 33 Pac. 104; *Jacques v. Little*, 51 Kan. 300, 33 Pac. 106; *Lease v. Freeborn*, 52 Kan. 750, 35 Pac. 817. Where the power of removal is definite, and the limits of its exercise prescribed, it must be exercised in the manner and upon the conditions provided by law. Where the statute gives power of removal for cause, without specifying the causes, the power is necessarily of a discretionary nature, and the removing authority is the exclusive judge of the cause and the sufficiency thereof; but where the statute specifies the causes for removal, and prescribes the procedure, it would seem that removals could not be made for other causes nor in any other method than that prescribed by statute. In the present case the proceedings for investigation and removal were instituted by the governor, and the procedure authorized by chapter 239 of the Laws of 1889 appears to have been followed for the purpose of determining whether there was sufficient cause for a removal. The proceedings under that statute appear to be regular, and the report of the committee upon the charges made against the defendant shows sufficient cause for removal. The findings and report of that committee were made the basis of the action of the governor in removing the defendant from the office of warden.

It is first insisted that the judicial power of the state is vested in the courts, and not in the governor, and that, therefore, he had no right to try and determine the charges made against the defendant, nor to make an order or render a judgment which would operate to oust the defendant from his office. Although the power to hear and determine is of a judicial nature, it is such a power as is frequently conferred on executive and administrative officers. It does not follow that, because the governor or other func-

tionary hears, considers, and decides, he performs a judicial function which belongs exclusively to a judicial officer or tribunal. We think the legislature has ample power to provide a summary method of suspending and removing incompetent and unfaithful officers, and that it may be accomplished without a judicial trial or judgment. The theory that a removal cannot be effected without a judicial trial and upon judgment of a judicial tribunal only prevails where it is regarded that the office is a hereditament, or one in which the officer has a property or vested right which cannot be disturbed. Although this view is sanctioned by the common law, it is wholly inconsistent with our system of government. It has been said: "Offices are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and to perform its duties, not for his, but for the public, benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office or had any title to it." *Donahue v. Will Co.*, 100 Ill. 94. The office is created for the public convenience, and the officer is the mere agent of the public, who, by virtue of his election or appointment, acquires the right to exercise the functions of the office, and receive the prescribed compensation, until the end of his term, or until such time as there may be a resignation or forfeiture of and removal from the office in the manner provided by law. In the absence of a constitutional limitation, the legislature has ample power to protect the public by providing a speedy and effective method for ridding the public service of officers who are incompetent, irresponsible, or dishonest, and to that end may prescribe the grounds which will operate as a forfeiture, and provide what officer or tribunal shall determine the fact. The decided weight of authority is that, while the proceeding to remove from office for cause involves the examination of facts and the exercise of judgment and discretion by the executive officer, his action is not judicial in the sense that it belongs exclusively to the courts. *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; *Conner v. Mayor*, 5 N. Y. 285; *State v. McGarry*, 21 Wis. 502; *State v. Prince*, 45 Wis. 610; *Keenan v. Perry*, 24 Tex. 253; *State v. Doherty*, 25 La. Ann. 119; *Taft v. Adams*, 3 Gray, 126; *Ex parte Wiley*, 54 Ala. 226; *Patton v. Vaughan*, 39 Ark. 211; *Wright v. Defrees*, 8 Ind. 301; *Donahue v. Will Co.*, 100 Ill. 94; *Cameron v. Parker* (Okl.) 38 Pac. 14, and cases cited; *Ran-kin v. Jauman* (Idaho) 36 Pac. 502; *Throop*, Pub. Off. §§ 19, 345.

There is a further contention, that chapter 152 of the Laws of 1891 is the latest legislative expression concerning the investigation of the state penitentiary and the removal of the warden; and as its provisions are complete within themselves, and antagonistic to the law of 1889, the provisions of the law of

1891 necessarily supersede those of 1889. This contention cannot be sustained. The act of 1891 is largely a re-enactment of the law of 1868 for the government of the penitentiary. Some additions and modifications have been made to fit the changed conditions, but the provisions with reference to the appointment and removal of the warden, as well as the power conferred upon the board of directors to inquire into the management of the institution and the conduct of the officers, are the same as those of the earlier statute, and, under the rules of construction, they must be treated as a continuation of such provisions, and not as a new enactment. Gen. St. 1889, par. 6687. These provisions were in force when the law of 1889 (providing for the investigation of state institutions and of the conduct of the officers connected therewith) was enacted; and they were re-enacted in the same terms in 1891, after the law of 1889 had been in force for a period of two years, clearly indicating that the legislature did not regard them as repugnant to each other, nor that one should supersede the other. The authority given to the directors in the act in relation to the penitentiary to inquire into its management was mainly intended as a means of gaining information which would enable them to govern and control the institution as the law requires. They are the governing body of the penitentiary, and are required from time to time to examine and inquire into all matters connected with the government, discipline, and police of the institution, the purchases and sales of articles provided for the penitentiary or sold on account thereof; and for this purpose they may compel the attendance of witnesses, the production of books, papers, and writings before them, and the president of the board is authorized to administer oaths to witnesses. Laws 1891, c. 152, § 5. There is nothing in the act providing that their inquiry or findings shall be made the basis of a proceeding to remove the warden. And this inquiry is made upon their own account, and whenever they deem it necessary, in order that they may the better govern and regulate the institution and perform the duties imposed on them by law. The law of 1889, however, is specific, and provides in terms what official conduct shall constitute grounds for a removal, and provides for the organization of a body to investigate those causes, and determine whether the statutory grounds for removal exist. It is plain that the provisions of the two statutes are not repugnant to each other, and that the one was not intended as a substitute for the other. The act in relation to the penitentiary provides that the warden may be removed by the governor for cause, but it does not in terms provide how the cause shall be ascertained. In the absence of such a provision, it is generally held that it rests with the governor to adopt a method of inquiry and ascertainment which his judgment may suggest, providing a rea-

sonable notice is given to the official, and a fair hearing had upon the charges preferred; and, when proof is offered, he is the exclusive judge of the cause and of the sufficiency thereof. In this case, however, the legislature has supplemented the provision with reference to removal by the enactment of 1889, providing a method by which the causes for removal may be ascertained and established. Although it may not be an exclusive method for determining cause, we are clearly of opinion that it is a proper method of procedure, and that the governor may properly act upon the investigation and report prepared under it.

It is urged that the act of 1889, under which the investigation was made, is unconstitutional, for the reason that the title does not fairly indicate and cover the provisions of the act. The title is "An act providing for the appointment of committees to investigate the affairs of state institutions and conduct of officers." It has been repeatedly held that section 16 of article 2 of the constitution is not to be enforced in any narrow or technical spirit, but that a liberal interpretation should be placed upon the language employed in the title to express the subject of the act. The provision, as has been held, must be applied in a fair and reasonable way, so that it will not embarrass or defeat the proper and legitimate exercise of the legislative functions. It is not necessary that the title should be an abstract of the entire act, but it is deemed to be sufficient if the title fairly indicates, though in general terms, its scope and purposes. Everything connected with the main purpose, and reasonably adapted to secure the objects indicated by the title, may be embraced in the act, without violating the constitutional inhibition. The title in the present case, although somewhat restricted, provides for the creation of a tribunal to inquire into the affairs of state institutions and the conduct of officers. It clearly indicates that an investigation or hearing is to be had before this tribunal, and anything reasonably adapted to carry out that purpose may be fairly regarded as embraced within the title. Whether the title is sufficiently broad to justify a removal by the governor upon the coming in of the report of the committee is unnecessary to the disposition of the present case. Even if the provision with reference to removal was held to be outside of the title, and therefore invalid, there is ample provision for the removal of the warden under a statute unquestionably valid. Under the rule adopted by this court in numerous cases, the title is undoubtedly sufficient to authorize the creation of the committee and the investigation and report that were made. *Woodruff v. Baldwin*, 23 Kan. 491; *Philpin v. McCarty*, 24 Kan. 393; *Board of Com'rs of Marion Co. v. Board of Com'rs of Harvey Co.*, 26 Kan. 181; *Commissioners of Cherokee Co. v. State*, 36 Kan. 337, 13 Pac. 558; *Railway Co. v. Harrelson*, 44 Kan. 253, 24 Pac. 465; *State*

v. Bush, 45 Kan. 140, 25 Pac. 614; In re Pinkney, 47 Kan. 89, 27 Pac. 179; State v. Lewelling, 51 Kan. 562, 33 Pac. 425; In re Sanders, 53 Kan. 191, 36 Pac. 348.

We have, then, a committee with undoubted authority to investigate and determine whether cause for removal exists, and there is unquestioned authority in the governor to remove the warden when cause is shown. The statutory provisions relating to investigation and report have been substantially followed. The charges were made in writing to the governor, and he, deeming them worthy of credit, instituted the investigation. The defendant received due notice of the charges, and had a hearing before a tribunal duly authorized to inquire and report. Cause having been shown, as the law requires, nothing remained for the governor but to remove the defendant from his office. The fact that the testimony was not taken nor the inquiry made by the governor himself is unimportant, so long as the inquiry was made and the cause for removal shown in one of the methods pointed out by the statute.

There is some complaint that the proceedings were not as full and precise as the statute prescribes, but, upon examination, we find no serious defects. Some of the charges were not as specific as they might have been, but most of those upon which findings were made were sufficient to fairly inform the defendant of the accusation, and to enable him to prepare for the hearing. A summary proceeding of this character is not like a common-law trial; nor is the same precision and accuracy required as in a trial before a court. *People v. Board of Police Com'rs*, 98 N. Y. 332; *People v. Board of Police Com'rs* 99 N. Y. 676, 2 N. E. 151; *People v. McClave*, 123 N. Y. 512, 25 N. E. 1047; *Throop*, Pub. Off. § 380.

As the committee do not constitute a court, and as the incidents and common-law rights of a court trial are not required, the objection made in regard to certain informalities and irregularities are unavailing.

There is no room for the application of the doctrine of *res adjudicata* in such proceedings, and the fact that other charges against the defendant had been made and investigated does not operate to defeat the present proceedings.

The allegation that the testimony was insufficient to sustain the findings is without force. The evidence was heard and considered by a tribunal created for that purpose, and the duty of determining its sufficiency belongs to that tribunal, and not to the court. Testimony was offered to sustain and refute the charges, and the weight and sufficiency of that testimony, as well as the fact of whether cause was shown, were concluded by the determination of the committee and the action of the governor.

Judgment will be awarded in favor of the plaintiff in accordance with the prayer of his petition. All the justices concurring.

(55 Kan. 401)

ATCHISON, T. & S. F. R. CO. v. NAPOLE.

(Supreme Court of Kansas. June 8, 1895.)

DEATH OF EMPLOYE — NEGLIGENCE OF EMPLOYER
—ACTION BY NONRESIDENT.

1. It is the duty of a railroad company to not only furnish reasonably safe machinery and appliances for the operation of its road, but to use reasonable care and diligence to maintain them in such condition.

2. Where a defect in a tool or instrumentality is one which suddenly appears, the company will not be deemed to be negligent unless it is remiss in testing the tool or instrumentality, or knew or ought to have known of the defects which caused the injury.

3. In the present case a recovery was sought for an injury to an employé resulting from a defect in a hand car, and it appeared that those in charge of the men who were using the hand car had actual knowledge of the defect. *Held*, that those to whom notice of the impairment was brought represented the company, and that it is bound by their knowledge and held for their negligence.

4. Chapter 131 of the Laws of 1889, which is supplemental to section 422 of the Civil Code, does not create a new cause of action, nor impose any limitation on an existing one. It simply changes the remedy by providing that a cause of action given by section 422 shall not be lost on account of the nonresidence of the deceased or nonappointment of a personal representative. *Berry v. Railroad Co.*, 34 Pac. 805, 52 Kan. 769.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. Miller, Judge.

Action by Josephine M. Napole against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for the death of her husband, Francesco Napole, alleged to have been caused by the negligence of the company. A trial was had with a jury, and upon the testimony submitted the following special findings of fact were made and returned by the jury: "Q. 1. Was the deceased, Francesco Napole, a section hand and laborer on section work on the line of defendant's road, in the county of Leavenworth, Kansas, in the month of August, 1888? A. Yes. Q. 2. How long had said Francesco Napole been in the employ of defendant company at the date of his injury, on or about August 13, 1888? A. Thirteen days, about. Q. 3. In such employ, was it the custom of the section men to ride upon hand cars to different localities on the section on which they were employed to work? A. Yes. Q. 4. Was such hand car one of the tools or apparatus used by section hands in the work on the track and roadbed? A. Yes. Q. 5. Was the said hand car used for the purpose of carrying the section men to and from their work, and to facilitate travel from one point to another? A. Yes. Q. 6. Was William Fitzgerald the foreman of a special gang doing ditching work on which said Francesco Napole was at work? A. Yes. Q. 7. Was the duty of said Napole, as such section hand, to assist, under the direction of said foreman, in the ditching work? A. Yes. Q. 8. Was it a part of the work of such hands, in the work, to level the

roadbed with dirt and clean out the ditches along the right of way, put in ballast, cut weeds, grass, and other growth from the right of way? A. Yes. Q. 9. Was the injury to said Napole, alleged in plaintiff's petition, caused by a fall from a hand car, while running on said section, on or about the 13th day of August, 1888? A. Yes. Q. 10. How long had said hand car been in use on said section at the time of said injury? A. About thirteen days. Q. 11. At the time said car was furnished for said use on said section, was said car in good repair and suitable for the use for which it was intended? A. Yes. Q. 12. Is it a fact that no report had been given to the roadmaster on that division of defendant's road that said hand car had become out of repair, or in bad order, prior to said injury? A. Yes. Q. 14. Is it a fact that on the day of this accident, said hand car was run about fifteen miles or more, prior to the accident, and the handles were used by the section men in going ten miles to their work in the morning and some five miles, or more, in return at night, before the accident happened that caused the fall of Napole? A. Yes. Q. 15. Is it not a fact that the fall of said Napole from the said hand car was caused by the handle suddenly breaking, without apparent cause therefor? A. Yes. Q. 16. Is it not a fact that when the men started to work, the morning of the accident, ten men rode on the car, and that the handle appeared to be all right and safe for use? A. Yes. Q. 18. How many men were on said car at said time? A. Ten men. Q. 19. Was said hand car put in motion or propelled along said track by men standing thereon taking hold of the handles fastened into a lever, and pushing up and down on said lever? A. Yes. Q. 20. At the time of this alleged injury to said Napole, how many men had hold of the handles of the car from which said Napole fell? A. Six men. Q. 21. Did the said Napole, deceased, have hold of the handle which broke at the time it broke? A. Yes. Q. 22. How many miles had they run with this car on that trip, from the time they left the place of that day's work to the place where said accident happened? A. About five miles. Q. 23. How far did the car run that morning from Lansing to reach the place of that day's work? A. About ten miles. Q. 24. When they started to their work in the morning of the day said injury occurred, and on the return trip at night, was there anything about the handles of said car to indicate that the handle was not sound or strong enough for the use to which it was put? A. No. 25. Is it not a fact that in the use of said hand car on said day, prior to said injury, there was nothing to indicate that the handle was unsound or might break if used? A. No. 26. Is it not a fact that the sudden breaking of said handle that caused the fall of said Napole was from a severe jerk, or more than the usual amount of strength, used at the time? A. No. 27. Is it not a fact

that another hand car, at the time of the accident, was following at some distance behind the one on which Napole was riding on the same track, carrying the same number of men as the car on which Napole was riding? A. Yes. 28. Is it not a fact that the men were in the habit of taking either car they chose, without special directions from the foreman or boss of the work, in starting out to their work and returning from it? A. Yes. 29. Is it not a fact that the force applied that broke the handle was caused by the men on the car trying to make it run faster to get back to Lansing, where they boarded and lodged, before the arrival of a train then about due? A. No. 30. Was the hand car in question used the Sunday before said injury by some of the section men taking it to the city of Leavenworth on their own accord? A. Yes, with permission. 31. While at Leavenworth, beyond the boundaries of their section, was said hand car removed from the track and left in a position where the handle could be struck by a passing train or engine? A. Yes. 32. When said men returned to said car at Leavenworth, had one of the handles been bent during their absence? A. Yes. Q. 33. Was said handle straightened by said men in such manner that it looked apparently as straight and sound and suitable for use as it did before it was bent? A. Apparently it did. Q. 34. After said trip to Leavenworth, and said handle had been straightened, was said car used by said section foreman, Fitzgerald, and did he and the hands using the car believe said car was sound and in good condition for use? A. Yes; the men thought so, but we have no evidence what Fitzgerald thought or knew. 35. Was any notice given to the proper agent of defendant company, after said trip to Leavenworth, and prior to said injury, that said car had become out of repair in such manner as to make it unfit for use? A. Yes. 36. If you answer question 35 in the affirmative, state what agent it was, and the time and what notice was given? A. Fitzgerald, the foreman, saw said car and rode on it after injured. 37. Was any request made of defendant by said Napole or any of the section hands to repair said car prior to said injuries? A. No. 38. Was one Andrew Lupols on the car that went to Leavenworth the Sunday prior to the accident? A. Yes. 39. Did he see the handle in its alleged bent condition? A. Yes. 40. Did he see or know of his own knowledge of said handle being straightened? A. Yes. 41. Did he see said car after said handle was straightened? A. Yes. 42. Did not said Lupols ride from Lansing to the place of work on said hand car on the morning of the day of the accident, after he knew it was bent and straightened? A. Evidence did not show what car he rode on. 43. Did any of the men that rode on said hand car to their work on the morning of the day the accident happened make any complaint, or object to using the same? A. No. 44. Was

the appearance of said car on the day of the accident and prior to the accident in such condition as to appear to any one of the section men or to the section foreman to be unfit for use? A. It appeared so to the section men, but no evidence to show what foreman thought. 45. What, if any, were the defects in said car that were apparent to those operating it? A. None. 46. Is it not a fact that said Francesco Napole was standing on said car, with his face toward the rear, toward the hand car that was following the car on which he was riding? A. Yes. 47. If the rear car should gain speed on the front car could not said Napole from his position on the car have readily seen the approach of the rear car? A. Yes. 48. Were said Napole and others, using said handle at the time, using more force on the handle than was used on that day prior to the time it broke? A. No. 49. Was said Napole pulling on said handle steadily and smoothly, or was he exerting great force on said handle by irregular and unsteady jerks? A. No evidence to show what force was being used. 50. Was there any evidence of having any old breaks or cracks in the iron bar in the place where it broke at the time of the accident? A. No. 51. How long had said car been in use? A. No evidence to show how long. 52. How long and how wide was the platform of said car? A. No exact measurements given. 53. How many men could ride on said hand car? A. Ten men. Q. 54. How far did said hand car run after said Napole fell until it was stopped,—how many feet? A. From three to five feet. Q. 55. What distance in feet was it usual or customary to stop said hand car when brakes were applied? A. Twenty to forty feet. Q. 56. How long after said break was it before said Napole fell? A. Immediately. Q. 57. Where did said Napole fall relative to the position of the hand car? A. In front. Q. 58. Could anything have been done to stop the car quickly that was not done? A. No. 59. Could the said car have been stopped quick enough after the said Napole fell to prevent said Napole from being run over and receiving the injuries he did? A. No. 60. Is it a fact that the said Napole had the same opportunity to see and discover a defect, if any there was, that others had in the handle of said car? A. Yes. 61. Was there any defect in said car that said Napole could not have discovered by reasonable observation? A. Yes. 62. In standing on front platform of car and holding center of wooden handle, is not the iron handle or bar directly in front and in plain sight? A. Yes. 63. Did said Napole ever make any objections to using said car on account of any supposed defect or unsoundness in said car? A. No. 64. How many men were in the section gang in which said Napole was working? A. Twenty men. 65. How many cars were in use by said gang? A. Two. 66. At about what speed was said car running at the time of the accident? A. About seven miles an

hour. 67. Was it on an up grade or down grade at the time of the accident? A. Down grade. 68. Was the car following the one on which Napole was riding on an up grade or down grade at the time of the accident? A. About level. 69. Which of the two cars was running the faster, the front or the rear car, at the time of the accident? A. About the same speed. 70. What were the nature of the injuries received by said Napole at the time of the accident? A. Serious. 71. Were there any vital organs of Napole's body injured, bruised, or cut? If so, state fully the nature and extent of said injury. Ans. No. 72. Were any of the bones of Napole's body broken? If so, state fully the nature and extent of such injury. Ans. Yes. The lower jaw fractured; a piece chipped off the head of the shin bone. 73. Were the injuries which said Napole received, of themselves, necessarily fatal under proper care and professional treatment? Ans. Yes. 74. What was the immediate cause of the death of said Francesco Napole? Ans. Blood poisoning. 75. Is it not a fact that the principal injury received by said Francesco Napole was to the right leg, close to the knee? Ans. Yes. 76. Is it not a fact that, immediately after said accident, said Napole was taken to the hospital at Ottawa, Kansas, and there placed under the care and treatment of a competent surgeon, one C. W. Nash? Ans. No. 77. Did said surgeon render or offer reasonable care and competent treatment of the said injuries of said Napole? Ans. Yes, when he arrived there. 78. Is it not a fact that blood poisoning resulted from the injury to said Napole's knee, and that such fact was communicated by said surgeon to said Napole, with the statement that, in order to save the life of said Napole, it was necessary to amputate the limb on which said injury was received above said knee? Ans. Yes. 79. Did not said surgeon offer and desire to amputate said limb, believing it to be the only means of saving the life of said Napole? Ans. Yes. 80. Is it not a fact that said Napole refused to allow said limb to be amputated? Ans. Yes. 81. Is it not a fact that said Napole refused to allow any surgical operation to amputate his leg or take out a diseased bone? Ans. Yes. 82. Is it not a fact that the cause of the death of said Napole was from blood poisoning resulting from the injury to his knee or leg? Ans. Yes. 83. Is it not a fact that he could have lived or survived said injury if he had submitted to amputation, as requested by the surgeon? Ans. No. Q. 84. Was one J. A. Justice, assistant roadmaster, having charge of the men and road work on the line of defendant's road from Wilder, Kansas, to Leavenworth? A. Yes. Q. 85. Was said J. A. Justice, assistant roadmaster, the person who furnished the men working on the sections along said line of road with hand cars and other tools for their work? A. Yes. Q. 86. Was said assistant roadmaster the person in defendant's employ to whom reports were

made and required to be made of any defect in machinery or tools used by said men that become in bad order for use? A. Yes. Q. 87. Did said assistant roadmaster furnish said hand car, from which said Napole fell, for said use about a week or ten days prior to said injury? A. Yes. Q. 88. At the time said hand car was so furnished for use, so far as said roadmaster could discover from inspection of the same, was it in good order? A. Yes. Q. 89. Did said roadmaster, at the time said hand car was so furnished for use, examine the same, and believe it was in good order and safe for use by the men on said section? A. Yes. Q. 90. Did said assistant roadmaster have notice from anyone, after said hand car was furnished for use on said section, and prior to said injury, that said hand car was in bad order, or that it had become unsafe while being used on said section? A. No. 91. Is it not a fact that the injury to said Napole was the result of an accident incident to the ordinary hazards of the business in which he was engaged? Ans. No. 92. Is it not a fact that the injury to said Napole was an accident happening suddenly, which no one could by ordinary care foresee and prevent? Ans. No. 93. Were the hand cars on which said work run by the section hands themselves, and did they have the same opportunity of seeing and discovering any defects that the foreman or roadmaster had of seeing and discovering same, if any existed? Ans. Yes. 94. When the men went to their work or came from it, did the men take such car as was nearest, without special direction from the boss? Ans. Yes. 95. Was the handle or lever on the two cars in use, including the one from which Napole fell, made of wrought iron? Ans. Yes. 96. Are such wrought-iron handles susceptible of being bent and straightened without injury? Ans. No. 97. Were the duties of the foreman of the gang, Fitzgerald, to stay with the men when at work and direct how their work should be done? Ans. Yes. 98. Was the work of the section gang, of which Napole was a member at the time of the accident, making ditches on the right of way, in Leavenworth county? Ans. Yes. 99. Was the hand car stopped in about two to five feet when said Napole fell? Ans. Yes. 100. How many feet does a hand car ordinarily run after brake is applied to stop it, when going same speed the hand car was from which Napole fell? Ans. Twenty to forty feet. 101. Was the cause of the fall of said Napole the sudden breaking of the handle or lever of the car that he was working at the time? Ans. Yes. 102. Was said fall in front and under the car the cause of his injuries? Ans. Yes. 103. Was the handle that broke the same handle on the same car that was bent on the Sunday previous to the accident? Ans. Yes. 104. If you answer question 103 in the affirmative, was not such bend in the handle repaired by the employes of the defendant prior to the accident in such manner as to

appear as fit for use as before it was bent? Ans. Yes. 105. While at the hospital at Ottawa was the said Napole requested by the surgeon in charge to have his leg amputated above the knee? Ans. Yes. 106. Was said Napole informed, and did he understand, that such amputation was necessary to, and would probably, save his life? Yes, through priest. 107. Did said Napole refuse to have such amputation performed? Ans. Yes. 108. Had said Napole permitted the operation to be performed as requested by the surgeon on the 17th day of August, 1888, and for several days thereafter, would it probably have saved his life, or prevented his dying from the injury? Ans. The experiment was not tried." The general verdict of the jury awarded damages to the plaintiff in the sum of \$4,000. Motions for judgment in favor of the railroad company on findings of fact, and also for a new trial, were made and overruled. The railroad company excepted to the rulings, and brings the case here for review.

A. A. Hurd and Mills, Smith & Hobbs, for plaintiff in error. John A. Hale, J. O. Fife, S. W. McCaslin, and Harkless & O'Grady, for defendant in error.

JOHNSTON, J. (after stating the facts). The main contention of the railroad company is that the special findings of fact do not justify the verdict of the jury or the judgment of the court. We cannot confine our consideration, however, to the mere findings returned in answer to the special questions which were submitted to the jury at the instance of one of the parties. Although a great number of questions were submitted at the request of the railroad company, the answers or findings do not embrace all of the testimony, nor purport to completely cover the entire case, as was done by the general verdict. To determine whether the general verdict is sufficiently supported we must look to the testimony as well as the findings, and when they are considered together they appear to be sufficient to establish a liability against the company and to justify the result that was reached. Napole was one of a crew of about 20 men who were employed in surfacing a track for the railroad company near Lansing, Kan., and they were in charge of William Fitzgerald, as foreman, or boss, as he was termed, and of Perry Davis, who acted as second boss and controlled and directed the men when Fitzgerald was not present. They traveled to and from their work on two hand cars provided by the company, ten of the men usually riding on each car. On the day of the casualty they went about 10 miles from their boarding car to the place of work, and while returning in the evening Napole and nine others were riding on the front car, accompanied by Fitzgerald, the boss, while the second boss, Perry Davis, was riding on the second car with the other workmen. Napole stood with his back in the direction the car

moving, working the handle of the car and down, when suddenly the metal lever which the handle was fastened broke, throwing him in front of the car, where he was run over, and received serious injuries, which resulted in his death a few days afterward. To account for the defect and the injury it was shown that, on the day before, which was Sunday, several of the men went to Leavenworth for provisions, with the permission of the foreman, but Napole was not one of them, and when they reached that place the hand car on which they rode was placed so near the main track of the railroad that an incoming train struck it, turned over, and the lever of the car was found to be bent and injured by the collision. The testimony that, within a brief time before the car was taken from Leavenworth, the bend or defect in the lever was pointed out by Fitzgerald, Davis, and also by the assistant roadmaster, J. A. Justice. The hand car was placed on the track, taken a short distance, when Davis, one of the foremen, took the lever from the car and straightened it when it was cold with a heavy hammer. Testimony was offered tending to show that the bending and straightening of the lever while cold would have a tendency to break the fibres and materially weaken the lever, and that the resulting defect might not be apparent upon the surface by a casual observation. It does not appear that Napole was informed or had any knowledge of the injury to the lever and it was shown that the defect was such that he could not have discovered it by reasonable observation. Prior to the collision the hand car was in good repair, and suitable for the use for which it was intended, and upon the day of the injury it appears that a casual glance would not have revealed anything indicating that the lever was not sound or strong enough for use to which it was put. It is contended that the defect in the lever was a latent one, which could not be detected by an ordinary inspection, and that as the company had no knowledge of the defect, and it was not discoverable by the exercise of ordinary care, it cannot be held liable. It cannot be said, however, in this case, that the company was without knowledge of the impairment of the hand car. The evidence showed that the defect was immediately brought to the attention of both the foremen, as well as of Justice, the assistant roadmaster, and Fitzgerald, who all rode on the car himself after the lever had been bent and before it had been straightened. One of the witnesses states that when the defect was discovered by the assistant roadmaster, he told Perry Davis, second foreman, that if he didn't fix it he would have it to pay for. It was the duty of the railroad company to not only furnish reasonably safe machinery and appliances for the operation of its road, but to exercise reasonable care and diligence to maintain them in such condition. Of course, if

the defect is one which suddenly appears, the company will not be deemed to be negligent, unless it has been remiss in testing the appliance, or knew or ought to have known of the defects which caused the injury. In *Railroad Co. v. Jones*, 30 Kan. 601, 2 Pac. 657, a case similar in many respects to the present one, it was said to be the undoubted duty of the company, not only, in the first instance, to make reasonable efforts to supply machinery, tools, and appliances safe and sufficient, but also to make like efforts to keep such machinery, tools, and appliances in good condition, and to this end must make all reasonable and necessary inspections and examinations. In that case it was held that the foreman in charge of a gang of men who were engaged in surfacing a track represented the company, for whose knowledge or means of knowledge the company is responsible. Here, the company cannot escape responsibility, for several of those representing it had actual knowledge of the collision and that the lever was bent and out of repair. Although possessed of this knowledge, no pains were taken to ascertain the effect of the impairment, and instead of sending it to the shop to be repaired in an approved way, so as to make it reasonably safe for use, it was straightened while cold, and in a manner likely to weaken and break the fibres of the iron. While it was apparently sound and fit for use after it had been straightened, the fact is that it was weakened and that it did break by reason of the impairment, and the injury of Napole was the result. While the defect was not easily discoverable after it had been straightened, and while Napole did not discover it, it had been discovered by those in charge of the men, and the company is bound by the notice of such defect.

There is some contention that the special findings are inconsistent with each other and with the general verdict, and that some of them are not sustained by the testimony. There were 108 questions submitted to the jury, some of which were involved and puzzling; but, while there is some confusion in the answers, we think a fair construction of all the questions and answers shows that the jury understood the issues in the case, and that their findings are reasonably consistent with each other and with the general verdict. In regard to the knowledge of the company, it is claimed that the jury found that the assistant roadmaster was the person upon whom notice should have been served in order to bring knowledge of the defect home to the company, whereas the notice was in fact brought to the foreman of the crew. The jury did find that the assistant roadmaster was the agent to whom reports were made in respect to defects in machinery or tools that became in bad order for use. But they also found that notice of the defect was brought home to Fitzgerald, the foreman, and that he was an agent of the

company upon whom notice of the defect could be properly served in order to bind the company. They found that while there was no evidence as to what opinion Fitzgerald held as to the safety of the lever after it had been straightened, he saw the car and rode upon it after it was injured, and therefore had knowledge of its defective condition. This finding is explained by the testimony that Fitzgerald not only saw the car shortly after the lever was bent, but that he rode upon it for a short distance before the attempt was made to repair it. Aside from this, we have testimony that notice of the defect was brought to the attention of both the assistant roadmaster and the other foreman, and although all three knew of the defect, all were aware that it had not been sent to the shops to be restored to a reasonably safe condition by proper repairs. We think the testimony is sufficient to sustain the special findings of the jury and the general verdict which they returned.

It is next contended that the action cannot be maintained by the widow, who is and was a resident of Missouri, because the injury occurred in August, 1888, before the passage of section 1, c. 131, Laws 1889, authorizing the bringing of an action, under section 422 of the Civil Code, by the widow, where no personal representative had been appointed. The later provision of the statute is supplemental to section 422, and is intended to make an existing cause of action available where the deceased was a nonresident of the state, or where, being a resident, no personal representative is or has been appointed. It has been held that the amendment does not create a new cause of action, nor impose any limitation on an existing one. It simply changes the remedy by providing that the cause of action given by section 422 shall not be lost on account of the nonresidence of the deceased or the nonappointment of a personal representative. *Berry v. Railroad Co.*, 52 Kan. 769, 34 Pac. 805. No error was committed by the court in overruling the demurrer to the petition of the widow, or in refusing to sustain the objection of the railroad company to all evidence offered by her.

We find nothing substantial in the objections to the instructions, nor in the claim that the conduct of counsel for defendant in error in the argument of the case to the jury was prejudicial. The judgment of the district court will be affirmed. All the justices concurring.

(1 Kan. A. 284)

BELL et al. v. FISHER.

(Court of Appeals of Kansas, Southern Department, E. D. June 19, 1895.)

CHATTEL MORTGAGES — VALIDITY — MORTGAGOR'S DISPOSITION OF PROPERTY — NEW TRIAL — SUFFICIENCY OF EVIDENCE — REVIEW ON APPEAL.

1. Where a maker of a chattel mortgage disposes of the mortgaged property, or a part

thereof, but the mortgage itself contains no reservation, either express or implied, by said mortgagor, to use or dispose of the mortgaged property without accounting to the mortgagee therefor, and where the evidence does not disclose any knowledge on the part of the mortgagee of such disposition of the property, the mere fact of such disposition does not render the mortgage void as to creditors.

2. Where, in an action of replevin, the jury assess a certain amount of damages for the unlawful detention of property, and there is evidence to sustain such findings, and afterwards the trial court, upon a motion for a new trial, passes upon the sufficiency of such evidence, this court will not disturb the judgment.

(Syllabus by the Court.)

Error to district court, Bourbon county; J. S. West, Judge.

Replevin by Paul Fisher against J. H. Bell and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Humphrey & Hudson and A. A. Harris & Son, for plaintiffs in error. Dillard & Padgett, for defendant in error.

COLE, J. Paul Fisher brought an action in replevin in the district court of Bourbon county against plaintiffs in error, Bell, Mapes, and Hart, whom he claimed unlawfully detained possession of certain horses and cattle, a part of which he claimed as the absolute owner, and a part by reason of a special ownership under a chattel mortgage given by one John R. Young. Upon the trial the jury found in favor of Fisher, and assessed his damages for the unlawful detention of the property at \$100. From a judgment upon this verdict, plaintiffs in error bring the case here.

The evidence shows that Hart obtained a judgment against John R. Young, and that Bell and Mapes were respectively a constable and deputy, who levied upon the property in controversy under an execution issued on said judgment. The chattel mortgage from Young to Fisher was in the ordinary form, and embraced, besides a portion of the property in dispute, some corn and hay, which, at the time of the levy, had been fed by Young to the stock upon his place, and otherwise disposed of. The principal contention of plaintiffs in error in this court is that the trial court committed error in refusing to give the following instructions: "If you find from the evidence that the mortgage given by Young to Fisher covered, among other things, eighty acres of field corn, more or less, fifteen tons of millet hay, and fifty tons prairie hay; that Young retained possession of said corn and hay, and used, consumed, or disposed of the same without accounting to Fisher for said corn and hay, or the proceeds thereof,—the mortgage is fraudulent as against the defendants, and the plaintiff cannot recover." It seems to us that the trial court properly refused to give this instruction as asked. The main difficulty is that, as requested, the instruction omits a most essential element. It is true that the rule is well settled that, where a chattel mortgage contains a reservation by

the mortgagor, either express or implied, to use or dispose of the mortgaged property, and there is no agreement on his part to account to the mortgagee therefor, and the mortgagor does so use or dispose of the mortgaged property, or a part thereof, without accounting to the mortgagee, or where there is no such reservation in the mortgage, but one is implied by the evidence disclosing such knowledge on the part of the mortgagee of a disposition of the mortgaged property without accounting to the mortgagee therefor, the mortgage will be held fraudulent as to creditors. And this, we think, is the doctrine laid down in the case cited in the brief of counsel for plaintiffs in error. But we know of no case where simply a sale or disposition of property described in the mortgage by the mortgagor without accounting invalidates the mortgage in the absence of such reservation or such knowledge on the part of the mortgagee. The counsel for the plaintiff contends that a new trial should have been granted on account of the jury having awarded \$100 as damages for the unlawful detention of the property. The evidence discloses that the levy was made in this case during the month of July, 1889, and that the title which were taken under the execution were hurriedly driven away by the plaintiffs in error Mapes and Hart; that the weather was extremely warm, and that the cattle became excited and heated, and that one of the animals was so injured as to be practically useless. The evidence further shows that the plaintiffs in error detained all the property some 15 or 16 days. The jury having found from the evidence that the amount of damages sustained by Fisher was \$100, and the court having, upon a motion for a new trial, passed upon the question, this court cannot say that the evidence was so insufficient as to cause us either to reverse or modify the judgment in this particular. The judgment is affirmed. All the judges concurring.

Kan. App. 265)

YOUNG v. BELL et al.

Court of Appeals of Kansas, Southern Department, E. D. June 19, 1895.)

EXEMPTIONS.

The animals and articles named in subdivision 5 of paragraph 2998 of the General Statutes of 1889 are absolutely exempt to the head of a family residing in this state, regardless of their use or his occupation.
Syllabus by the Court.)

Appeal to district court, Bourbon county; J. West, Judge.
Appellee by John R. Young against J. H. Bell and others. There was a judgment for defendants, and plaintiff brings error. Reversed.

Willard & Padgett, for plaintiff in error.
Mphrey & Hudson and A.A. Harris & Son, for defendants in error.

DENNISON, J. This is an action in replevin, brought in the district court of Bourbon county, Kan., by John R. Young, this plaintiff in error, as plaintiff, against J. H. Bell, J. B. Mapes, J. L. Woodward, and James Hart, as defendants, to recover the possession of one light gray stallion of the value of \$200, and for \$1,000 as damages for the wrongful detention of the same. The stallion in question was the property of said Young, and was taken under an execution by J. B. Mapes, as deputy of J. H. Bell, as constable, and left with J. L. Woodward by said deputy constable. The said execution was issued by a justice of the peace upon a judgment in favor of James Hart against John R. Young et al. The contention of the plaintiff is that the stallion is exempt, under subdivision 5 of paragraph 2998 of the General Statutes of 1889, which reads as follows: "Every person residing in this state and being the head of a family shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this state the following articles of personal property: * * * Fifth. Two cows, ten hogs, one yoke of oxen and one horse, or mule, or in lieu of one yoke of oxen and one horse or mule, a span of horses or mules, twenty sheep and the wool from the same, either in the raw material, or manufactured into yarn or cloth." There is no dispute in this case that the plaintiff, John R. Young, is a resident of this state, and the head of a family, or that he claimed this stallion as being exempt under the above section. The error complained of in this case is the refusal of the judge of the district court to give the following instructions: "First. Under the law of this state a man is entitled to one team of horses, and is entitled to make his selection from any number of horses that he may have or own, and has a right to make this selection at any time before the sale of the property, or even after the sale of the property if he gives notice at the sale of his selection. Second. And he has the right to make the selection from horses that are not mortgaged or incumbered. This right to so select is an absolute right, and the use to which the horses are put cuts no figure in the case. Third. And he is not restricted to any particular use of the property. Every person who resides in this state, and is the head of a family, is entitled to the exemption of the articles and animals named in the exemption law, and the articles and animals therein mentioned are absolutely exempt to him, regardless of their use or his occupation." And upon the judge giving the following instruction: "The defendants claim that the property was not exempt to the plaintiff, because it was used exclusively as a stallion for breeding purposes, and that the plaintiff had other horses which he used as work horses. * * *

In this state the head of a family may have exempt from execution a team of horses, and he is entitled to make his selection from

any number of horses he may have or own, and has the right to make his selection at any time prior to the sale of the property, or even after the sale, if he gives notice of his selection at the time of the sale; and, if some are mortgaged, he may select those not mortgaged. The intention of the law is that the head of a family shall have a team, and if you find that the stallion in question was used and kept by the plaintiff for other than breeding purposes, it would be exempt, though, in addition to such use, he used him for breeding purposes; but, if you find that he was kept and used only for breeding purposes, and not kept and used by him for any other purpose, it would not be exempt, and the plaintiff could not recover in this action. You will further determine from the evidence, under these instructions, whether or not the plaintiff, at the beginning of this suit, was a resident of this county, and the head of a family, and whether or not, under the above instruction, this stallion was an animal to which he was entitled under the exemption law. * * *

The record shows that the plaintiff excepted to the instructions given, and also to the refusal of the court to give those asked for by the plaintiff. In the case of *Nuzman v. Schooley*, 36 Kan. 177, 12 Pac. 829,—a case in which it was attempted to recover two cows, which *Nuzman* claimed were not exempt, because they were not used by *Schooley*, and were not necessary for the support of *Schooley* or his family at the time of the seizure,—Chief Justice *Horton*, in rendering the opinion, after quoting so much of the statute as is quoted above, in relation to paragraph 2008 of the General Statutes of 1889, and subdivision 5 thereof, uses this language: "This section makes the articles therein named exempt absolutely, and therefore the articles so named cannot be confined to such as the debtor is in actual possession of, or such as are actually necessary for the support of himself or his family. The statute must be construed beneficially to the debtor;" and cites *Mallory v. Berry*, 16 Kan. 293. And further along in the same case he uses this language: "Even if *Schooley* had eighteen or twenty head of cattle just prior to the commencement of this action, he had the right to claim as exempt the particular animals in dispute. The election of what animals he would claim as exempt was with him, and not with the creditor." *Rice v. Nolan*, 33 Kan. 31, 5 Pac. 437. Also, in the case of *Wilhite v. Williams*, 41 Kan. 288, 21 Pac. 256. In this case *Williams* was an insurance agent, and purchased a horse, harness, and buggy for the purpose of carrying on his business, for which they were adapted, and they were being so used when the sheriff levied upon them. The opinion in this case was written by *Johnson, J.*, in which he used the following language: "In regard to the horse, there can be no question that it was exempt under the fifth subdivision of section 3 of the act relating to exemptions. The language employed in that

clause is general, and evidently the legislature did not intend to restrict the exemption to persons pursuing any particular occupation, or those making any particular use of the property therein mentioned, or to any particular class of debtors, except that they be residents of the state, and heads of families. Every person who resides in the state, and is the head of a family, is entitled to the benefits of exemption; and the animals and articles therein named are absolutely exempt to him, regardless of their use or his occupation." This seems to us to be the proper construction of the statute mentioned, and seems to be decisive of this case. The only authority cited by the defendants in error in their brief that would seem to controvert this interpretation of the Kansas statutes was in the case of *Reed v. Cooper*, 30 Kan. 574, 1 Pac. 822, where it was held that the words, "and other farming utensils," in the sixth subdivision of said exemption law, would not exempt a grain drill, except in the hands of a farmer. This defendant in error, in his brief, says that in support of this decision the court cites *Robert v. Adams*, 38 Cal. 383, and further says: "This 38 Cal. case is one in which the exact question at issue was decided, and the California court held that the stallion was not exempt to farmers except when kept in whole or in part as a work horse." The language of the California Code (section 690) exempts "two horses used as farm horses"; so it seems that, while the exact question at issue may be the same, the language of the statute is not the same. The instructions given by the judge of the district court were not the law which governs this case, and the instructions asked for by the plaintiff were the law, and should have been given by the court. The judgment of the court below is reversed, and the case remanded for further proceedings. All the judges concurring.

(1 Kan. App. 367)

HILL v. VAN SANDT.

(Court of Appeals of Kansas, Southern Department, E. D. June 19, 1895.)

ESTOPPEL—TO CLAIM PROPERTY—APPARENT OWNERSHIP IN OTHERS.

1. Where this plaintiff, by his agent, permitted *Powell* to take his goods, and sell them, and hold himself out as their owner, and to advertise the business in the name of *Powell & Co.*, he is not estopped from proving his title to said goods in an action brought against the sheriff, who levied upon said goods by virtue of an execution issued against said *Powell* upon a judgment rendered upon a debt contracted prior to any of the transactions between this plaintiff and said *Powell*.

2. The court gave the following instruction: "If *Hill* allowed *Powell* or *Powell & Co.* to assume ownership and control of these goods, and hold themselves out to the world as such, and deal with them as their own, and get money, and reinvest them in other goods, *Hill* cannot, in this action, be heard to say he is the owner of the goods in controversy; and, for the purposes of this case, it makes no differ-

ence whether the debt of Powell to Abernathy & Co. occurred before these particular goods were bought, or not. *Held* error.

(Syllabus by the Court.)

Error to district court, Neosho county; L. Stillwell, Judge.

Replevin by Luther Hill against S. L. Van Sandt. There was a judgment for defendant, and plaintiff brings error. Reversed.

This is an action of replevin, brought by Luther Hill, as plaintiff, against S. L. Van Sandt, as defendant, to recover a quantity of furniture, and for damages for the wrongful detention of the same. The defendant, S. L. Van Sandt, alleges in his answer that he was the sheriff of Neosho county, Kan., and that as such sheriff, on the 21st day of November, 1889, he levied upon the goods and chattels described in said plaintiff's petition, as the property of J. J. Powell, by virtue of an execution issued out of the district court of Neosho county, Kan., on the 20th day of November, 1889, upon a judgment in said court against the said J. J. Powell in an action wherein Abernathy Furniture Company was plaintiff and the said J. J. Powell was defendant, and that the goods were the property of the said J. J. Powell. Upon the trial of the cause the court gave the following instructions to the jury: "Gentlemen of the Jury: This is an action of replevin brought by the plaintiff, Luther Hill, against S. L. Van Sandt, as sheriff of this county, for the purpose of recovering the possession of a quantity of goods. Plaintiff alleges that he was the owner and entitled to the possession of these goods, and defendant, therefore, at the commencement of this action, wrongfully detained the same. The position of the sheriff, in substance, is that he levied on the goods in controversy by virtue of an execution in favor of the Abernathy Furniture Company, against J. J. Powell; and he claims that, at the time he so levied the execution on the goods, Powell was the owner or had an interest in the goods, as a member of the firm of J. J. Powell & Co., or owned part of it himself, and therefore had the right to levy on the goods for the purpose of obtaining means wherewith to pay the judgment of Abernathy Furniture Company against Powell. There has been evidence introduced tending to show that, some time previous, Hill, the plaintiff, bought a quantity of goods at the Mission, belonging to the old stock of furniture, and that these goods were put in possession of Powell for the purpose of disposing of them. In the event the evidence shows to you any of that old stock of goods testified to by witnesses are in controversy in this case, and the sheriff levied upon them in this action, the plaintiff will be entitled to recover any of that old stock that may have been in the possession of Powell, and levied upon by the sheriff, in the event there is any of the old stock. With reference to the new goods bought subsequently by Powell, I instruct you this way:

If you find from the evidence that Hill, the plaintiff in this case, allowed Powell, or the firm of Powell & Co., to hold themselves out to the world as the owners of these new goods, and do business in that regard, and control the stock and sell it, and invest the proceeds, according to the best judgment of Powell, in other goods, subsequently bought and placed in this stock to sell; if you find these facts and circumstances existing, Hill is not in a position to claim the goods belonging to him, and, for the purpose of this case, they would be as the goods of the firm of J. J. Powell & Co. As I have said, if Hill knowingly allowed Powell or said firm to trade and deal with the goods as firm property, and obtained credit upon the goods they had there, Hill could not claim that these goods belonged to him. The burden of proof is upon the plaintiff. It is for him to show his right to recover by a preponderance of the evidence. If you find for him, you will return a verdict in his favor,—that at the time he owned, and had the right to the possession of, the property, and the defendant wrongfully detained it from him. If you find for the defendant, you will have to find that he had a special ownership over the goods, and you will return in your verdict the value of his ownership. That will be the amount of the judgment, with interest and costs, as specified in his execution. As regards to what I state to you with reference to the knowledge of Hill,—with reference to the manner in which he allowed Powell to trade and dispose of and hold these goods,—when I speak of Hill and his knowledge, in that regard, I mean to include in that instruction any knowledge of his agent." It also appears in the record that while counsel were making their argument to the jury, and before plaintiff's counsel had concluded his argument, the court gave the following additional instruction: "By the Court: * * * There seems to be some misunderstanding among the counsel as to what the court instructed you with reference to the acts of Hill allowing Powell or Powell & Co. to hold themselves out to the world as owners of these goods. What I intended to say to you in reference to that, and what I thought I did state, was this, in substance: That if Hill allowed Powell or Powell & Co. to assume ownership and control of these goods, and hold themselves out to the world as such, and deal with them as their own, and get money, and reinvest them in other goods, Hill cannot, in this action, be heard to say he is the owner of the goods in controversy; and, for the purpose of this case, it makes no difference whether the debt of Powell to Abernathy & Co. occurred before these particular goods were bought, or not." The record in this case shows: "It is admitted that on the 24th of November, 1888, the Abernathy Furniture Company obtained a judgment against J. J. Powell before a justice of the peace in Erie township in Neosho county,

Kansas, for the sum of \$127.21, and \$2.70 costs, at 7 per cent. interest from that date; that a transcript of that judgment was filed in the district court on November 4, 1889. On November 20, 1889, an execution issued on that judgment by the clerk of the district court to the sheriff of Neosho county, Kansas, and by virtue of the execution he did, on the 21st day of November, 1889, levy on the goods in controversy, as the property of J. J. Powell, the defendant in that case. By Mr. Denison: And it is not a debt contracted on this last arrangement? By Mr. Rager: * * * No, sir." And it is also admitted that the furniture business was advertised in the Erie Republican and Record, by Powell, as J. J. Powell & Co., furniture dealers, Erie, Kan., from May 18, 1888, to the date of the trial.

J. L. Denison, for plaintiff in error. J. W. Sharrock, for defendant in error.

DENNISON, J. (after stating the facts). The only question necessary to be decided in the determination of this case by this court is whether or not Luther Hill, the plaintiff, is estopped from setting up his ownership in the goods sued for in this case. If he were not so estopped, then the instructions would be erroneous and prejudicial, and this case would have to be reversed. In order to constitute an estoppel in pais, the doctrine is clearly laid down that all of the five following elements must be present: First, there must be a misrepresentation or a concealment of material facts; second, the misrepresentation must have been made with knowledge of the facts; third, the party to whom it was made must have been ignorant of the truth of the matter; fourth, it must have been made with the intention that the other party should act upon it; fifth, the other party must have been induced to act upon it. Bigelow, Estop. p. 437, and cases cited therein. In the case at bar it must be clearly apparent that the fourth element mentioned above was entirely lacking in this case. There is no evidence or claim that this plaintiff, Hill, or his agent knew that the Abernathy Furniture Company had a judgment or an execution against J. J. Powell, or that the sheriff, Van Sandt, had such an execution; and there is no evidence tending to show that this plaintiff, Hill, or his agent, made any statement, that they are claimed to have made, with the intention of inducing the sheriff or Abernathy & Co., or anybody else, to levy upon this stock of furniture to collect a debt owing by J. J. Powell & Co. "In general, where there is nothing to show that the representation was intended to be acted upon as a statement of the truth, or that it was, tantamount to a promise or agreement that the declaration made is true, so as to amount to an undertaking to respond in case of falsity, the party making

is not estopped from proving the truth." Bigelow, Estop. 486. In the case of Carithers v. Weaver, 7 Kan. 125, Brewer, J., in delivering the opinion in that case, gives the following definition: "Estoppels in pais are upheld to prevent gross injustice in cases where one party, having rights in property, by representations or conduct in reference thereto, fraudulently induces another to part with value for that property, and thereafter insists on those rights to deprive the latter of both value and property. But, where the latter party loses nothing by permitting the former to assert his legal rights, the reason for upholding estoppel fails." In the case of Palmer v. Meiners, 17 Kan. 483, Chief Justice Horton, in delivering the opinion in this case, cites the above language in the case of Carithers v. Weaver, and says: "As Claflin and Thayer were never influenced or induced to part with their goods on such alleged statement, and never gave any credit or extension of payment thereon, the reason for holding Mrs. Meiners estopped thereby fails." In the case at bar there is nothing in the record to show that Hill or his agent made any statements or admissions for the purpose of inducing, or in any way induced, or attempted to induce, this defendant, Van Sandt, or Abernathy Furniture Company, or their agents, or any one else, to extend any credit to J. J. Powell or to Powell & Co., by representing to them that said J. J. Powell or J. J. Powell & Co. were the owners of the goods levied upon in this case. In this case it was admitted that the debt upon which this execution issued was not contracted under this last arrangement, and it clearly appears that it was for goods bought by said J. J. Powell when he was in business for himself, before he burned out.

Plaintiff in error in this case complains because a portion of the instructions are given during the argument of counsel. So far as this case is concerned, it is not necessary to decide whether that is error or not.

The defendant in error in this case says that "Hill, by his conduct, induced the Abernathy Furniture Company to go to the expense of obtaining a judgment, issuing and levying an execution; and he is estopped from asserting title to the goods levied upon, even if the debt to Abernathy had accrued prior to said conduct." We think this contention is not sustained by authorities. Bigelow, Estop. 487.

The plaintiff in error raises the point that the representations were not made to this defendant, Van Sandt, but to the judgment creditor. Having decided that the doctrine of estoppel does not apply to the facts in this case, it is not necessary to decide this question.

The question which should have been submitted to the jury in this case is, was Luther Hill the owner of the goods? And he was not estopped in this case from showing that

was the owner by any representations which the evidence shows were made by his agent, Denison. The judgment of the strict court will be reversed, and the case remanded for further proceedings. All the judges concurring.

Ariz. 337)

SHEEN v. HUGHES, Supervisors' Clerk.

Supreme Court of Arizona. June 27, 1895.)

GENERAL ELECTION—PROCLAMATION BY GOVERNOR—PREPARATION OF BALLOTS—OFFICES TO BE FILLED—APPOINTMENT TO FILL VACANCY—EFFECT.

1. Rev. St. par. 1588, provides that there all be held on the Tuesday after the first Monday in November an election for such officers may be required by law to be chosen at such election, to be called a "general election." Paragraphs 1590 and 1591 provide that at least 30 days before a general election the governor must issue a proclamation stating the time of election, and the offices to be filled. *Held*, that a mere statement in the proclamation that a certain county office is to be filled does not require the clerk of the board of supervisors to prepare a ballot for such office, when, by law, the office could not be filled at the election.

2. Under Rev. St. par. 3116, providing that any person appointed to fill a vacancy possesses the rights and powers, and is subject to all the liabilities, duties, and obligations, of the officer whose vacancy he fills, one appointed to a vacancy caused by the death of a supervisor is entitled to hold the office during the unexpired portion of decedent's term.

Appeal from district court, Pima county; before Justice Bethune.

Mandamus by Alfred C. Sheen to compel G. Hughes, clerk of the board of supervisors of Pima county, to place plaintiff's name on ballots to be used at the general election, as a candidate for the office of supervisor. Judgment was rendered for defendant, and plaintiff appeals. Affirmed. Appellant filed a complaint October 20, 1894, for a mandamus to compel appellee, as clerk of the board of supervisors, to place appellant's name on the ballots to be used at the general election in 1894, as a candidate for the office of supervisor of Pima county. Plaintiff alleges in his said complaint that at the general election in 1890 Frank Allison was elected a supervisor of said county for a term of four years, ending January 1, 1895; that said Allison resigned December 7, 1891, and the remaining supervisors and the probate judge of said county filled the vacancy caused by Allison's resignation by the appointment of G. M. Avery, who duly qualified; that at the general election in 1892 M.

Samaniego and Hiram Stevens were duly elected supervisors for terms commencing January 1, 1893,—Samaniego for two years, and Stevens for a term of four years, from that date,—and each duly qualified; that thereafter, on March 1, 1893, said Stevens departed this life, and the probate judge and remaining members of board of supervisors filled the vacancy caused by Steven's death by appointing James Finley a supervisor, and that Finley duly qualified; that the board of

supervisors then consisted of Avery, Samaniego, and Finley; that the governor on September 24, 1894, by proclamation of election, ordered a general election to be held in the territory of Arizona, according to law, fixing the time for the election, specifying and enumerating the offices to be filled by election, and therein specifying and directing the election in Pima county of three members of the board of supervisors; that at the Democratic convention in Pima county held September 13, 1894, two candidates only for supervisors were nominated, and that they, with candidates named for other offices, were properly returned by said convention, to authorize their names to be placed on the ballots by the defendant; that the Democratic executive committee, which had been duly authorized by the said convention to fill vacancies or omissions occurring in the ticket, after the said proclamation, viz. on October 15, 1894, selected and nominated plaintiff as a candidate for supervisor, for a term of two years, from January 1, 1895, in the place and stead of said Finley, and thereafter reported said nomination and appointment of plaintiff to the defendant, and demanded that he place the name of said Sheen on the ballots to be voted at said election, for the office of supervisor. Defendant refused to comply with the demand and request to place plaintiff's name on said ballots, and plaintiff filed said complaint for a mandamus, to which defendant made an answer in the nature of a demurrer, and, further, that there was no vacancy in the office of supervisor caused by Stevens' death; that Finley was filling said vacancy. On the trial, judgment was given refusing the writ of mandamus, and in favor of defendant, from which plaintiff appeals.

Heney & Ford, for appellant. Barnes & Martin, for appellee.

ROUSE, J. (after stating the facts). The first thing to claim our attention, presented by the record in this case, is the proclamation of election. Counsel for appellant contend that, as it was stated in the proclamation of election that three supervisors were to be elected, it was the duty of appellee to place the names of the three persons nominated on the ballots as candidates for supervisors; that the proclamation, per se, fixed the number to be elected. It will only be necessary for us to consider a proclamation of election far enough to dispose of the above contention. We have the following statutes with reference to elections, viz.: "There shall be held throughout the territory, upon the Tuesday after the first Monday in November, A. D. 1888, and every two years thereafter, an election for members of the legislative assembly and such other offices as may be required by law to be chosen at such election, to be called the 'general election.'" Rev. St. par. 1588. "Special elections shall only be held

to fill the vacancies in the offices of members of the legislature or delegate to congress, on the proclamation of the governor for that purpose." Rev. St. par. 1589. Two kinds of elections have been established, viz. general elections and special elections. Special elections can only be held to fill vacancies in the offices of members of the legislature or delegate to congress. No other officers can be chosen at such election, and they can only be held on the proclamation of the governor for that purpose. It is further provided by law as follows: "At least thirty days before a general election and at least ten days before a special election the governor must issue an election proclamation. * * *" Rev. St. par. 1590. "Such proclamation must contain: (1) A statement of the time of election and the offices to be filled * * *." Rev. St. par. 1591. A proclamation of election is necessary in order for the holding of any election. Paragraph 1590, *supra*. It is evident from the above provisions of the statute that proclamations of elections are for the purpose of giving notice of the time and place of holding the elections. Proclamations of elections, as a rule, are considered only as notices. McCrary, *Elect.* § 26, pp. 141-151. Mr. Cooley states the rule thus: "Where, by the express provisions of the statute, the election is to be held after proclamation or notice announcing the time or the place, or both, and where no such proclamation has been made, or notice given, the election is void. But where both the time and the place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty. The right to hold the election in such a case is derived from the law, and not from the notice." Cooley, *Const. Lim.* 603. The statute provides for the holding of general elections, fixing the dates thereof, and what officers are to be elected at such elections. Paragraph 1588, *supra*. The law declares what officers are to be elected at general elections, and it is not in the power of the governor to authorize the election of an officer at such an election, unless there is such office provided by law, or to prevent the election of an officer at such election, to an office to be filled at that time, by including the office in his proclamation in the first case, and withholding it in the other. Cooley, *Const. Lim.* 603; *Foster v. Scarff*, 15 Ohio St. 532; *Dishon v. Smith*, 10 Iowa, 212.

It is provided that special elections to fill vacancies occurring in certain offices may be held "on the proclamation of the governor for that purpose." General elections occur at fixed periods, and for the election of the officers to take the places of those whose terms expire by operation of law. Special elections are held for the election of officers to places made vacant by the occurrence of some unexpected event,—something which

may occur without becoming generally known. For these reasons, notices of special elections should be given of the time, and also the purpose thereof should be stated. It is apparent that the statute requiring the words "the offices to be filled," to be in the proclamation applies more particularly to the proclamations of election for special elections. The proclamation of election in this case, *per se*, did not make it the duty of appellee to place on the ballots the name of appellant. The election was a general election, and only such officers as were provided by law could be elected at that time. The proclamation of election was only a notice of the time of such election. As this is not a contest for an office, it is not necessary that we should dwell upon this point any longer.

The only other question presented by the record is as to the length of time for which Finley was appointed. "An office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent, * * *." Rev. St. par. 3111. It is the term that becomes vacant. *Id.* "Any person elected or appointed to fill a vacancy, after filing his official oath and bond, where a bond is required, possesses all the rights and powers and is subject to all the liabilities, duties and obligations of the officer whose vacancy he fills." Rev. St. par. 3116. The person appointed to fill an office made vacant, after qualifying, possesses all the rights, etc., of the officer whose place he takes. That which is surrendered by the one is gained or acquired by the other. The one loses the office for the remaining or unexpired portion of the term, and the other acquires, by appointment, that which is surrendered. When an office becomes vacant, and there is no mode provided by the law to fill the vacancy, the governor is to fill it by granting a commission, etc. Rev. St. par. 3114. A mode for filling vacancies in the board of supervisors is provided in paragraph 388, Rev. St. Such vacancies are filled by the remaining supervisors and the probate judge, and, if there are no supervisors, then by the probate judge, recorder, and treasurer of the county. The law provides for three supervisors, two of whom are elected for terms of two years, and one for a term of four years, all being elected at the first election, and the long, or four-years, term being acquired by the candidate receiving the greatest number of votes. Provisions have been made for filling vacancies in the entire board of supervisors, two of whom have terms not to exceed two years, and one having a term not to exceed four years. It follows from the above that those whose duty it is to fill such vacancies must do so in a way that the terms of the former members of the board will be perpetuated for those terms, each term in the person of a certain individual. Otherwise it would result in confusion, and there would be no

ay to determine the time of the expiration of the terms of the individuals appointed.

We are of the opinion that on the death of Stevens a vacancy in the office of supervisor occurred for the remaining portion of his term, viz. from March 1, 1893, until January 1897; that the appointment of Finley was for the term made vacant by Stevens' death; and that no election of a successor of Finley can be had until the general election in 1906. The act of defendant in refusing to place plaintiff's name on the ballots was right, and the judgment of the district court in favor of defendant is correct, and is affirmed.

BAKER, C. J., and HAWKINS, J., concur.

Wyo. 385)

STATE v. CROCKER.

Supreme Court of Wyoming. June 10, 1895.)

JURISDICTION OF SUPREME COURT — CERTIFIED QUESTIONS—BAIL IN CAPITAL CASES—HEARING OF APPLICATION.

1. Under Laws 1868, c. 66, providing that when an important or difficult question arises in action pending in the district court the judge may cause the same to be reserved, and sent to the supreme court for its decision, and Const. t. 5, § 2, giving the supreme court a general superintending control over all inferior courts, the supreme court has jurisdiction of questions certified from the district court as to whether a person indicted for murder should be admitted to bail.

2. Laws 1890, c. 23, § 1, providing that no person under indictment for a capital offense shall be admitted to bail, is in conflict with Const. art. 1, § 14, providing that "all persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident and the presumption great."

3. Under Const. art. 1, § 14, providing that all persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great, one indicted for murder in the first degree is entitled of right to a hearing on an application for admission to bail.

4. On the hearing of the application for admission to bail by one under indictment for murder in the first degree to determine whether or not the proof is evident or the presumption great, the burden of proof is on defendant.

5. In such a case, both parties are entitled compulsory process to secure the attendance of witnesses.

Reserved case from district court, Uinta county; Jesse Knight, Judge.

Edwin S. Crocker was indicted in the district court for Uinta county for murder in the first degree. After pleading not guilty to the indictment, he filed and presented an application to be admitted to bail on the ground that the proof of his guilt is not evident, nor the presumption great. Thereupon the district judge, Hon. Jesse Knight, reserved the matter to the opinion of the supreme court upon several questions certified to be difficult and important.

Benjamin F. Fowler, Atty. Gen., Cyrus Ward, M. C. Brown, and J. C. Hamm, for

the State. Samuel T. Corn, J. H. Ryckman, and Lacey & Van Devanter, for defendant.

POTTER, J. Edwin S. Crocker stands indicted in the district court of Uinta county for the murder of Harvey Booth. The indictment charges murder in the first degree, which is a capital offense. He was arraigned, and pleaded not guilty, and was remanded to the custody of the sheriff, and is confined in the jail of said county. On April 19, 1895, the defendant made a written application to the court for admission to bail, alleging as grounds or reasons therefor that the case had been continued for the term; that such continuance was occasioned by the fact that the regular panel of the petit jury had been discharged before the finding of the indictment, and there was not sufficient time remaining of the April term within which to try the cause. Further, that he is not guilty of any offense charged in the indictment; that the proof against him in said cause is not evident, and is wholly insufficient to authorize or support a conviction for any crime or offense whatever; that there is no presumption of his guilt of any offense charged in said indictment, arising from the proof or otherwise, and that the cause is one in which the defendant is entitled to bail under section 14 of article 1 of the constitution of this state; and further, that he desires, and is able, to give bail with sufficient sureties in any reasonable sum or amount. In the application thus presented, a hearing was prayed, to the end that he might be admitted to bail. Upon the submission of the application to the district court, the judge thereof, upon his own motion, reserved the matter to this court for its opinion upon certain important and difficult questions deemed by the said court to arise upon said application. Said questions are as follows: First. Can and should the district court entertain an application for bail by a defendant, after indictment found and returned by a grand jury, charging him with the crime of murder in the first degree, when such application for bail is based upon the fact that the proof of guilt is not evident, and the presumption of guilt is not great? Second. Is an indictment found and returned by a grand jury, charging a capital offense, conclusive evidence that the proof of guilt is evident, or that the presumption of guilt is great? Third. Do the provisions of chapter 23 of the Session Laws of 1890, approved March 3, 1890, preclude the admission to bail of one charged with a capital offense in an indictment found and returned against him by a grand jury? Fourth. Are any of the provisions of chapter 23 of the Session Laws of 1890 in conflict with section 14 of article 1 of the constitution of the state? Fifth. Where one is charged by an indictment with a capital offense, alleged to have been committed January 26, 1895, do the provisions of chapter 23 of the Session Laws

of 1890 preclude the defendant from admission to bail, or should he be admitted to bail if, upon a proper hearing, and sufficient showing, it appears that the proof of his guilt is not evident, and that the presumption of his guilt is not great,—the time of the death of the deceased being admitted and conceded to be as stated in the indictment, and since the admission of Wyoming as a state? Sixth. In capital offenses, where the proof of guilt is not evident, and the presumption of guilt is not great, is bail a matter of right in the defendant, under the constitution and laws of this state, after indictment found and returned by a grand jury? Seventh. If the last question be answered in the affirmative, can and should the court, or judge in vacation, proceed, by hearing the evidence, to determine the character of the proof and the extent of the presumption, where the defendant files in the cause and presents to the court his written and sworn application, alleging, among other things: "That he is not guilty of any offense charged in the said indictment; that the proof against him in this cause is not evident, and is wholly insufficient to authorize or support a conviction for any crime or offense whatever; that there is no presumption of his guilt of any offense charged in such indictment, arising from the proof or otherwise; that this cause is one in which the defendant is entitled to bail under section 14 of article 1 of the constitution of the state of Wyoming; and that this defendant is able and desirous to give bail herein, with sufficient sureties, in any reasonable sum or amount?" Eighth. What is the proper and necessary procedure to be followed on a hearing had to determine whether the proof is evident or the presumption great upon an application for admission to bail, after indictment found, charging defendant with a capital offense? Upon such hearing, does the burden of proof rest upon the prosecution or the defendant; and are the state and the defendant entitled to subpoenas and compulsory process to secure the attendance of witnesses? Ninth. Upon the hearing of an application for bail in a capital case, after indictment, should the inquiry be limited to determining the probable degree of the homicide? Tenth. Upon such a hearing, where no dispute arises as to whether the killing was probably murder in the first degree, on the part of the person doing the slaying, but where the defendant denies all connection with the killing, may the inquiry extend to the probable connection of the defendant with the homicide as a guilty agent?

Counsel for the state, in their brief, and also upon oral argument, questioned the jurisdiction of this court to pass upon questions thus reserved. It is strenuously insisted that the statute of the territory which authorized such a proceeding conflicts with the constitution, and attempts to confer upon this court

a jurisdiction not authorized by that instrument. At the outset it should be said that it is not the desire of this court to extend, by construction, its jurisdiction, nor to assume to itself any jurisdiction not warranted by the constitution, or within the fair and reasonable meaning thereof; neither will it hesitate to exercise to the fullest extent, if necessary, the jurisdiction and powers legally conferred upon the court when required to do so by appropriate proceedings. The subject has been ably presented by counsel on both sides in exhaustive arguments seldom equaled in this court. The territorial statute of 1888 provides that when an important or difficult question arises in an action or proceeding pending before the district court in any county, the judge of the court, on motion of either party, or upon his own motion, may cause the same to be reserved and sent to the supreme court for its decision. When such a reservation occurs, the statute requires the original papers in the case to be sent to the supreme court, and that the matter stand for hearing at the next term of such court upon the papers; that upon the hearing the supreme court may remand the same, together with the original papers, to the district court for further proceedings, and the clerk of the supreme court is required to certify the order of the court to the clerk of the district court, who, it is provided, shall immediately enter the same upon the journal of the district court, and when so entered such order shall stand as the order of said district court. Laws 1888, c. 66, p. 140. It was held by the supreme court of the territory that under this statute it was indispensable to any action by that court that the question which is conceived to be difficult or important should be specially stated by the district court, and without such statement the supreme court had not power to consider any questions which may arise in the case. *Corey v. Corey*, 3 Wyo. 210, 19 Pac. 443.

In *Board of Com'rs of Crook Co. v. Rollins Inv. Co.*, 3 Wyo. 470, 27 Pac. 683, this court, in considering certain reserved questions from the district court of Laramie county, gave expression to the opinion that the statute of 1888 was not repugnant to the constitution, and was a valid and subsisting statute law of the state. In that case, however, the question of jurisdiction was not raised, or even suggested, by counsel, and, notwithstanding what is there said, we have given the matter the benefit of original investigation. It is conceded by counsel for the state that the act of 1888 was within the power of the legislature of the territory, and was in force as a law thereof; but it is urged that it did not remain in force after the admission of the state, for the reason that it conflicts with the constitution, and attempts to confer authority upon this court not permitted thereby. Section 2 of article 5 of the constitution is as follows: "The supreme court shall have appellate jurisdiction, coextensive with the state, in both

civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law." Section 3 of the same article is as follows: "The supreme court shall have original jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon the petition by or on behalf of a person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any district court of the state or any judge thereof." Counsel for the state assume that the jurisdiction or authority given to the supreme court by the statute of 1888 is original in its nature, and therefrom contend that the original jurisdiction of the court is clearly limited by the constitution to cases within which the case at bar does not come. On the other hand, counsel for defendant insist that proceedings of this character are strictly within the appellate jurisdiction of this court, as well as authorized by that provision of the constitution giving this court a superintending control over all inferior courts. The language of our constitution is not entirely similar to any to which our attention has been called. In some of the older states the constitutions respectively leave the jurisdiction of the courts to be defined by law. This is broader than our own. In others, and probably the majority, it is provided with reference to the supreme court that, except as otherwise provided in the constitution, it shall possess appellate jurisdiction only. In many a superintending control over all inferior courts is granted without modification, in others such superintending control is connected with the power to issue certain remedial writs or writs of review. In our own case and in Colorado, and possibly some others, the superintending control is to be exercised under such rules and regulations as may be prescribed by law. In the state of Michigan the supreme court was vested with a superintending control over all inferior courts, and power to issue certain writs and determine the same, and in other cases to have appellate jurisdiction only. Two cases from that state are cited by counsel for the state in support of their contention,—*Sanger v. Truesdail*, 8 Mich. 543; *Jones v. Smith*, 14 Mich. 334. No opinion seems to have been filed as a basis for the order in those cases,—at least none is reported; but it is stated that the court held that it possessed no jurisdiction over cases reserved from the circuit courts, and not involving the exercise of appellate powers. In that state there was a statute authorizing a cause, so far as neces-

sary to present the question of law, to be reserved for the opinion of the supreme court whenever any question of law should arise in any civil cause or criminal prosecution in any circuit court, which, in the opinion of the circuit judge, should be so reserved. The supreme court of that state had exercised such jurisdiction in several cases, and in one (*Bagg v. City of Detroit*, 5 Mich. 66) the jurisdiction was expressly upheld in the opinion rendered by Justice Campbell. The jurisdictional question therein raised, however, seems to have been confined to such authority in chancery causes. Judge Campbell in that case said: "When cases are reserved upon these principles, we think we have jurisdiction, and will cheerfully exercise it." With but one change in the personnel of that court the contrary seems to have been held in the two cases first above cited, and it is somewhat peculiar that, in view of the discussion and decision in *Bagg v. City of Detroit*, the later cases should not have been supported by an opinion in one or the other announcing the reasons for the apparent overruling of the former case. The Michigan cases are the only ones cited as directly in point in support of the proposition that we are without jurisdiction, although others are referred to as showing that such reserved cases do not come within the purview of appellate jurisdiction; but none of them are directly in touch with the questions before us. We respect very much the learning and ability of the Michigan court, but cannot accord so much persuasive authority to a decision even from that court, which does not afford us a knowledge of the reasons upon which it is based, as we would otherwise be inclined to do. The principal argument advanced in favor of the contention that this is not within the appellate jurisdiction is that in this class of cases no decision or judgment has been rendered in the lower court, and there is nothing to appeal from or to predicate error upon, and therefore there can be no appeal or proceedings in error. It must be confessed that the argument is not without much strength, but is it essential in all cases, to the exercise of appellate jurisdiction, that there should have been a judgment or decision by the trial court? In the exercise of such appellate jurisdiction the supreme court of the United States for many years took cognizance of and decided cases certified from the United States circuit courts in which the opinions of the circuit and district judges were divided, and without the entering of any judgment in the case below, by virtue of an act of congress authorizing it. This, too, in the face of a dissenting opinion in one case by Justice Catron, wholly based upon the proposition that the court had no such jurisdiction, as not being appellate. It was evidently not considered indispensable to the exercise of that jurisdiction that there should have been a judgment or decision upon the question. We are not able to perceive any distinction in this respect between the

act of congress and our own statute. In either case no judgment is rendered, and, if that determines whether the jurisdiction is appellate or not, then the cases under the act of congress would have been amenable to the same doctrine or contention. I think we must assume that the supreme court of the United States acted in and determined the questions certified in such cases on the ground that, although no judgment had been rendered, the cases came within its appellate jurisdiction. Indeed, in the case of *White v. Turk*, 12 Pet. 238, the whole cause having been certified up, instead of certain separate questions of law, and apparently in a case wherein there would have been no appeal from any final judgment because of the amount involved, the court said: "This certificate, therefore, brings the whole cause before this court; and, if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate, jurisdiction." And in *Veazie v. Wadleigh*, 11 Pet. 55, the same court, by Story, J., in referring to the character of the proceeding, in a case in which a discontinuance was moved by the plaintiff below, and the defendants insisted upon their right to have a decision upon the certified questions, expressed itself thus: "In construing a statute providing for such a novel mode of obtaining the decision of an appellate court upon the matters of controversy between the parties, it is not surprising that there should be some difficulty in ascertaining the precise rights of the parties." And again: "It is clear that the statute does not, upon the certificate of division, remove the original cause into this court. On the contrary, it is left in the possession of the court below for the purpose of further proceedings if they can be had without prejudice to the merits; so that, in effect, the certified questions only, and not the original cause, are removed to this court." And so it was held that, if one originally having the right to discontinue the cause in the lower court had done so, it left the appellate court with nothing to decide but abstract questions of law. Many other opinions in that court might be quoted from to further illustrate this point, but we will only cite some of the cases in which questions arising in such proceedings have been considered. *U. S. v. Gurney*, 4 Cranch, 333; *Sergeant v. Biddle*, 4 Wheat. 508; *U. S. v. Wittberger*, 5 Wheat. 76; *U. S. v. Daniel*, 6 Wheat. 542; *Willinks v. Hollingsworth*, Id. 240; *Miller v. Stewart*, 9 Wheat. 680; *Schlimmelpenich v. Bayard*, 1 Pet. 264; *Bank v. Owens*, 2 Pet. 527; *U. S. v. Randenbush*, 8 Pet. 288; *U. S. v. Chicago*, 7 How. 185; *Ex parte Milligan*, 4 Wall. 2; *Ogle v. Lee*, 2 Cranch, 33; *Adams v. Jones*, 12 Pet. 207; *Dow v. Johnson*, 100 U. S. 158-163.

A somewhat analogous question being before the supreme court of Ohio, Judge Thurman gave it as his opinion that the law might allow an appeal before judgment;

that it was not clear that there was no such thing as appellate jurisdiction unless there is a judgment or decree to be appealed from. True, the case was not decided upon that point, but the question was fully discussed in the opinion. *Chase v. Washburn*, 2 Ohio St. 99. In Wisconsin a statute was enacted by which it was provided that if, after conviction of any person in a circuit court, any question of law shall arise which, in the opinion of the judge, shall be so important or so doubtful as to require the decision of the supreme court, he shall, if the defendant desire it, or consent thereto, report the case, so far as may be necessary to present the question of law arising therein, and thereupon all proceedings in that court shall be stayed. The constitution of that state confines the jurisdiction of the supreme court to appellate proceedings in stronger language than we are bound by. The supreme court of Wisconsin has taken jurisdiction of many such questions, all before final judgment. In *State v. Fellows*, 50 Wis. 65, 6 N. W. 239, after plea of guilty of adultery, the question was certified to the supreme court whether the facts stated in the information constituted the said crime. The answer was in the affirmative, and the order of the court was that the circuit court be directed to proceed to judgment. In *State v. Goodrich*, 84 Wis. 359, 54 N. W. 577, the questions were certified upon a motion in arrest of judgment, and the questions being answered in the negative, the supreme court advised the municipal court to arrest judgment, and discharge the defendant from custody. No judgment having been rendered, and neither party appealing or grounding error upon any ruling of the lower court, that court would not have had jurisdiction if the position of counsel for the state is sound. We cannot adopt the view that this class of cases invoke any original jurisdiction in this court. No process issues from this court, no pleadings are filed here, no judgment is rendered by us. It may be doubtful if the provision of section 3 of chapter 66 of the Laws of 1888, that our order shall stand as the order of the district court when entered on its journal, is now proper; but it has not been the custom of this court to regard that provision. In all cases we have either confined ourselves to an answer merely of the questions certified, or advised or directed what order the lower court should make. If, in any case, we have overstepped that custom, it has been an inadvertence. On the other hand, we are unable to avoid the conclusion that such cases come within the appellate jurisdiction of this court. Beyond that, however, the constitution grants to the supreme court a superintending control over all inferior courts under such rules and regulations as may be prescribed by law. Why may not the legislature, under this clause, well authorize such superintending control

to be exercised in important and difficult matters in the manner provided for by the statute of 1888? It seems to us that there is neither impropriety nor invalidity in so doing. The advantages of such a proceeding are well shown in an opinion of the supreme court of Connecticut. *Nichols v. City of Bridgeport*, 27 Conn. 459. Referring to a similar statute of that state, the court say: "It was adopted for the purpose, among others, * * * for the benefit of its suitors by procuring in that mode in advance the opinion of this court on questions of difficulty or importance which might otherwise, after the final determination of a case, be brought before us by a writ of error, and thus settling at the earliest practicable period points arising on the trial of the case, or in the previous stages of it, which otherwise could be reviewed only by writ of error, and where the reversal of the decisions on them would be attended with great, and, as the event would prove, useless, delay and expense, already sustained, in addition to that which would be afterwards incurred by another trial of the case. A reference to a case reserved for the opinion of this court on a demurrer to a declaration at law or bill in equity, or on facts specially found by the court or jury, or on a motion for new trial for alleged errors in the rulings or charge of the superior court, will at once suggest other and very great advantages, which it is unnecessary to specify, attending the practice of reserving questions for our advice." We quote from that case, not because it is an adjudication supporting our conclusion, because in that state the legislature has constitutional authority to define the jurisdiction of the various courts, but as nicely expressing the benefits which may generally accrue from such a mode of proceeding. Should this privilege at any time be abused, we apprehend this court or the legislature can easily remedy the same. We therefore conclude, upon this branch of the case, that this court has jurisdiction of this matter, under the provisions of the statute of 1888, and that such jurisdiction is permitted by the constitution.

We now come to a consideration of the questions reserved for our decision. The constitutional right to bail is granted by the provisions of section 14 of article 1, as follows: "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." The right to furnish bail with sufficient sureties, then, arises in favor of any person accused of crime, and before conviction, absolutely and without exception in cases of all crimes not punishable with death; and in capital cases when the proof is not evident, or the presumption not great. This much, at least, is clear, and is apparently conceded. It is ably insisted, however, that after indictment found it is conclusive that the proof is evident, and that

the presumption of guilt is great, so far as the question of admitting to bail is concerned. This, we understand, is contended for as a general principle, and a statute of the territory of Wyoming, enacted in 1890, is also invoked to sustain this claim. "All offenses shall be bailable under the laws of Wyoming, by sufficient sureties, except capital offenses, when the proof is evident or the presumption great. Provided, that no person shall be admitted to bail after an indictment has been found against him charging a capital offense." Laws 1890, c. 23, § 1. If the legislature of the state has the power to so provide after indictment is found charging a capital offense, then the statute is in force, and would control; if that authority is not possessed by our legislature now, the law of the territory does not remain of binding force, because it is clear that the constitutional provision is self-acting, conferring an absolute right, so far as it goes; and, if the statute is in force to its full extent, and is controlling, it would deny bail to the defendant in the case at bar, he being charged by indictment with a capital offense. May the legislature so control the courts as to exclude any consideration of the actual, evident character of the proof, or the actual greatness of the presumption of guilt, when an indictment charging the offense has been found by a grand jury? When the statute of 1890 was enacted, our only mode of presentment for crime was by indictment found by a grand jury. Pursuant to constitutional authority since the admission of the state into the Union, the legislature has authorized prosecution for crime upon information filed by the prosecuting attorney, and a grand jury is only called upon order of the court, and we know that in practice this is now done only in exceptional cases. An information filed, charging a person with a capital offense, would not, either under the constitution or statute, preclude the right to bail, unless the proof is evident or the presumption great. Regardless of the distinction made by statute, which created no distinction when adopted, is there any such greater sanctity surrounding the presentment of a grand jury than a prosecution by information? We apprehend none such exists, and that no such distinction is recognized by the constitution or laws since enacted, changing the mode of prosecuting for crime. Whether it is indictment or information, the prisoner in each instance is charged with the same crime, and he enjoys the same rights and privileges as to trial. The same presumption and protection are thrown around him upon the trial. The sole purpose subserved by either is to bring the accused properly to the bar of the court to answer and stand trial upon the accusation. So far as the two methods are concerned, the accused, in the event that he is charged by information, is generally given a preliminary hearing before a magistrate, when he may be present, be confronted with the wit-

nesses against him, introduce testimony on his own behalf if he desires, and have the merits of the charge presented to the magistrate by counsel on argument. In case of indictment he is not heard, he is not confronted by the witnesses against him, he is not represented by counsel. The magistrate, on the one hand, is chosen by the people to serve a term of years, and to officiate in all such cases. On the other, the grand jury are now selected by the sheriff under an open venire, who sit only during one term of court, and hold secret sessions. True, there is no subsequent secrecy thrown around the testimony adduced before them, under our laws, as their subsequent secrecy is disclosed by their oaths to be to keep secret the counsel of the state, their fellows, and themselves. Their deliberations are secret, and must not be disclosed. Neither are they to disclose the fact of indictment found until after arrest of the accused. The testimony they have heard may be disclosed in a proper case, if necessary. Under our system, we are loath to believe that any inherent reason exists for denying any right after indictment which is possessed in case of an information. The grand jury does not determine, and are not clothed with the power to decide, the question of bail in any case. The court or judge is to exercise that power in all cases. Necessarily then, the authority which fixes the bail, and who is to settle that matter, must determine the right to bail. That authority, then, must decide, and in that authority alone resides the duty and right to decide, as to whether or not the proof is evident or the presumption great. Is this to be determined for the court in all capital cases by a grand jury, generally unskilled in the law, incapable of judging as to the materiality or admissibility of testimony? We cannot so conclude. No doubt the finding of an indictment is prima facie evidence that the proof is evident and that the presumption is great, and, if not so, the legislature may well so provide, thus throwing the burden of proof upon the defendant to establish the contrary. To this extent the statute is certainly a valid law. Can the lawmaking power go further, and make any particular method of presentment for crime a conclusive element in determining the right to bail? If it can assume that authority in capital cases, why not with the same propriety and legality extend it to the case of any other felony after indictment? Does the fact that a question of proof or presumption arises in the one case and not in the other involve any distinction upon principle? We think not, if, as it seems entirely clear to us, a constitutional right to bail exists in either case,—in the one case absolutely without proof, in the other just as absolutely if the proof is not evident, or the presumption not great. At common law it was within the discretion of the magistrate, judge, or court to allow or deny bail in all cases, and was usually denied in cases of

felony punishable by death. This has been so changed by the state constitutions in this country generally, as well as by our own, so as to give bail as a matter of right in those cases where it is allowable. This was even asserted in the case of *People v. Tinder*, 19 Cal. 539, although in that case the right to bail in a capital case after indictment was denied. The opinions of Justice Field, who announced the decision of the court in *Tinder's Case*, are entitled to very great consideration. The course of his reasoning in that case, however, is hardly applicable to our conditions, and under our rules of procedure before grand juries. Reviewing a similar constitutional guaranty, he adverted to the fact that under their statutes an indictment was more than a mere accusation; that the grand jury were expressly required to receive "none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence"; and "that it is their duty to weigh all the evidence submitted to them, and, when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced"; and "ought to find an indictment when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained or contradicted, warrant a conviction by the trial jury." And the learned judge adds: "Such being the case, an indictment is something more than a mere accusation based upon probable cause; it is an accusation based upon legal testimony, of a direct and positive character, and is the concurring judgment of at least twelve of the grand jurors." The California case is supported also by the case of *Hight v. U. S.*, 1 Morr. (Iowa) 410, and possibly in one or two other states, where it does not clearly appear, however, a constitutional provision like our own exists. A contrary view is held in Alabama, Arkansas, Colorado, Florida, Illinois, Indiana, Mississippi, Nevada, Ohio, South Carolina, and Texas. In many, if not, indeed, in all, of those states, the constitution or statutes give the right to bail in language very like or entirely similar to the provisions of our constitution. The doctrine announced in California as applicable generally under such a constitutional guaranty is repudiated, and the view is held that the indictment furnishes presumptive evidence only of the guilt of the accused, and does not conclusively establish that the proof is evident, or the presumption great. The great weight of authority, therefore, unquestionably sustains this latter proposition; and the reasoning upon which it is supported appears to us entirely sound. In *re Losasso* (Colo. Sup.) 24 Pac. 1080; *Lumm v. State*, 3 Ind. 293; *Lynch v. People*, 38 Ill. 494; *Ex parte Wray*, 30 Miss. 673; *Schmidt v. Simmons* (Ind. Sup.) 36 N. E. 510; *State v. Simmons*, 19 Ohio, 139; *Ex parte Finlen*, 20 Nev. 141, 18 Pac. 827; *Ex parte Bryant*, 34 Ala. 270; *Ex parte Banks*, 28 Ala. 89; *Ex*

parte Good, 19 Ark. 410; Ex parte Kittrel, 20 Ark. 499; Ex parte McAnally, 53 Ala. 495; Yarbrough v. State, 2 Tex. 519; Street v. State, 43 Miss. 1.

It must be borne in mind that our laws are intended to be framed upon the humane idea that no man is to be punished until he has been convicted; that an accused is only confined in jail before trial and conviction to secure his presence at the trial, and, if convicted, that he may be compelled to undergo sentence; that, however, if by sureties his presence can as well be secured, it is deemed wise and just that he shall, until trial and conviction, be allowed his liberty, except in capital offenses, where the proof is evident or the presumption great, in which cases it is deemed that the offense is so grave it is not safe to allow the presence of the accused to be secured by bail. If, then, taking the constitution alone, an indictment found would not of itself preclude the right to bail in capital cases, is the statute prevailing in that respect? We have already commented upon this question to some extent. This court held in the case of *In re Boulter* (Wyo.) 39 Pac. 875, that the constitutional right to bail extended to a person until conviction, and not after. We were then considering a case other than capital. So far as, and in the cases wherein, the right is given by the constitution, we think the time during which bail is to be allowed is the same in all cases, in capital as well as other felonies, the only difference being that in the former the right only exists when the proof is not evident, and the presumption not great. Until conviction, then, under the constitution, all persons are bailable, without exception in all felonies, other than capital, with the sole exception already stated in capital cases. The statute is not to be construed as merely providing that an indictment shall be conclusive evidence of the evident proof or great presumption. It does not so state. That part is contained in a proviso, which is preceded by the provision similar to the one found in the constitution allowing bail in all cases except capital, where the proof is evident, or the presumption great; but it adds: "Provided, that no person shall be admitted to bail after an indictment has been found against him charging a capital offense." This, then, is an exception to the preceding provision of the statute. It unquestionably thus provides that, after indictment found, whatever may be the proof, whether evident or not, whatever may be the presumption, whether great or otherwise, no bail shall be permitted. This is the construction which we think must be given to the statute. It must be manifest that such a law is restrictive of the constitutional right. It entirely disregards, in case of indictment, the only exception to the right to give bail embraced in the bill of rights. In our opinion, therefore, the statute, instead of attempting to render a certain fact conclusive evidence of

the proof or presumption which excludes the right to furnish bail, clearly denies bail under certain circumstances stated, in utter disregard of the nature or effect of the proof or presumption. To this extent the legislature cannot go. Suppose, however, we take the other view, viz. that the statute in effect but constitutes the finding of an indictment conclusive that the proof is evident and the presumption great. It is clearly within the authority of the legislature to say that the indictment shall be taken as *prima facie* evidence of such facts. We very sincerely question its power to go further, and make it conclusive evidence. We understand the rule to be, even with respect to civil rights, that the legislature cannot make certain facts conclusive as evidence (Cooley, Const. Lim. 450); and much less, it seems to us, can it declare in a criminal proceeding that a certain fact, such as an indictment found, shall be conclusive against the prisoner when he seeks to obtain the benefit of a right granted him by the constitution, and prevent or entirely preclude him from asserting and proving the contrary. As the constitution is supreme, and neither the legislature nor the courts can disregard it, and as the rights which it guarantees to the people were intended to be and should be upheld, we have, in view of this and all the foregoing considerations, arrived at the conclusion that, notwithstanding the statute, a person charged with a capital offense by indictment is bailable, unless the proof is evident, or the presumption great.

Answering the questions submitted for our decision, therefore, we say:

To the first question: The court can and should entertain an application for bail by a defendant, after indictment found and returned by a grand jury charging murder in the first degree, when such application is based upon the fact that the proof of guilt is not evident, and the presumption of guilt is not great.

To the second question: An indictment is not conclusive evidence that the proof of guilt is evident, or the presumption great, in an application for bail in a capital case. It is, however, *prima facie* evidence thereof.

To the third, fourth, and fifth questions: In so far as chapter 23 of the Session Laws of 1890 attempts to forbid bail after an indictment, regardless of whether or not the proof is otherwise evident, or the presumption of guilt otherwise great, it is in conflict with section 14 of article 1 of the constitution; and in such case, as stated in the fifth question, if upon a proper hearing and sufficient showing it appears that the proof is not evident, or the presumption not great, under the rules hereinafter stated the accused should be admitted to bail in such sum as, considering the gravity of the offense charged, will, in the judgment of the court or judge, procure his attendance and presence for trial.

The sixth question must be answered, under our conclusions stated in this opinion, in the affirmative, if, upon a hearing, the court concludes that the proof is not evident, and the presumption is not great.

To the seventh question: Upon the facts therein stated, we give an affirmative answer.

To the eighth question: The burden of proof is upon the defendant, and both parties are entitled to compulsory process to secure the attendance of witnesses. The method of procedure will readily suggest itself to the court under the principles announced in this opinion.

To the ninth and tenth questions: No; the inquiry should not be limited to determining the probable degree of the homicide. Such inquiry may, and properly should, include the determination of the evident character of the proof, or the strength of the presumption, respecting whether or not the defendant did the killing, or was connected with it as a guilty agent.

We think that the best rule in ultimately determining whether the prisoner should be admitted to bail or not is that bail should be refused in all cases where a judge would sustain a conviction for murder in the first degree if pronounced by a jury on such evidence of guilt as is exhibited on the hearing for bail, and where the evidence is of less efficacy to admit to bail. In addition, it should be said, the indictment, while not of itself conclusive against the right to bail, may be taken into consideration by the court, together with the evidence in determining the question of admission to bail. It may, in a doubtful case, have the effect of turning the scale. It should not be entirely ignored, but it is a circumstance, like any other, to be taken into consideration for whatever effect, in the light of the other facts, and together with them, it may have upon the mind of the court or judge.

GROESBECK, C. J., and CONAWAY, J., concur.

(21 Colo. 309)

BROWN v. WILSON et al.¹

(Supreme Court of Colorado. Dec. 5, 1894.)

QUIETING TITLE—WHO MAY SUE—DEFECTIVE ATTACHMENT LEVY—LACHES—NOTICE.

1. Where one out of possession has only an equitable title to land, an action may be brought by him against one in possession under a legal title, for the purpose of trying the title.

2. The grantee of a trustee, who has purchased property at a foreclosure sale of a trust deed to secure bonds, will be estopped from claiming that an execution sale of the property as that of the original owner, under a judgment in attachment which became a lien on the property prior to the execution of the trust deed, is void for want of proper service in the attachment suit, where the trustee and some of the bondholders knew of such irregularity in the

service for many years, without seeking to avoid the sale, while the purchaser on execution was in possession, making improvements, and defending suits involving the title.

3. Knowledge of facts rendering an execution sale void, obtained by an attorney while acting professionally for the judgment creditor, cannot be imputed to one who subsequently becomes a partner of the attorney in the purchase of the property.

Error to district court, Arapahoe county.

Action by C. C. Brown against Alfred H. Wilson and others, for trespass, and to remove cloud upon title. From a judgment for defendants, plaintiff brings error. Affirmed.

Two causes of action are stated in the complaint. In the first it is alleged that on June 23, 1883, plaintiff, Brown, was, and ever since that time has been, seised in fee, and legally entitled to the possession of certain mining property in Park county, Colo. This allegation is followed by a description of the property. Plaintiff avers that while so seised and possessed the defendants, without right or title, entered into possession of the premises, and ousted and ejected plaintiff therefrom, etc. The second cause of action is in the nature of a bill in equity to remove a cloud upon plaintiff's title upon the premises. There is no dispute upon the facts, which, so far as the present controversy is concerned, may be stated, in brief, as follows: The Great West Mining Company was the owner and in possession of the property on and before January 18 and 19, 1883, the property at the time being unpatented mining claims. Upon the dates mentioned two suits of attachment were brought against the company, and writs of attachment were duly levied on its property, real and personal, including the premises now in controversy. One of these suits was instituted by John T. Perkins, and the second by James Moynahan. On the 15th day of February, 1883, and after the levy of these writs of attachment, the Great West Mining Company executed a deed of trust to one James M. Strickler to secure the payment of a proposed issue of \$50,000 in bonds. The bonds thus provided for were afterwards issued, and a part thereof sold. On or about the 24th of April, following, judgments were entered in both the Perkins and Moynahan cases in favor of the plaintiffs. These judgments aggregated something over \$3,000. Executions having been duly issued upon these judgments, the property was levied upon and sold under such executions in September, 1883. At this sale the property was bid in by Gwynn and Moynahan, and certificates of purchase were executed by the sheriff. At this time one Purmort was working the property as lessee of the Great West Mining Company. In November, 1883, Purmort was enjoined in a suit by Gwynn and Moynahan. The defendants in this suit were the Great West Mining Company, as owners, and Purmort, as lessee; and these facts were immediately made known to Kellogg and Whitaker, officers of the Great West Mining Company. After this time no work was done, or

¹ Rehearing allowed, and former judgment adhered to, May 20, 1895.

attempted to be done, by the Great West Mining Company, for some years. In June, 1884, sheriff's deeds were issued to Gwynn and Moynahan, under their purchase. Upon receiving these deeds the grantees took possession of the property, as owners. They continued in possession and worked the same until December, 1884, when they sold the property to Alfred H. and Randall W. Wilson for the sum of \$8,194. This amount was paid by the Wilsons, who were, in turn, admitted into the possession of the property. In April, 1885, the Wilsons conveyed to the Woodmas of Alston Mining Company. Thereupon this company immediately entered into possession of the property, and continued in such possession to the time of the trial in the district court of the present action. About this time one Bates claimed an interest in the property, and brought suit against the Wilsons to enforce his claim. In that suit a receiver was appointed. Thereafter, another suit was brought by one Whitaker, a holder of some of the bonds secured by the Strickler trust deed. Both of these suits were decided in favor of the defendants in June, 1886. Afterwards a similar suit was brought by one Needham and others in the United States circuit court for the district of Colorado, with like result. It also appears that as early as April, 1882, the Great West Mining Company became indebted to one Duncan McBride in the sum of \$3,000, and to secure this claim it executed a note for this amount, and secured the same by deed of trust upon the property in controversy; that upon default in the payment of this claim the property was sold under foreclosure, and bid in by McBride; that afterwards the amount of the McBride judgment was paid by defendants. Among other suits brought to set aside the judgments and sales made in the attachment suits instituted by Perkins and Moynahan was one by the Great West Mining Company v. the Woodmas of Alston Mining Company et al. In this suit a full hearing was had, and judgment rendered in favor of the defendants. This judgment was reversed by this court, and the case remanded. See 12 Colo. 46, 20 Pac. 771. After this case reached the district court a change of venue was taken to the district court of Arapahoe county, and a new trial had; the evidence taken at the previous trial being used, and much new evidence given. This trial resulted in a judgment in favor of defendants, and another appeal was taken by the Great West Mining Company to this court. Upon this appeal it was determined that the Great West Mining Company had been guilty of such laches as precluded it from maintaining the action, and the judgment of the district court was accordingly affirmed. See Great West Min. Co. v. Woodmas of Alston Min. Co., 14 Colo. 90, 23 Pac. 908. Upon the two appeals in this court four written opinions were filed. In these the facts are fully set forth, and also the law applicable to the case, in its various

phases, as then presented. Nothing was done in the Needham Case during this time, but, after the final decision of the Great West Cases, in this court, that suit was revived, and an amended complaint filed. To this complaint a demurrer was interposed and sustained, and the cause dismissed. Brown, the plaintiff in the present action, derives his title as a purchaser at a sale made by Strickler under a decree of foreclosure upon the deed of trust to the latter. He sets up the irregularities occurring in the Perkins and Moynahan suits, and the sales made thereunder. The only additional facts disclosed in this record are that, pursuant to the decree of foreclosure, the property was sold to the plaintiff, Brown, for the sum of \$150, and that, before the bringing of this suit, patents had been obtained by the defendants from the United States for all the property in controversy. The district court, upon the pleadings and evidence, found that the sales made as a result of the attachment suits might have been avoided by the Great West Mining Company, if it had moved in time, but that this right had been lost by laches; that the sales were not absolutely void, but that the present defendants in error had a perfect record title to the property, as the liens of the attachments had priority over the lien of the Strickler trust deed; that no fraud had been shown to vitiate defendants' title. The complaint was accordingly dismissed. To reverse this judgment the plaintiff brings the case here upon error.

H. B. Johnson and J. M. Washburn, for plaintiff in error. Hugh Butler, for defendants in error.

HAYT, C. J. The fee-simple title to the property in controversy being in the defendants, by patent from the United States government, the plaintiff cannot recover upon his first cause of action unless he succeeds in establishing the second. A recovery upon the second cause of action was denied by the district court for the reason that in the opinion of that court a lien was established against the property by the attachment proceedings, having priority over the lien created by the trust deed. In this court objection is made to the sufficiency of the second cause of action upon the ground that the plaintiff, being out of possession, cannot maintain the action, under the Code provision with reference to determining an adverse claim, estate, or interest in the property. It has been held, however, by this court, after careful consideration, that, where one out of possession can assert only an equitable title, he may have his equitable remedy. Bank v. Newton, 13 Colo. 245, 22 Pac. 444; Mulock v. Wilson, 19 Colo. 296, 35 Pac. 532. In this suit, as in the previous ones, it is urged by plaintiff in error that the Perkins and Moynahan judgments were void because there was no proper service upon the Great

West Mining Company. This question was, however, put at rest by the last opinion filed in the case. It is there said: "As a rule, a judgment of a court of general jurisdiction is not void unless it appears from the record itself that the court, in pronouncing it, acted without jurisdiction. A judgment rendered without bringing the defendants into court is not for this reason void, but voidable only, unless the failure to obtain jurisdiction over them appears from the record. That this distinction has been kept constantly in mind by this court is quite apparent from the qualification expressed in each instance in which the judgments are alluded to in the former opinions of this court as being 'absolute nullities,' under certain conditions. The proceedings being regular, upon the record, the judgments can only be avoided upon extraneous evidence." *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 14 Colo. 90, 103, 104, 23 Pac. 908. And it was held that plaintiff had been guilty of such laches as precluded it from introducing such evidence. It is to be borne in mind that the record shows personal service in the one case, and appearance by attorney in the other; and, as the same evidence upon the question of the character of the judgments is now before us as in the former case, the conclusion in this case, as in that, must be that the judgments are not absolutely void. This result necessarily follows, irrespective of any question as to whether or not the former decision is *res adjudicata* in this case.

Has the present plaintiff the right to contest these judgments rendered against his grantor, the grantor itself having forfeited and lost the right by reason of its laches? In the *Great West* Case the plaintiff was shown to have had notice of the fraud complained of for a little more than two years before instituting suit, and it was held, for this reason, that the courts should refuse relief. The laches that will bar a recovery in a particular case depend, to a large extent, upon the character and nature of the circumstances surrounding the transaction. Where the subject-matter of the litigation is unpatented mining property, purely speculative in value, the necessity for prompt assertion of title has always been recognized by the English and American courts. See *Great West Min. Co. v. Woodmas of Alston Min. Co.*, *supra*, and cases cited. In this case both the trustee and the bondholders, as it is claimed, were chargeable with laches, with full knowledge of all the facts, which should preclude a recovery. From the record it appears that one McBride commenced a suit as early as 1884 to subject the property to his claim. In that suit, Strickler, the trustee for the bondholders, was made a party, and, in his answer, admitted that McBride had a prior lien, and consented to a decree for complainant. *McBride v. Gwynn*, 83 Fed. 402. And this constitutes one of the sources of title under which defendants now hold.

Nothing more was attempted by the trustee until 1892, when he commenced a foreclosure suit upon his trust deed. In this suit he obtained a decree of foreclosure, but, as the deed gave him power to sell, the suit was unnecessary. During all these years the interest upon the bonds was in default, and, by the terms of the trust deed, the trustee was authorized to sell for any failure to pay the interest as it fell due, and yet for eight years he allowed the matter to rest. During this time the defendants defended many suits involving the title to the property, procured patents from the United States, and by an expenditure made by them and their grantors the mine was reclaimed from its worthless condition, and put upon a paying basis. At one time a block of these bonds of a par value of \$10,000 was sold for about \$3,000, and the money used to prosecute the suit instituted by the *Great West Mining Company* against the *Woodmas of Alston Mining Company*. The facts upon which plaintiff now relies to impeach the judgment and sales were well known to all parties as early as 1884, and in 1886 Whitaker brought suit on behalf of himself and other bondholders, setting up these facts, and made application for an injunction against the defendants, and for the appointment of a receiver. In these applications he was defeated, and thereupon abandoned the suit. In the same year a similar suit was brought by William Needham and other bondholders, in the circuit court of the United States in and for the district of Colorado, against the defendants. 47 Fed. 97. In this suit the issuance of bonds aggregating the sum of \$50,000 was alleged to have been made by the *Great West Mining Company* on or about the 15th day of February, 1883; that the same were secured by trust deed upon the property in controversy; that said Needham and others were the owners and holders of said bonds. It was further alleged that the judgments rendered in favor of Gwynn and Moynahan, and the sales made thereunder, were fraudulent and void. The plaintiffs prayed that such judgments and sales be declared fraudulent and void, and for an accounting. Various proceedings were had in that suit, but the suit was finally dismissed some time in 1891. It is alleged, however, that the bondholders could not be guilty of laches until after the principal of the bonds fell due, and that laches cannot be imputed to them unless they failed to act within a reasonable time thereafter. We do not think this contention is well founded, when applied to the facts in this case. Defendants have a perfect record title to the property. No fraud is shown upon their part. The title dated back, and took priority to the issuance of the bonds in question. As we have seen, the property conveyed was unpatented mining property, purely speculative in value. The purchasers made the property valuable, as the result of their hazard and enterprise.

and as soon as the value had been established their title was contested, to an extent that is seldom paralleled. For 10 years they have been called upon to defend their title against a multitude of claimants, attracted by the value given the property as the result of the enterprise and expenditure of defendants and their grantors, and eventually procured patents to the property from the United States. The litigation was notorious, and the facts now relied upon must have been within the knowledge of all the parties. Under these circumstances, it would be unjust and inequitable to allow the plaintiff to maintain this action. In the original suit brought by the Great West Mining Company, a period of delay of less than two years was held sufficient to bar a recovery. Under the most favorable view of the evidence, the plaintiff in this suit had been guilty of a delay of six years, and, under a view which the evidence warrants, he has been guilty of delay for a much longer time. The Great West Case was cited with approval in the recent case of Johnston v. Mining Co., 148 U. S. 380, 13 Sup. Ct. 585; and in speaking of the necessity of diligence in actions of this character, involving the title to mines, where the property has been developed and its value established by the enterprise of others, the court says: "Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require, not only clear proof of fraud, but prompt assertion of plaintiff's rights." The delay that barred a recovery in that case was trivial, compared with that in this case. In fact, a stronger case for the interposition of the doctrine of equitable laches can seldom be found. The judgment of the district court will be affirmed.

Affirmed.

On Rehearing.

(May 20, 1895.)

PER CURIAM. Although the argument of senior counsel in this case in support of the petition for rehearing is not characterized by that courtesy which always should, and, to the credit of the bar of this state be it said has, with rare exceptions, characterized the conduct and arguments of members of this bar, the prayer of the petitioner was granted, in order that the court might review the record for the purpose of ascertaining if any injustice had been done plaintiff in error by the former opinion of this court. The controversy over this property has been waged for a period of more than 10 years, and has been reviewed by this court upon several occasions. To restate the facts would be a work of supererogation. Every fact bearing upon the rights of the parties appearing from the pleadings, or which the evidence tends to establish,

will be found stated in some one or more of the opinions or statements of fact preceding the various opinions which have been heretofore announced, and we shall not do more than refer to the cases, with the volumes and pages where the same may be found. *Grat West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 55, 20 Pac. 771; *Id.*, 14 Colo. 90, 98, 23 Pac. 908.

It is claimed for the first time upon this rehearing that the Wilsons had implied notice at the time of their purchase of the true character of the service in the Purmort case, and appearance by an unauthorized attorney in the Moynahan case. The argument in this behalf is based upon notice to Bates from Gwynn, communicated, as it is said, to Bates, in his professional capacity, as attorney; it having been adjudicated in another action that the transaction between Bates and the Wilsons constituted them mining partners, with reference to this property. This claim cannot be sustained, as Bates was acting as attorney for Gwynn at the time he received notice of the character of the judgments and sales, and before he was engaged by the Wilsons. If it be conceded that Bates had information, as claimed, there is no evidence that he ever communicated such information to the Wilsons, and it would have been of doubtful professional propriety on his part to have done so. Under these circumstances, notice cannot be imputed to the Wilsons. Moreover, there is nothing before this court in this case to establish a partnership relation between Bates and the Wilsons. *Wade, Notice*, § 692; *McCormick v. Wheeler*, 36 Ill. 114.

Counsel contend that there is an irreconcilable conflict between the following statements, the first appearing in the opinion of Mr. Justice Gerry, at page 49 of 12 Colo., and page 771 of 20 Pac., and the other in the opinion recently filed by this court, to wit: "The mining property described in the complaint, and the subject-matter of this suit, has been worked by the appellees, and a large amount of ore extracted therefrom; and they have derived, in profits, an amount largely in excess of the amount of the judgments in question." "The purchasers made the property valuable, as the result of their hazard and enterprise, and, as soon as the value had been established their title was contested, to an extent that is seldom paralleled." The two statements are entirely consistent, and both are supported by the record. It is undisputed, and indisputable, by the record, that the mines were being worked at a loss at the time of the attachment levies. It is equally certain that afterwards they were made valuable. If this change was not brought about by the expenditure and hazard of plaintiffs and their grantors, who did put the properties upon a paying basis?

It is said that the suit instituted by the

men employed at the mine was a friendly suit, set on foot at the instance of the company; that this suit was afterwards turned into a hostile suit; and that the court has never alluded to this fact. In this statement, counsel is in error as to the court. See page 93 of the opinion in 14 Colo., and page 908, 23 Pac. In addition to what is there said as to the effect of that judgment, the suit never was other than a hostile suit, the suggestion made by Kellogg being for the purpose of giving the men an opportunity to place a first lien upon the property before Moynahan could institute suit. The men did commence suit, and caused an attachment to be levied upon the property, prior to the lien of the trust deed, and the title secured under the attachment sales antedates that obtained by the proceedings and sales under the trust deed. The suit was instituted as a hostile suit against the company, and was maintained and prosecuted to final judgment as such.

It is claimed that under the decision in *Raynolds v. Ray*, 12 Colo. 108, 20 Pac. 4, no attachment lien was ever perfected, for the reason that no service was had upon the defendant company in either the Perkins or Moynahan suits. The record shows personal service in one case, and appearance in the other; and it has been decided, as the result of protracted litigation, that the Great West Mining Company, by its negligence and laches, lost its right to impeach the validity of the judgments by extraneous evidence. Plaintiff in error claims under the Great West title, and is estopped by that judgment. *Bigelow, Estop.* 587; *Wood v. Seely*, 32 N. Y. 105; *Parker v. Crittenden*, 37 Conn. 148; *Bank v. Bowen*, 80 Ill. 541. The Perkins and Moynahan suits were instituted nearly a month before the Strickler trust deed was executed. Strickler knew at the time he accepted the trust deed that there were prior liens, by attachment, upon this property; and, if he had information that the service was incomplete in one or both of the cases, he knew that under the law the service might be perfected, or an appearance entered by the defendants, and that the same could be followed by a valid judgment, which would relate back to the levy of attachment, and convert the same into a valid lien. *Raynolds v. Ray*, supra. Aside from this, it is shown that the present suit is being prosecuted in the interest of Whitaker, Washburn, Griffith, Pomeroy, and others, who were active in the prosecution of the suits instituted for the same purpose by the Great West Mining Company. It is further shown that the bonds secured by the trust deed to Strickler were sold, in part, at least, for the purpose of procuring money for the purpose of prosecuting that suit. This is shown by the evidence of the witness Whitaker, who, upon being interrogated as to the reason why \$10,000 of these bonds were sold for the sum of \$3,-

000, said: "Q. Par? A. Oh, no; they got bonds 51 to 90, inclusive, for three thousand dollars. As this money was to go into the litigation, of course, we could not sell them at par." The evidence leaves no doubt that Whitaker, Purmort, Washburn, and Griffith caused the Great West suit to be instituted, and that the bondholders who purchased after that time purchased at a heavy discount, for the purpose of providing funds for carrying on that litigation, and are, for this reason, bound by that judgment. *Hurd v. McClellan*, 1 Colo. App. 327, 29 Pac. 181, affirmed in 21 Colo. —, 40 Pac. 445; 1 *Herm. Estop. and Res Judicata*, §§ 156, 186. As we have said, the title of defendants in error relates back, and takes effect from the time of the levy of the writs of attachment. It antedates the trust deed; hence the decisions that have been cited to show that the record of the trust deed is notice to subsequent purchasers and incumbrancers are not applicable. And cases in reference to forged instruments, like *Meley v. Collins*, 41 Cal. 663, are not in point, for the manifest reason that the title set up by the Great West Company to the properties has been conclusively adjudged against that company, in favor of the Wilsons and the Woodmas of Alston Mining Company. For these reasons, in addition to those given upon the former opinion, the judgment of affirmance must be adhered to. Judgment affirmed.

(21 Colo. 272)

CRAWFORD, to Use of TAYLOR, v.
BROWN.

(Supreme Court of Colorado. June 3, 1895.)

APPELLATE JURISDICTION OF SUPREME COURT —
PAROL INSTRUCTIONS—COMMISSIONS FOR
SALE OF LAND.

1. Under Const. art. 6, § 23, providing that writs of error shall lie from the supreme court to every final judgment of the county court; and Laws 1891, p. 121, § 15, providing that writs of error from the supreme court shall lie to review every final judgment of the court of appeals in cases which, under this act, might have been taken to the supreme court in the first instance,—the supreme court does not lose jurisdiction to review a final judgment of a county court because of a review had in the court of appeals.

2. Code, § 187, subd. 6, providing that instructions shall be given in writing before argument, does not allow the giving of parol instructions, though the same be taken by a stenographer, and afterwards transcribed, and given to the jury on retiring. 29 Pac. 1137, affirmed.

3. Where a third person, after agreeing to improve and sell defendant's lots and with the proceeds pay for the lots, agreed to pay plaintiff a commission for making the sale, defendant is not liable for such commission.

Error to court of appeals.

Action by R. J. Crawford, for the use of D. G. Taylor, against Charles E. Brown. From a judgment of the court of appeals (29 Pac. 1137) reversing a judgment in favor of plaintiff, the latter brings error. Affirmed.

G. F. Dunklee and O. E. Jackson, for plaintiff in error. D. G. Taylor, pro se. C. E. & F. Herrington, for defendant in error..

HAYT, C. J. This action was commenced in a justice's court by Crawford, the plaintiff in error, as plaintiff. The trial to the justice resulted in a nonsuit. From this an appeal was taken to the county court. In the county court a jury trial was had, which resulted in a verdict and judgment in favor of the plaintiff, Crawford, and the defendant, Brown, sued out a writ of error from the court of appeals. As the result of a review in that court, the judgment of the county court was reversed. See *Brown v. Crawford*, 2 Colo. App. 235, 29 Pac. 1137. The case comes here by writ of error to the judgment of the court of appeals.

In this court a question has been mooted in reference to the jurisdiction of the court. This must be settled in favor of our jurisdiction. When the court of appeals was created the legislature was prevented from passing an entirely harmonious act, so far as jurisdiction is concerned, by reason of the following provision of the constitution: "Writs of error shall lie from the supreme court to every final judgment of the county court." Const. art. 6, § 23. Under this constitutional provision the legislature perhaps had the power to provide that, in cases taken from the county court to the court of appeals, and determined by the latter court, writs of error and appeals to the supreme court should only lie as in other cases; but we are not called upon to, and we do not, pass upon this question. It is sufficient for the purposes of this case to say that the legislature did not thus limit the jurisdiction of this court. In the first section of the act creating the court of appeals, after fixing a limit upon the jurisdiction of the supreme court, it is provided, *inter alia*, that the foregoing limitation should not apply to writs of error to county courts. Sess. Laws 1891, p. 118. Again, in paragraph 3 of section 4, the same caution is manifested. It provides that the court of appeals shall have jurisdiction, not final, where a franchise or freehold is involved, or where the construction of a provision of the constitution of the state or of the United States is necessary to the decision of the case; also in criminal cases, or upon writs of error to the judgments of county courts. To put the jurisdiction of this court beyond all question, it is further provided in section 15 of that act, as follows: "Writs of error from, or appeals to, the supreme court, shall lie to review every final judgment of the court of appeals in cases which, under this act, might have been taken for review to the supreme court in the first instance." By the express terms of the constitution, a review might have been had in this court of the judgment of the county court in the first instance, and it necessarily follows from the provision just quoted that such review has not been lost in

this case by reason of the review had in the court of appeals.

The judgment of the county court was reversed by the court of appeals for the reason that the jury were instructed orally. Counsel for plaintiff in error does not question the correctness of the law as laid down in the opinion of the court of appeals, but does claim that the record does not sufficiently show that the charge was not written. The record in this case shows affirmatively that, before the instructions were given, counsel for defendant objected to oral instructions; also that, after the instructions were given, the defendant especially excepted, "because the same were given orally." The facts, as they are to be gathered from this record, are that the instructions were given orally by the judge, and taken down at the time by the stenographer. The charge was short, and the stenographer extended the same immediately, and, as so extended, they were handed to the jury upon their retirement. This was not a compliance with the statute. See Sess. Laws 1887, p. 156; *Brown v. Crawford*, *supra*.

Aside from this, the judgment of the county court is not supported by the evidence. There is no privity of contract shown between the defendant, Brown, and the plaintiff. The evidence shows that Brown was the owner of two vacant lots, and that he made an arrangement with Coe Bros., whereby they were to build two houses on these lots, and then sell the property, and from the amount received pay Brown a certain price for his lots. After this arrangement was made, and the houses built, the evidence tends to show that Coe Bros. agreed to pay Crawford a commission if he would find a purchaser for the lots so improved, or either of them; but Brown was not a party to this contract, and is in no way bound by this agreement of Coe Bros. The judgment of the county court should have been for the defendant, and the judgment of the court of appeals will be affirmed. Affirmed.

(6 Colo. App. 181)

CITIZENS' COAL & COKE CO. v. STANLEY.¹

(Court of Appeals of Colorado. April 8, 1895.)

CHATTEL MORTGAGE—DESCRIPTION OF PROPERTY—UNRECORDED MORTGAGE—NOTICE—CONVERSION OF MORTGAGED PROPERTY—MEASURE OF DAMAGES.

1. A chattel mortgage, payable one day after date, after enumerating, as covered thereby, a horse and wagon, scales and stove, and fork and shovel, used by the mortgagor in his coal business, stated on separate lines two items, "stock on hand at time of expiration," and "insurance on stock, etc., as per policy." *Held*, that the stock mortgaged was that on hand at the time of the expiration of the mortgage, and not that on hand at the time of the expiration of the insurance policy.

3. Where one takes a chattel mortgage ex-

¹ Rehearing denied June 10, 1895.

pressly subject to a prior unrecorded one, he is charged with notice of the contents of the prior one, and of the rights of the mortgagee therein.

3. In an action by a mortgagee for the conversion of the mortgaged property, plaintiff's damages are limited to the amount due on his mortgage.

Appeal from Arapahoe county court.

Action by E. M. Stanley against the Citizens' Coal & Coke Company for conversion. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Early in December, 1892, the appellee, Stanley, bought into a business which was then being carried on in the city of Denver by W. F. Mitchell. It was a coal and feed business. What of stock was possessed by the firm at the time of its organization is not disclosed. As copartners, Stanley and Mitchell carried on business until the latter part of January, 1893, when, becoming mutually dissatisfied with the situation, they dissolved. Mitchell bought Stanley out for the agreed price of \$215.35. The odd money was paid in cash. The remainder was not then liquidated. It is to be fairly gathered from the record that the property subsequently mortgaged to Stanley was part of the firm assets. Under the terms of the dissolution, Mitchell was to pay Stanley as soon as he could collect the outstanding bills. In this he was unsuccessful. The cause is not evident. Shortly after Stanley sold out, he went down to the office of the Citizens' Coal & Coke Company, the appellant, and stated the dissolution. It would seem that quite a bill was owing to that company, and when they learned of the dissolution they immediately called on Mitchell to settle. He was unable to do so, and they insisted on a mortgage as security. The outcome of the negotiations was the execution and acknowledgment on the 3d of February of a note for \$200, due one day after date, and a mortgage on certain personal property, due at the same time, and containing the usual conditions with regard to possession by the mortgagor and power of disposition. On this fact much of the appellee's contention hinges. The form of the mortgage is somewhat peculiar. It proceeds with eight items, each separately stated in lines by themselves, and covering, speaking generally, the horse and wagon and harness, scales and stove, and fork and shovel, which constitute the subject-matter of this litigation. After these six items, the mortgage contains apparently the following two items, separately stated, and on different lines: (1) "Stock on hand at time of expiration." (2) "Insurance on stock, etc., as per policy 373,117, Union Insurance Company." The only occasion to state the form of the mortgage with reference to these last two items is to enable us to make plain in the opinion the form which the argument takes. After this note and mortgage had been made, and given to the company, Stanley insisted on being protected in his sale to Mitchell. Thereupon Mitchell made a mortgage to Stanley on the

first six items named in the coal company's mortgage, and delivered it to Stanley. It was executed and recorded on the 6th, and contained a specific reference to the coal company's mortgage in this form: "That the same are free from all incumbrances except mortgage to the Citizens' Coal & Coke Company." The coal company's mortgage was not recorded until the 7th of February, a day after the record of the Stanley instrument. There was considerable controversy at the trial respecting the proper construction of the coal company's instrument, the dispute being over the clause, "stock on hand at the time of expiration." The company attempted to prove, by way of aiding the interpretation of the instrument, what occurred at the time the paper was signed and acknowledged before the notary. This evidence was excluded. Both parties seem to have taken alarm about the same time respecting the debt, and Stanley went up, as he states, to obtain possession. He did something in that direction, but it will not be necessary to state the facts about it, for the case will turn on another proposition. While he was there, the company's representatives came up, and seized all the stuff, and, against Stanley's protest, loaded it into wagons, and carried it off. Thereupon Stanley brought this suit against them to recover the value of the property. The note which he produced was for \$200, and amounted, with its interest, at the time of the trial, to a few cents less than \$208. He made proof of the value of the articles taken which were covered by his security, and in accordance with that proof the court rendered a judgment against the company for \$275 and costs. Therefrom the company appealed.

H. D. Ingersoll and Ralph E. Stevens, for appellant. Thomas B. Stuart and Charles A. Murray, for appellee.

BISSELL, J. (after stating the facts). We regard the judgment as fundamentally erroneous. The difficulty experienced in the interpretation of the mortgage given to the company is very plain. If the instrument be so construed as to operate as a mortgage on the stock then owned and held by Mitchell, it would necessarily be invalid under our statute respecting chattel mortgages. By a long series of decisions in both the appellate courts, such instruments, if they purport to cover stocks of goods of any description, and likewise reserve to the mortgagor the power of sale, are fraudulent and void as against creditors or bona fide purchasers for value. This law is too well settled to require discussion. Two or three very ingenious arguments are advanced by the respective parties to support their different theories concerning the proper interpretation of the instrument. None of them seem to us to be necessarily correct, nor to accord with the probable purpose of the parties as it is evidenced by their agreement. As we view it,

the mortgagor evidently intended to transfer to the company, as security for his debt, three different classes of items. The first was personal property, about the identity of which there can be no dispute. The last was an attempt—whether it would have been successful in case of a fire we need not consider—to transfer the insurance which was carried on the property as an additional security in case it was burned up. The other item covered the stock on hand. But the pivotal question still remains—whether it covered or attempted to cover the stock from the date of its execution or from some other date. The equities are manifestly with the Coal & Coke Company, for it is fairly inferable from the evidence which Stanley himself gave that he was liable for at least a very considerable part of the debt due to the coal company. He sold out on the 24th day of January, and a good deal of the indebtedness was owing at that time. The exact amount, of course, is not made plain, since this question was not of importance to the issue; but it is enough, if the law justifies it, to subordinate his claims as a retiring partner to those of the general creditors. As we read the instrument, there was no evident intention on the part of the mortgagor to transfer or to incur by the security the stock which he held when he executed it. Whether the parties proceeded with an apt provision and understanding of the law in such matters, we are not able to apprehend, but to us it appears to have been the intention to cover whatever stock might be on hand when the mortgage should mature; otherwise there is no sense in the last clause, and there is a want of connection between the two phrases. It is impossible to connect what relates to the stock on hand with the reference to the insurance policy. It is inconceivable that the parties should have intended to mortgage the stock from the date of the expiration of an instrument of insurance, when the security itself matured in 24 hours after its execution. Neither can the policy be referred to for the purposes of description, to ascertain what was intended to be covered by the antecedent provisions of the mortgage. They were plain, definite, and could not be aided by the policy. There is no connection between the two in the form in which they are written, and they lack both punctuation and the necessary conjunctions to warrant a joint construction of the two clauses. We thus disagree with both counsel respecting this matter. It is our conclusion that the mortgage on the stock took effect, if at all, only after the maturity of the instrument, when, by the terms of the security itself, the power of disposition by the mortgagor had entirely ceased. As is usual in that class of mortgages, the mortgagor retained the power to sell only during the life of the mortgage. If the stock which he owned at maturity could then be covered by the instrument as it was executed, it would be uncoupled with

the power of disposition which renders such instruments invalid as against creditors or bona fide purchasers. We do not undertake to determine whether such a security would be valid, nor what the rights of the parties or of third persons would be if a conflict should arise between them over the stock owned at maturity. The appellee does not claim it, the mortgagor is making no contest, and no other creditor asserts any right to the stock. The subject-matter of this dispute is the property which is specifically described as the "horse and wagon, the scales and stove, and the fork and shovel." All we adjudge is that the instrument does not come within the purview of those decisions which adjudge a security invalid which covers a stock in trade, and reserves to the mortgagor the power of disposition. It cannot be legitimately contended that the security might, under some other circumstances than those disclosed by the record, attach to the stock of goods before the maturity of the note. The argument based on the provision of the mortgage which permits the holder to take possession when he regards his security as jeopardized, or on levy of an attachment, is unsound. Whatever force is to be given to this claim as affecting goods actually covered by the mortgage, it cannot be invoked to invalidate a security otherwise good. It took effect, as to the stock of goods, only on its own maturity. Neither a levy nor a conclusion of insecurity would operate to mature the note, however great might be its effect on what was actually covered by specification, and as to which a right of seizure might accrue before the note was due.

Having reached this conclusion, the solution of this matter is a very simple one. When Stanley took his mortgage, he had absolute and specific notice of the outstanding security held by the Coal & Coke Company. It had matured when he received his mortgage on the 6th of February, and the fact that it was not recorded does not affect its validity, nor deprive the company of the preferential rights which they enjoyed on the elder security. We attach no importance whatever to the conversation between Stanley and Mitchell about the company's mortgage, and the uncertainty of the information according to Stanley's version of his talk with Mitchell. It is sufficient that his security contained a specific exception of the mortgage to the Citizens' Coal & Coke Company. This was enough to put him on inquiry, and charge him with notice of all the information which he could have procured if he had sought knowledge of the paper. He must be taken to have had notice of its contents, of what it covered, and of the rights of the company thereunder. The case is clearly brought, by all the matters appearing in its borders, within the decisions of this court in two cases,—*Harblison v. Tufts*, 1 Colo. App. 140, 27 Pac. 1014; *Cassidy v. Harrelson*, 1 Colo. App. 458, 29 Pac. 525.

There is another matter which must be called to the attention of the parties in the event of a future prosecution of this litigation. This concerns the judgment which was rendered. Stanley's total claim was \$208, and yet he got judgment for \$275. This he could not do, for, even though he had the right to recover the value of the property by reason of the conversion by the company, his right would be limited to the amount of his own claim. This principle was settled by this court in a recent case. *Cramer v. Marsh* (Colo. App.) 38 Pac. 612. There was some attempt at the close of the trial to introduce testimony of a conversation which occurred between Mitchell and the notary, or possibly between Mitchell, the notary, and a representative of the company, respecting what was intended to be covered by the security. This testimony was properly excluded. Such evidence is not admissible. No evidence to contradict the terms of a mortgage can be introduced. While parol testimony may be offered to identify the articles embraced, or to interpret the meaning and extent of the terms employed, it is a generally recognized principle that this evidence must be consistent with the description. The offer as made was not brought within the exception to the rule, and it was properly excluded. What has been said disposes of all necessary matters, and the judgment must be reversed. Reversed.

(16 Mont. 312)

COQUARD v. WEINSTEIN.

(Supreme Court of Montana. June 17, 1895.)

Sale of Mining Stock—Negligence of Broker—Misunderstanding of Telegram.

1. Where, in an action for money paid, defendant pleads as set-off that plaintiff should have sold certain stock for defendant at a certain price, which plaintiff denies, the burden of proof is on defendant.

2. Defendant telegraphed plaintiff in October: "Sell, my account, 500 shares E., at market price. Wire price sold." Plaintiff next day wrote defendant that E. stock was dull, and impossible to sell at any reasonable price, and that he would continue the order till countermanded. Plaintiff kept defendant informed as to the market till the close of the year, but received no further instructions, and the stock continued to decline. Plaintiff thought that defendant's telegram meant to sell at the highest market price at the date it was received, and acted accordingly, while defendant contended that it meant to sell at the highest price when the sale was made. *Held*, that, even if plaintiff acted on an erroneous construction of the telegram, defendant, by his conduct, discharged him from liability.

Appeal from district court, Deer Lodge county; Frank H. Woody, Judge.

Action by L. A. Coquard against William Weinstein for balance due on stock purchased for defendant. Defendant set up a counterclaim. Plaintiff, at the conclusion of defendant's testimony, moved for a nonsuit, which was granted, and judgment entered for plaintiff. Defendant appeals. Affirmed.

The plaintiff and respondent, a broker at

St. Louis, Mo., on or about the 22d of September, 1891, purchased for the defendant 500 shares of the Elizabeth Mining Company stock, for which he advanced \$962.50. He sues to recover the money due him for said stock, alleging that no part thereof has been paid, except \$395, the proceeds of the sale of 200 shares of the stock sold by plaintiff for defendant, at defendant's request, leaving a balance due of \$567.50. Plaintiff also sues to recover \$3 for protest fees on a certain draft upon defendant for the aforesaid amount of \$567.50. The defendant, for an answer, set up a counterclaim, alleging that after the purchase of the 500 Elizabeth shares, the defendant ordered plaintiff to sell said stock at the highest market rate said stock was selling in St. Louis; that the highest market rate in St. Louis at the time the order was made was \$1.90 per share; that plaintiff sold 200 shares of said stock at \$2 per share, realizing thereon the sum of \$400, and failed and refused to sell the additional 300 shares at said market price; that by reason of such neglect and failure to sell said 300 shares, defendant was damaged in the sum of \$600. Defendant denied that plaintiff paid the \$3 for protest fees, as set forth in the complaint. The replication admits that defendant ordered plaintiff to sell the said stock at the highest market rate said stock was selling for in St. Louis. Plaintiff admits that he sold 200 shares at \$2 per share, realizing \$400; denies that he refused to sell the said 300 shares at said market price of \$1.90 per share; but alleges that immediately upon the receipt of the order to sell the said 500 shares of stock, plaintiff offered the same for sale on open market, and to individual buyers, and endeavored to sell the same, and the whole thereof, at said market price of \$1.90 per share; that he was unable to find purchasers at the market price for more than 200 shares; that the market price declined, and the said price of \$1.90 per share could not be obtained upon the sale of said stock, the next day after plaintiff received said order for sale, and that at all times thereafter the market price was under the sum of \$1.90 per share, and plaintiff has been unable to sell said stock at said price; that plaintiff has always exercised due care and diligence in attempting to sell said stock at \$1.90 per share, offering the same in open market, and to purchasers generally, but has been unable to sell said 300 shares at \$1.90 per share. The case was tried to the court without a jury. At the conclusion of defendant's testimony, plaintiff moved for a nonsuit. This motion was granted, and judgment entered for plaintiff. Defendant appeals.

About October 2, 1891, the defendant telegraphed from Montana to plaintiff, at St. Louis, as follows: "Sell, for my account, five hundred shares Elizabeth, at market price. Wire the price sold." Upon October 3, 1891, the plaintiff wrote the defendant, telling him that his telegram was received "late yester-

day after the afternoon call. The stock was extremely dull yesterday, and it was impossible to sell stock at any reasonable figure. I wired you to-day in substance that I had sold 200 shares at \$2, and trust to sell the remainder Monday. Will continue your order until countermanded. To-day being a Jewish holiday, and, in addition, a half holiday, business is remarkably dull." Again, on October 9th, plaintiff wrote defendant, acknowledging the receipt of defendant's letter of the 4th instant, and telling him that Elizabeth was very dull, and that 500 shares sold that day at \$1.90. On cross-examination defendant was asked if he had not received communications from plaintiff right along, from October 3d until the close of the year 1891, keeping him posted entirely as to the market price of the Elizabeth stock, to which the defendant replied: "Yes, I received some letters telling me about what that stock was. He [Coquard] advised me continually that the stock was declining right along after the 31st of October. I didn't give him any other, or further instructions or write to him concerning the sale of that stock. I never countermanded or considered that I owned the stock." In response to questions propounded by the court, the defendant said he "directed the plaintiff to sell the 500 shares at whatever the market price may be. He sold 200 shares at \$2 a share, and he did not sell the other 300. I lost, by reason of his not selling that there 300 shares at the market price, the difference between what he could sell the stock at then and what it is worth now. He has got these 300 shares of stock that belonged to me. I ordered him to sell the stock at whatever he might get. At the time this action was brought the stock had got down to 40c."

The plaintiff's motion for nonsuit was upon four grounds: (1) There is no proof to sustain the allegations and counterclaim. (2) There is no proof in support of the allegation that the highest market price at the time of making said order was \$1.90 per share. (3) There is no proof that plaintiff failed or refused or could have sold 300 shares, or any part thereof, at \$1.90 per share. (4) There is no proof of the value of the stock at the present time, or as to damage defendant has sustained.

F. W. Cole and H. R. Whitehill, for appellant. McConnell, Clayberg & Gunn, for respondent.

HUNT, J. (after stating the facts). A majority of the court are disposed to affirm the judgment of the district court solely upon the ground that the defendant's order for the sale of the stock was to sell for \$1.90 per share, and not to sell for any other lower price, and that for failure of any substantial proof tending to show that plaintiff, by the exercise of reasonable diligence, could have sold the 300 shares for said price

of \$1.90 per share, the motion for a nonsuit was properly sustained. The answer of the defendant expressly pleads that the highest market price was \$1.90 per share, and avers that plaintiff neglected to sell at said figure. The replication admits that the highest market price at the time of the order to sell was as plaintiff pleads, but says it could not be obtained after defendant's order to sell was received, although plaintiff tried to find purchasers at that figure. These pleadings raised a material issue, upon which the defendant assumed the burden of proof. The only direct evidence at all upon the fact that plaintiff could have sold at \$1.90 per share, is in his letter of October 9th, wherein he says, "500 shares sold to day at \$1.90," coupled with the admission that plaintiff was a broker on the stock market, and familiar with stock quotations.

The division of our opinions consists in this: My learned associates say that it is too strained an inference to conclude, even on a motion for a nonsuit, that, because a broker knows of one sale of stock at the figure he was directed to sell at, he could have sold his client's stock at an equally high price, and should be held liable for not doing so. They may be correct, but upon a motion for a nonsuit, I think, under all the facts of this case, as developed by the testimony and correspondence, that probably defendant made a bare prima facie case of negligence on plaintiff's part. We have therefore determined to rest our affirmance of the case upon a ground on which we are thoroughly in accord, namely, that even if the plaintiff acted upon an erroneous construction of the telegram, the defendant, by his conduct, discharged plaintiff from the legal consequences of any such misconstruction. The broker appears to have acted honestly and in good faith throughout the whole transaction between himself and the defendant. He interpreted defendant's telegram to sell for the highest market price at the date of its receipt, and acted accordingly. Thereafter the stock fell in price. Of this decline, and of the market price, the plaintiff repeatedly advised defendant, by letters, at divers times between the time of defendant's order to sell up to the close of the year 1891. The defendant never again advised him to sell, but knowingly permitted him to retain the stock, under the belief that his authority to sell was limited to the highest market price at which it could have been disposed of at the date of the receipt of the original order of sometime previous. We therefore have a case presented where the defendant contends that his telegram was a continuing order to sell, without limitation as to time or price, except that it be the highest when sale was made, while plaintiff argues that the order was to sell only for the price paid at the date of the receipt of the telegram, and that he had no authority to take less, and that he non-

estly so construed its directions. The most favorable view of the telegram, from defendant's standpoint, is that it was fairly susceptible of two constructions. Its ambiguities gave rise to this litigation, for the plaintiff, in good faith, acted upon one construction, while defendant has sued him upon another. The want of precision on defendant's part fixes the loss, if any, in such cases, upon the writer of the order, rather than upon his broker. *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282.

Under the facts, a further principle governs, which may be stated as follows: Where a principal gives to his agent telegraphic instructions, fairly susceptible of two materially different constructions, and the agent honestly acts upon an interpretation not intended by the principal, yet repeatedly advises the principal of his acts, and the principal well knows of such acts, and of the agent's construction of the telegraphic instructions, but does not advise his agent of the erroneous construction of the instructions, if loss occurs to the principal by the agent's acts under his construction of such instructions, the principal must be held to have accepted the agent's construction, and cannot afterwards sue the agent for any loss which may have occurred by such acts of the agent. *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Mechem*, Ag. §§ 315, 484, 954; *Story*, Ag. § 74; *Vianna v. Barclay*, 3 Cow. 281; *Foster v. Rockwell*, 104 Mass. 167; *National Bank of Commerce of Boston v. Merchants' Nat. Bank of Memphis*, 91 U. S. 92; *Long v. Pool*, 68 N. C. 479; *Pickett v. Pearsons*, 17 Vt. 471; *Oil Co. v. Montague*, 65 Iowa, 67, 21 N. W. 184. The defendant should have dissented, during their correspondence, if the plaintiff had disregarded his instructions. Not having done so, his assent to the broker's act in holding the stock must be presumed. The judgment is affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(16 Mont. 278)

**STATE ex rel. NORTHWESTERN NAT.
BANK OF GREAT FALLS v. DICK-
ERMAN, County Treasurer.**

(Supreme Court of Montana. June 10, 1895.)
**BONDS OF SCHOOL DISTRICTS—FRAUD—PLEADING
—CONSTITUTIONAL LAW.**

1. Under Comp. St. div. 5, § 1951, providing that bonds issued by a school district shall be signed by the chairman of the board of trustees, and shall be countersigned by the clerk, a warrant drawn by the trustees on the county treasurer, and signed by the chairman and clerk of the board, is sufficient in form.

2. Where the facts alleged in support of an allegation of fraud are contradictory thereof, they are properly stricken out.

3. Where a school district contracted for a loan on bonds which were afterwards declared to be void, it is liable for money advanced in good faith under the contract which was used for school purposes.

4. The act of February 18, 1895, providing that money loaned on school bonds afterwards declared by the supreme court to be void may be repaid out of the proceeds of sale of subsequent school bonds, does not conflict with Const. art. 13, § 3, providing that money borrowed for public purposes shall be used only for the purpose specified in the law authorizing the loan.

5. Such act does not conflict with article 15, § 13, providing that the legislature shall pass no law retrospective in its operation, or which imposes on the people a new liability in respect to transactions or considerations already passed.

Appeal from district court, Cascade county:
C. H. Benton, Judge.

Application for mandamus, upon the relation of Northwestern National Bank of Great Falls, against Arthur E. Dickerman, county treasurer of Cascade county, to compel defendant to pay a certain warrant. There was a judgment for the relator. Defendant appeals. Affirmed.

This is a proceeding for a writ of mandamus. In its affidavit the relator alleges that it is the owner of the following warrant: "No. 2,604. Great Falls, Mont., April 6th 1895. The treasurer of Cascade county will pay fifteen thousand eight hundred thirty-three and 56/100 dollars to Northwestern National Bank, or order, for moneys advanced on H. S. Bldg., out of any moneys in the treasury to the credit of school district No. 1 building fund. \$15,833.56. O. H. Holmes, Chairman of Trustees. A. E. Canfield, Clerk of Board of Trustees." It is alleged that it presented said warrant to the defendant, and demanded payment thereof; that said demand was refused; that, at the time of the presentation and demand of the payment of said warrant, the defendant had in his custody, as the treasurer of said county, ample funds available for the payment thereof. The lower court issued an alternative writ of mandamus on the filing of the affidavit, requiring defendant to pay said warrant, or show cause for not doing so. In his answer and return to said writ, defendant admits that he is the treasurer of said county; that the warrant was presented, and demand made for the payment thereof; and that he refused to pay the same. He also admits that he had sufficient funds in his hands belonging to said district to pay the same. He denies, however, that the warrant was drawn by the board of trustees of said school district. The answer then sets up at great length the history of the transactions between the trustees of said school district and the relator herein in reference to the issuing of bonds by the trustees of said district for the purpose of building school houses, and purchasing land therefor in said district, and the advancement of money by relator to said trustees for said purpose on said bonds, as well as the conditional sale of said bonds to the relator by said trustees. From this history it appears that in the year 1894 an election was had by the electors in said district upon the proposition to issue bonds in the sum of \$80,

000, for the purposes aforesaid. Bonds were issued in said amount, by said district, for said purposes. They were advertised for sale. Bids were made. These bids were all rejected. Thereafter the bonds were conditionally sold to relator at private sale. The condition was that the relator was to take the bonds, provided the supreme court decided the bonds to be valid. At that time there was a doubt in the minds of the trustees and the relator as to the validity of these bonds. To determine this question, a suit was commenced by James T. Stanford, vice president of the relator, against the trustees of said district. See *State v. School Dist. No. 1* (Mont.) 38 Pac. 462, for the facts and result of said suit in this court. After said conditional sale of said bonds, and before the question of their validity had been determined by the courts, the relator and trustees entered into a contract whereby relator agreed to advance a sum of money to the trustees, not to exceed \$20,000, for the purpose of building a schoolhouse in said district. While these transactions between relator and said trustees were taking place, the trustees had contracted with the McKay Brothers for the erection of a high school building in said district, at a cost of more than \$50,000. Pursuant to the contract to advance money to said trustees for said purposes, the relator paid out the sum mentioned in the warrant in controversy on divers and sundry warrants drawn by the trustees for labor, material, etc., employed and used in the partial construction of said high school building. It is alleged that there were no funds in the treasury with which these several warrants could be paid, but that they were assigned to the relator, and thereupon the relator furnished the funds to the treasurer to meet and pay them, in accordance with the contract aforesaid with relator to advance money to the trustees for such purpose. It is alleged in the answer that all these transactions between the relator and the trustees, as well as the building contract with the McKay Brothers, were without authority of law and void, for the reason that there were no funds in the treasury at the time to meet and pay for the same. It is also alleged that the conditional private sale of the bonds to relator, and all the transactions set out in the answer, were void, and that relator had full knowledge thereof. It is alleged in the answer that on the 27th day of December, 1894, and after the date of the transactions aforesaid, an election was held in said school district upon the proposition to issue the bonds of said district in the amount of \$90,000, for the purpose of building one or more schoolhouses, etc.; that a majority of the qualified electors of said district voted in favor of issuing said bonds; that said bonds have been issued and sold by the trustees, and the money for the sale thereof has been paid to the defendant, but the defendant claims that this money is not available for the payment

of the warrant in controversy. The court below, on motion of relator, struck out all of defendant's answer, except the denial that the warrant in suit was issued by the board of trustees of said district. After hearing proof as to the issuance of the warrant, the court entered judgment for the relator that a peremptory writ of mandamus issue, and for costs. From this judgment the defendant appeals.

A. J. Shores, for appellant. B. P. Carpenter and Lyter & Greene, for respondent.

PEMBERTON, C. J. (after stating the facts). The appellant contends that the warrant in controversy is not in legal form. This contention is based upon the fact that the warrant is signed by the chairman and clerk of the board of trustees of the school district in their official capacity, and not by all or a majority of the trustees. It is not disputed that the trustees properly audited the claim for which this warrant was issued. For the purpose of raising funds, and for the issuing and sale of bonds to raise funds for the building of schoolhouses, etc., each school district is declared by the law of this state to be a body corporate. Comp. St. div. 5, § 1953. Throughout the school law the trustees are designated the "Board of School Trustees." Section 1951 provides that, when bonds are issued by a school district, "they shall bear the signature of the chairman of the board of trustees, and shall be countersigned by the clerk." From a consideration of the school law of the state, we are of opinion that the warrant is in such form as is contemplated in such cases. We are unable to see that the defendant could have been in any way liable to injury by paying the warrant on account of the form thereof.

The appellant assigns as error the order of the court striking out those parts of his answer noted in the statement. The portions of the answer stricken out set out with great particularity, and at great length, the entire history of the bonds in the sum of \$80,000, issued by the trustees of the district, the sale thereof to relator, as noted in the statement, the contract of the relator to advance money to the trustees for the purpose of building schoolhouses, the contract with the builders for the erection of a schoolhouse, the drawing of warrants in payment for labor and material employed and used in the construction of said schoolhouse, the payment of said warrants by the treasurer with funds advanced by relator, the doubts that existed as to the validity of the bonds, the institution and result of the suit to test the validity thereof, and the issuing of new bonds by said district in the sum of \$90,000 in lieu of those which were declared to be invalid. But in all this showing we are unable to discover any allegations of fact establishing or tending to establish bad faith or fraud on the part of the trustees and the relator in any of these transactions. There does not ap-

pear a single allegation in the answer stricken out that is inconsistent with good faith and fair dealing between the trustees and the relator. It is true that defendant alleged in his answer, which was stricken out, on information and belief, that relator procured and induced the trustees to sell it these bonds at private sale, for the purpose of procuring them at a less price than other investors would have paid for the same if valid, for the purpose of defrauding the district. But this allegation, on information and belief, must be construed in the light of the other allegations in the pleadings. It is not denied that these bonds were first advertised for public sale; that the bids were all rejected, as shown by defendant's answer. It is further shown by the answer stricken out that relator, in its private bid for these bonds, agreed to take them at par, with an added premium of \$6,833.33. These allegations of the answer are absolutely contradictory of and inconsistent with the allegation of fraud made therein on information and belief. We see no error in the action of the court in this regard.

The appellant contends that the school district did not become indebted to or liable to repay the relator the money advanced by it to pay warrants issued for the construction of a school building in said district under the contract entered into with relator. This contention proceeds, and is sought to be maintained, upon the theory that the trustees had no authority in law to enter into such contract with relator; that said contract is for that reason void, and, being void, the relator is not entitled to recover the amount advanced thereunder. The doctrine here contended for by appellant is fully discussed, and a great many authorities collected, in *Brown v. City of Atchison*, 39 Kan. 37, 17 Pac. 465. In this case the court says: "From the authorities we think the following principle may be deduced: Where a contract has been entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or in part, because of a want of power on the part of the corporation to make it or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party, by either rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit."

In *Morawetz on Private Corporations* (section 689) this doctrine is thus stated: "After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract to recover compensation for a breach of the contract by the other party." In section 721 the same author says: "The general rule is that, if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case." In *Pimental v. San Francisco*, 21 Cal. 352, the city had received money from the unauthorized sale of land, and refused to refund the same. In speaking of the rights of the purchaser to recover money paid for said lands at said void sales, Mr. Chief Justice Field says: "This alleged want of privity, as we understand it, amounts to this: That, inasmuch as the mayor and land committee had no authority to make the sale, they had no authority to pay the money which they received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct, but the facts of the case go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys or her refusal to refund them after their receipt. The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. *Argenti v. San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution; and we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics. Its command always is to do justice." From these authorities it seems clear that if, in making the contract under discussion, the trustees exceeded their authority, still there was created thereby a liability to refund the money advanced by relator under

and in pursuance of said contract. The most, we think, that can be said in this case, is that there was an imperfect or defective attempt to comply with the law on the part of the trustees in the issuing of the bonds of the district. They had the authority under the law to issue them for the purpose for which they were issued, but failed to give a sufficient notice of the purpose and conditions thereof in providing for the election to authorize their issuance. Nor is any bad faith or fraud alleged in the issuance of said bonds. If the bonds had been declared void, we think it could hardly be contended that the contract with relator to advance money on them as security, for the building of the schoolhouse, would have been considered void for want of authority in the trustees to make the same. And, besides, the contract, so far as relator is concerned, has been fully executed, and we think the doctrine of *ultra vires* can be invoked with less force here than in cases of executory contracts. The school district secured the benefit of relator's money advanced in good faith; and we think it would be a most inequitable and unjust holding to say that the district assumed no liability on account thereof, and that relator is left without a remedy, under the circumstances of this case.

The appellant finally contends that the relator is not entitled to recover in the proceeding, under the provisions of an act of the legislature, entitled "An act to authorize the board of school trustees of any school district of Montana to repay from the proceeds of the sale of bonds any money heretofore loaned or advanced to it for the erection of a school house or school houses in such school district," approved February 18, 1895. This act is as follows: "Whenever heretofore money has been loaned or advanced to the board of school trustees of any school district for the erection of a school house or school houses therein by any person or corporation, in reliance upon the proceeds of the sales of bonds for the payment of the same, the issuance of which bonds had been voted for by a majority of the electors of such district, voting at an election held for the purpose of authorizing the issuance of the same for the erection of a school house or school houses, which said money has been used by such board of school trustees in the erection of a school house or school houses in such district, but which bonds when issued have been adjudged and held to be void or invalid by the supreme court of the state, the money so loaned or advanced may be repaid, together with interest thereon covering the period for which interest has not been paid at the rate specified in said bonds so held to be void; said payment to be made by the board of school trustees to the person or corporation who or which had loaned or advanced the same, from the proceeds of the sale of any bonds thereafter issued for the purpose of building one or more school houses in said district, or for any other

school purpose." The appellant insists that this law is in conflict with section 3, art. 13, and section 13, art. 15, of the constitution of the state. Section 3, art. 13, is as follows: "All moneys borrowed by, or in behalf of the state, or any county, city, town, municipality, or other subdivision of the state, shall be used only for the purpose specified in the law authorizing the loan." Section 13, art. 15, is as follows: "The legislative assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already passed." We think that it is clearly shown that the money advanced by relator was used "for the purpose specified in the law authorizing the loan," as required by section 3, art. 13, of the constitution. The law authorized the loan of money for the purpose of building a schoolhouse in the district. The relator advanced the money for that purpose on the bonds conditionally sold to it by the trustees, and it is not disputed that the trustees used the money for that purpose only.

The appellant contends that the law of February 18, 1895, is retrospective, and is therefore within the inhibition of section 13, art. 15, *supra*. We think this law did not impose upon the school district "a new liability in respect to transactions or considerations already passed," such as is prohibited by this section of the constitution. We have already held that a liability existed on the part of the district to refund the money advanced by relator. This liability existed prior to the passage of the law under discussion. The law imposed no new liability or burden upon the district. The law was intended to give a remedy, if remedy were wanting before its enactment. We think the legislature had the power to enact the law, and that the law does not conflict with the constitution of the state. In *New Orleans v. Clark*, 95 U. S. 644, a case involving the constitutionality of such legislation, the court says: "The constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law; no more than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the state, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion." See, also, *Read v. City of Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208; *Louisiana v. Wood*, 102 U. S. 294.

We have carefully considered all the assignments of error presented in this case. We have been unable to discover any reason or law to support the contention of the appellant that relator is without right or remedy in this case. The judgment of the court is affirmed.

DE WITT and HUNT, JJ., concur.

(11 Utah, 401)

JONES v. NEW YORK LIFE INS. CO.

(Supreme Court of Utah. June 17, 1895.)

APPEALABLE ORDERS.

Orders permitting parties to intervene, and refusing to strike out an answer as sham, are not final orders, and therefore are not appealable.

Appeal from district court, Fourth district; before Justice H. W. Smith.

Action by Ricy H. Jones against the New York Life Insurance Company. From orders permitting B. H. Jones and another to intervene, and refusing to strike out defendant's answer, plaintiff appeals. Dismissed.

R. H. Jones, in pro. per. Frank Pierce, for respondent.

MERRITT, C. J. Plaintiff sued the defendant company to recover \$1,500 and interest and costs upon an insurance policy, No. 363,119, issued on the life of Lewis H. Jones. The defendant answered that B. H. Jones and R. D. Jones each claimed said insurance money as administrator of Lewis H. Jones, deceased; that it was ignorant of the respective rights of the said claimants, and that it was not in collusion with either of them; and asked to be permitted to pay the money into court, and be discharged. Plaintiff moved to strike out the affidavit as "a sham and irrelevant answer," and cited defendant into court. Upon the hearing, plaintiff being present as his own attorney, the court found that the affidavit was sufficient to conform to the provisions of section 243 of the Code of Civil Procedure, and ordered the defendant to pay the insurance money, interest, and costs into court. Pursuant to this order, the defendant paid into court the sum of \$1,555, the face of the policy and interest, and \$15.50 costs, and was discharged. The affidavit filed by the defendant was entitled "Answer and Interpleader," but it contained all the facts required under section 243 of the Code of Civil Procedure. Defendant denied that any interest was due, and claimed that it should not be charged with the costs, but these two claims were waived by defendant in open court, in presence of plaintiff, and no issues were tendered by defendant. Plaintiff appeals only from the judgment permitting B. H. Jones and R. D. Jones to interplead, and denying plaintiff's motion to strike out the answer as sham and irrelevant. The appeal is not from the order, or that part of the order which discharges the defendant under section 828 of the Code

of Civil Procedure. An appeal from an order allowing parties to interplead is not allowed. Neither is an appeal from an order refusing to strike out an answer. They are not final judgments. There is no reason shown to change the order of the court. The motion to dismiss the appeal is granted.

BARTCH and KING, JJ., concur.

(11 Utah, 404)

NORTHWESTERN WHEEL & FOUNDRY CO. v. SALT LAKE CITY COPPER MANUF'G CO.

(Supreme Court of Utah. June 17, 1895.)

ATTACHMENT — MOTION TO VACATE — NATURE OF ATTACHED PROPERTY.

On a motion to vacate an attachment, the court will not decide whether property levied on is personalty, or so affixed to realty as to be appurtenant to it.

Appeal from district court, Salt Lake county; before Justice S. A. Merritt.

Action by the Northwestern Wheel & Foundry Company against the Salt Lake City Copper Manufacturing Company for money due on a contract. An attachment levied on property of defendant was, on defendant's motion, vacated, and plaintiff appeals. Reversed.

Loofbourov & Kahn, for appellant. Bennett, Marshall & Bradley, for respondent.

SMITH, J. This was an action for money due upon a contract, and was commenced on December 1, 1894. A writ of attachment was regularly and properly issued and delivered to the sheriff of Salt Lake county for service. On the 3d day of December, 1894, as shown by his return, the sheriff levied this writ upon one Corliass engine, complete, one Howe scale, and 24 ore cars, all of which the sheriff, as shown by his return, seized as personal property, and left in charge of a keeper. On January 15, 1895, the defendant served on plaintiff's attorneys a notice as follows: "You are hereby notified that upon the records and files herein, and upon the affidavit of John W. Flintham, copy of which is herewith served upon you, and upon other affidavits to be hereafter prepared and served, and upon oral testimony to be introduced at the hearing, the defendant will, on Saturday, January 26, 1895, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, move the court to dismiss the attachment of the property made herein, and to release all property attached from the operation and effect of the levy or attempted levy made under the writ of attachment issued herein on December 1, 1894." This motion came on for hearing on March 9, 1895, and the attorneys of the plaintiff appeared, and objected to the court taking testimony, or making any order in the premises, for the reason that the court had no jurisdiction to hear the matters raised by the motion, and

for the reason that the motion did not come within any statutory ground authorizing the discharge of attached property upon motion. The court overruled the objections, and proceeded to hear the motion, to which plaintiff excepted, and, after hearing, made the following order, after reciting the history of the proceeding: "That of the property described in said return the one Howe scale, United States standard, the twenty-four new eighteen-inch ore cars, and the one Corliss engine complete, were fixtures, at the time of said levy, attached to and appurtenant to the real estate belonging to said defendant company on said date, and were not subject to attachment as personal property, and therefore the said levy of said writ of attachment on said property above described be, and the same is hereby, discharged, and vacated." To this order plaintiff duly excepted. There are no findings of fact other than such as are included in this order.

An examination of the evidence shows that the property attached was machinery and appliances intended to be used in the construction of a certain copper refinery in course of erection at Salt Lake City; that this attached property had been shipped to and unloaded on the premises of the defendant, but no part of it had been put in place, and it was practically all of it in the boxes and shipping cases, just as it was unloaded from the cars. We do not deem it necessary or proper in this case to give our own opinion as to whether property so situated had become a part of the real estate or not, because we are clearly of opinion that such a question cannot properly be determined upon motion, as was done in this case. There was no objection to the writ of attachment, or the bond and affidavit upon which it issued. The whole controversy was that the sheriff had seized as personal property certain machinery which the defendant claimed was real estate; and, as we have seen, the court, taking the defendant's view of the matter, directed that the levy be discharged. We know of no authority for the court or judge to direct the sheriff or other ministerial officer how to make his levy, or what property he should levy upon. If the court can lawfully give such direction, who would be responsible for a wrongful levy, or a wrongful failure or refusal to levy? The court could not ordinarily be held responsible for it, for, if lawful, it is the exercise of a judicial power. The sheriff certainly ought not to be responsible, for he would be acting in obedience to the commands of the court. We are clearly of opinion that questions of the character raised by this motion can only be tried in an action duly instituted, where the parties, by appropriate pleadings, may tender issues of fact, and upon which a trial may be had, findings made, or verdict rendered, as the case may require. This motion, and all motions of like character, are usually determined largely upon affidavits, without opportunity for cross-examination. We cannot

give our consent to such a practice, and we find no warrant for such practice in the Code of Civil Procedure. We hold that section 3026, vol. 2, Comp. Laws, does not authorize it. Nor is the authority for it to be found in that somewhat hazy field of jurisprudence known as the "inherent power of the court." In coming to this conclusion, we are not without authority to support us. See *Mason v. Lieuallen* (Idaho) 39 Pac. 1117.

Some question was made on the argument to the effect that the sheriff, having left the property on the premises for an unreasonable length of time after levy, had made himself a trespasser. If the defendant in good faith makes this claim, it should sue the sheriff as a trespasser, and then a jury, after hearing the evidence, and under instruction as to the law, will give redress, if defendant is entitled to it. We think the order discharging the levy of the attachment should be, and it is hereby, reversed, and set aside, and this cause is remanded, with directions to the court below to fully reinstate the attachment; the appellant to recover the costs of this appeal.

BARTCH and KING, JJ., concur.

(11 Utah, 414)

PEOPLE v. FARRELL

(Supreme Court of Utah. June 14, 1895.)

CRIMINAL LAW—APPEAL—REVIEW—EVIDENCE.

1. Assignments of error in the abstract, not supported by any exception in the transcript, will not be considered on appeal.

2. Where, on a criminal trial, defendant's counsel waived any objection he had made to evidence admitted, the appellate court will not pass on the admissibility of such evidence.

3. On the separate trial of one of two who had been indicted together for larceny, it is fatal error to admit against the one on trial the acts and statements of the other, made after the crime had been completely committed.

Appeal from district court, Fourth district, before Justice Miner.

Hyrum Farrell was convicted of stealing cattle, and appeals. Reversed.

L. R. Rhodes, for appellant. J. W. Judd, U. S. Atty., for the People.

SMITH, J. The defendant was indicted and tried for stealing certain cattle of one John Carver. The defendant was found guilty and sentenced to a term of imprisonment in the penitentiary. From this judgment he appeals.

Many errors are assigned. Several assignments of error are made in the abstract that are not supported by any exception in the transcript, and those, of course, cannot be considered by us. The following matters however are fairly presented by the record and are relied on here: (1) A witness named Clark was permitted to testify to the loss of certain cattle claimed to have been stolen on the same night that Carver's cattle were stolen. Clark and Carver lived in the same

vicinity. The defendant had been tried and acquitted upon the charge of stealing Clark's cattle. Under these circumstances he objected to the reception of any testimony relative to the loss or theft of Clark's cattle. His objection was overruled, and he excepted. (2) The second error relied on is that the court received the evidence of the witnesses Clark and Belnap to the effect that, after the cattle had been stolen and killed, according to the theory of the prosecution, one John Farrell, a brother of the defendant, and in the absence of defendant, made certain statements to these witnesses, Clark and Belnap, and took them and showed them certain hides of cattle recently butchered, among which, John Farrell claimed, were the hides of the stolen cattle, and among which Clark found the hides of the cattle that he himself had lost, and for the stealing of which the defendant had just been tried and acquitted. (3) The third error assigned is that the court permitted the witness Engold to testify to certain statements made by John Farrell, in the absence of defendant, on the night the cattle were stolen. Several other errors are assigned in the brief and abstract, and were urged in the oral argument, including some objections to the instructions given. We have looked into the transcript and find no objection was made or exception taken at the trial. The assignment here appears to be an afterthought, and, as we have before stated, will not be considered by us.

As to the first error assigned, which we have stated above, the district attorney concedes that it is not competent, ordinarily, to prove a separate larceny than that charged in the indictment, in order to secure a conviction, but claims in this case that the objection of defendant to Clark's testimony was sustained, and no error was committed in the respect alleged. We have carefully looked into the transcript, and we find the following proceedings took place: The witness Clark was a witness called by the prosecution. After stating his place of residence, he was asked to testify as to the theft of certain cattle of his own, alleged to have been stolen on the same night that Carver's cattle were stolen. This testimony was objected to for the reason that defendant had already been tried for stealing these cattle belonging to Clark, and acquitted. The court, after a long colloquy with counsel, in which he intimated that the testimony might be received, but did not squarely rule on the objection, was interrupted by counsel for defendant with the following statement: "I am perfectly willing that it [speaking of Clark's testimony] shall go in, with this understanding: that there shall be no inference drawn in any manner from the transaction, and this jury shall be informed that this man has been honorably acquitted of any charge of stealing these cattle." Thereupon the evidence was received, and the jury at the time was instructed by the court as follows: "The jury are instructed that the

testimony of this larceny, or supposed larceny, from Clark is no evidence in this case, and the jury have no right to consider it as a distinct act of larceny." We are of opinion that this action of the defendant fully waived any objection he had made to this testimony, and relieves us from any duty to determine whether the evidence was admissible or not.

The second error stated above, and which embraces two or three assignments in the transcript, is more serious. It involves the question whether or not, when two or more persons are indicted together, as the defendant and John Farrell were in this case, upon the separate trial of one, the prosecution may prove the acts and statements of the other, made after the crime has been fully and completely committed. Admitting, for the sake of argument, that there was sufficient evidence of a conspiracy or joint intention to commit a crime to go to the jury, still are the acts and statements of one conspirator admissible against the other, when made in his absence, and after the criminal enterprise had completely terminated? The evidence, in brief, was that on Sunday night the cattle were stolen; that they were driven to Ogden, a distance of 14 miles. There was a conflict in the evidence as to whether defendant had anything at all to do with driving them, but certain it is that the last 10 or 12 miles of the distance he did not. They were driven to John Farrell's slaughterhouse. On Monday they were butchered by an employé of John Farrell, and the meat was sold by John Farrell. On Monday or Tuesday either John Farrell or an employé of his took the hides and hid them in the brush. On Wednesday the sheriff, Belnap, and Clark, went to John Farrell in Ogden, and in the absence of defendant, and, after informing him that the cattle had been stolen, demanded to know where the hides were. John Farrell then took the witnesses up the river to where the hides were concealed, and produced them, and they were delivered to the sheriff. Some time afterwards, one Engold, who was also charged to have been connected with the crime with defendant, took the sheriff and pointed out where certain earmarks and brands were concealed. It was shown that the brands had been cut out of the hides that John Farrell had produced to the sheriff. The defendant was not present and knew nothing of this circumstance. Without copying the record, we may say that the whole of the testimony was objected to. The trial court ruled that all that John Farrell and Engold did after the offense was complete might be received in evidence, but failed to rule on the question whether what they said at the same time was competent. But, although repeated objections were made, the substance of even their statements was gotten before the jury. It is claimed by the attorney for the people that very much of this testimony came in without objection from de-

fendant, and that the questions objected to were not of themselves specially injurious, also that some of the testimony received over the objection was afterwards stricken out. We have carefully read the transcript in this case, and take this occasion to remark that the abstracts filed are remarkable chiefly for inaccuracy, and that the transcript, if correct, discloses that the court failed to rule on at least half of the objections made, and we incline to think there must be omissions in it. But we must pass on it as we find it. The transcript discloses that the defendant aptly objected to all testimony as to the words and acts of the parties who were charged to be confederates with him, said and done after the alleged crime was complete. Notwithstanding all these objections, and many of them were sustained, still all of the testimony as to what these confederates did after the crime was complete was finally received. Much of the substance of what they said was also gotten before the jury, although in every instance the literal conversations were excluded, and the court finally squarely ruled that what the alleged confederates did after the crime was complete could be received, but the admissibility of what they said was not ruled upon. There is no serious conflict in the authorities upon this question. Mr. Wharton, in his work on Criminal Evidence (section 699, 9th Ed.), lays down the rule in this language: "When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the others." And again, at section 700, the same author says: "It makes no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a codefendant does not make his acts or declarations any more evidence against another than they were before." We do not deem it necessary to multiply authorities upon this question. We have examined several of the many cited in note 1, p. 600, and note 3, p. 601, Whart. Cr. Ev. (9th Ed.), and find them directly in point, and we know of no case holding to the contrary rule. The district attorney has cited none. It will be observed that the rule prohibits evidence of both the acts and declarations. It is claimed by the district attorney that the defendant's counsel waived objection to this testimony. We have carefully examined the colloquy between the court and counsel on both sides, found in the transcript, which is relied on to furnish this waiver. It is quite lengthy, and we will not repeat it in this opinion. The substance of it was that the defendant objected to the testimony as to the production of the hides by John Farrell. The objection was argued by counsel. The district attorney claimed that it was admissible on one ground. The court ruled it was admissible

on another. After the court had announced its reason for admitting this testimony, but before any final ruling had been made, counsel for the defendant interjected the expression, "I don't care," and nothing more than this. There is nothing else in the record upon which a waiver can be in anywise claimed. From the context we are of opinion that there was no intention to waive anything, and that the words interjected were intended merely as part of an argument with the court, and as signifying that counsel for defendant did not agree with the view of the court. This conclusion is supported by the fact that this colloquy occurred when the witness Clark was under examination, he being the first witness who testified in regard to the acts of John Farrell after the cattle were stolen, and the defendant thereafter repeatedly objected to all this testimony showing clearly that he never intended to waive his objection.

We are of opinion that the court erred in admitting this testimony and we are also of the opinion that this error was prejudicial. We are not prepared to say that there was error in allowing Engold to testify that on the night the cattle were stolen, and while the act of theft was still in progress, John Farrell being at home, some one whistled out at the gate as if giving a signal; also that John Farrell went out, and shortly came back and said that it was the defendant who had whistled at the gate. There was evidence of a conspiracy to steal the cattle in which the defendant and John Farrell were concerned. We think the evidence as to all John Farrell did and said before the crime was complete was admissible.

The other questions argued here are not properly saved by exception, in the record, and cannot be considered.

On account of the error above pointed out, the judgment is reversed and the case remanded, with directions to grant a new trial.

MERRITT, C. J., and BARTCH and KING, JJ., concur.

(11 Utah, 42)

WELLS v. KELLY et al.

(Supreme Court of Utah. June 12, 1905.)

CITATION—SERVICE BY PUBLICATION—APPEAL BY ADMINISTRATOR—APPEAL BOND.

1. Where a court has ordered a citation to be published once a week for four successive weeks, the court has jurisdiction, though the hearing is set more than seven days after the last day on which the publication appeared in the paper.

2. Sup. Ct. Rule 24 (27 Pac. ix.), providing that, on appeal from a probate court to a district court by an administrator who has given official bonds, there need be no additional undertaking, does not apply to a case where the sureties have been discharged before the taking of the appeal.

Appeal from district court, Fourth district, before Justice Miner.

In the matter of the estate of H. C. Wells,

deceased. John Kelly and others applied for removal of David P. Wells as administrator. His appeal to the district court from the order of the probate court removing him was dismissed, and he again appeals. Affirmed.

R. H. Jones, for appellant. Nels Jensen and T. D. Jensen, for respondents.

BARTCH, J. This controversy first arose in the probate court of Box Elder county over an order of that court revoking the letters of administration of the appellant, who had been appointed administrator of the estate of Henry C. Wells, deceased. There were also several other orders made, among them being one discharging the sureties of the appellant. From all of these orders an appeal was taken to the district court of the Fourth judicial district, and the appeal to this court is from an order of the district court dismissing the appeal taken from the orders of the probate court.

The facts disclosed by the record are, substantially, that the appellant was appointed administrator of the estate of Henry C. Wells, deceased, by the probate court, on November 16, 1892, and thereupon gave bond and qualified as provided by law; that on October 23, 1893, C. A. Wells and John Kelly petitioned the probate court to remove him from the office of administrator, charging waste, fraud, and mismanagement of the estate, and removal from the territory of Utah; that thereafter said court suspended his powers as administrator, and issued a citation for him to appear and show cause why he should not be removed from office; that the sheriff, who attempted to serve said citation, made return on October 26, 1893, that the said administrator could not, after due diligence and inquiry, be found within the territory of Utah; that then, by order of the court, the citation was published in a newspaper once a week for four weeks; that on the 23d day of October, 1893, the sureties on appellant's official bond petitioned the court to be released from all responsibility for all his future acts as administrator; that a hearing was had, on the several petitions, on the 27th of November, 1893, when appellant was removed from office, his sureties discharged, and John Kelly appointed administrator in his place; that from all these orders the deposed administrator appealed to the district court, but filed no undertaking on appeal, and, because of the failure to file such undertaking, the district court, on motion of counsel for the respondents, dismissed the appeal.

Under this state of facts, counsel for the appellant claims that the several orders appealed from are void, because the service of the citation on the administrator, by publication, was not properly made, and that, therefore, the probate court was without jurisdiction. The order of the court was that the citation be published once a week for four successive weeks, and, while the record does not

refer specifically to each day on which it appeared in the newspaper designated, still it is clear from the affidavit of publication that it appeared the first time on the 28th of October, and the last time on the 18th of November, 1893, and the hearing was set for the 27th of November, 1893. At the oral arguments in this court it was admitted that there were four regular insertions of the notice in the weekly newspaper designated in the order of the court. The last insertion having occurred on the 18th of November, the publication was complete on the 25th, and the fact that the hearing was not set or had until the 27th of November did not leave the court without jurisdiction, because the publication was complete before the day on which the case was set for hearing, and this was a compliance with the order of publication. The authorities cited by counsel for the appellant on this question are not in point, because they refer to cases where the hearing was had before the publication was complete. The law is too well settled to require reference to authorities that where jurisdiction depends on the publication of a notice, and the trial of the cause is proceeded with before such publication is complete, the court acts without jurisdiction, and its orders are void; but such is not the case at bar, for here the publication was complete, and another insertion in the newspaper was not necessary, under the order of the court. It is manifest from the record that the court had jurisdiction to make the order in question.

Counsel for appellant also insists that, under the rules of practice in this territory, an undertaking on appeal was not necessary in this case, and that the district court erred in dismissing the appeal from the probate court. He refers to rule 24 of this court (27 Pac. ix.), and to the case of Uebel v. Maltese, 2 Utah, 430, to sustain his position on this point. A perusal of rule 25 will show that it does not apply to a case like the one at bar at all. It applies to any case where an administrator has given an official bond which, at the time of taking an appeal, is in full force and virtue; but this does not include a case like this one, where the sureties were discharged at their own instance, before the appeal was taken. In such case, the appellant, in order to make his appeal effectual, must file a sufficient undertaking. Nor does the case of Uebel v. Maltese avail the appellant, or conflict with the views herein expressed; for in that case, only the letters of the administrator having been revoked, and his official bonds not having been affected, this court held, in conformity with rule 25, that it was not necessary to file an undertaking on appeal in addition to his bonds as administrator.

We are of the opinion that the appeal from the probate to the district court was properly dismissed. Having reached this conclusion, we do not deem it necessary to decide what effect an appeal has on the

judgment appealed from, under the provisions of the Poland bill. There appears to be no reversible error in the record. The judgment is affirmed.

MERRITT, C. J., and SMITH and KING, JJ., concur.

(11 Utah, 427)

CUPIT v. BANK OF PARK CITY.

(Supreme Court of Utah. June 3, 1895.)

DISSOLUTION OF ATTACHMENT.

Under Comp. Laws 1888, § 3326, relating to attachments, and providing that defendant may apply for a discharge of the writ "on the ground that the same was improperly or irregularly granted," the notice of such motion must state the ground of the motion.

On rehearing. Denied.

For former opinion, see 37 Pac. 564.

KING, J. After this case had been decided by this court, during the June term, 1894, a petition for rehearing was filed, in which it was claimed that the cases cited in the opinion, and upon which it is rested, were based on a statute wholly different from that prevailing in this territory. The petition was granted, and the case again argued at the following term. It was held by this court when the case was first presented (Cupit v. Bank, 37 Pac. 564) that the notice given by the defendant of its motion to discharge plaintiff's attachment was defective, in failing to "specify the ground upon which the motion was based"; and in support of this position the cases of Freeborn v. Glazer, 10 Cal. 337; Loucks v. Edmondson, 18 Cal. 204; Donnelly v. Struveen, 63 Cal. 183,—were cited. It is stated in the petition for rehearing that the statute of California relating to the procedure on motion to dissolve an attachment, in force at the time these decisions were rendered, was as follows: "That a defendant applying to have a writ of attachment discharged shall state in his notice the particular ground upon which he relies." It was also stated that this statute has been changed, and is now the same as that found in our Compiled Laws. It is therefore argued that the decisions holding that the notice to discharge the attachment must specify the particular grounds wherein it is claimed the attachment was improperly issued would, under our statute, be erroneous. An examination of the laws of California demonstrates the incorrectness of counsel's contention. The language of the statute, as it existed at the time Freeborn v. Glazer, supra (October 1858), was decided, is: "The defendant may also at any time before the time for answer expires, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, or to a county judge, that the attachment be discharged, on the ground that the writ was improperly issued." Gen. Laws

Cal. (by Hittell, Pub. 1865) § 138. In April, 1860, this section was amended by adding the words "or irregularly" after the word "improperly"; and in 1877 this section appears as No. 556 in the Code of Civil Procedure, and contains substantially the same phraseology as section 3326 of the Compiled Laws of Utah. Harston, Code Civ. Proc. p. 254. Upon the adoption of the new constitution of California, the office of county judge was abolished; and in Deering, Code Civ. Proc. p. 246, section 566 appears, the only modification being that the words "or to a county judge" are omitted. It will thus be seen that the statute of California, so far as it concerns the questions involved in this case, is the same as ours, and was at the time the cases above referred to were decided. Judge Field, upon the motion for rehearing in the case of Freeborn v. Glazer, refers to section 138, which was substantially the same as section 3326, Comp. Laws Utah, and reaffirms the decision first given. Donnelly v. Struveen, supra, was decided after section 138 had been slightly amended, and read the same as section 3326 of our Code; and it is there held that the interpretation first placed upon this section by Judge Field, in Freeborn v. Glazer, was correct, and the court declare, in effect, that the notice must specify the grounds of the motion, and point out where in it will be urged that the writ was improperly issued. The court followed the decisions of California, which construed the sections of its Civil Procedure above referred to, and which had been incorporated into our Code. The rehearing was granted because it was urged that our statute was different. We find it is not. The opinion and judgment heretofore rendered in this case are adhered to.

MERRITT, C. J., and SMITH, J., concur.

(11 Utah, 430)

UNITED STATES v. DUGGINS.

(Supreme Court of Utah. June 12, 1895.)

CRIMINAL LAW—APPEAL—DISMISSAL—REVIEW.

1. An appeal from the judgment roll will not be dismissed, though no exceptions were saved to any of the rulings of the trial court.

2. Errors in admission and rejection of testimony, and in overruling motion for new trial for newly-discovered evidence, can be reviewed only on bill of exceptions.

Appeal from district court, Third district; before Justice George W. Barch.

Sim Duggins appeals from a judgment of conviction. Affirmed.

Warner & Knight, for appellant. J. W. Judd, U. S. Atty.

SMITH, J. The defendant, having been indicted, tried, and convicted in the Third district court, made a motion for a new trial, which was overruled, and he was sentenced. He appeals to this court.

No bill of exceptions was ever settled, and no effort appears to have ever been made to have one settled. The district attorney asks us to dismiss the appeal for the reason that no exceptions were saved to any of the rulings of the court below. We think this motion must be denied, as the appeal is regular, and must stand as an appeal upon the judgment roll. Therefore the motion to dismiss is overruled.

In the brief of appellant it is nowhere claimed that the judgment roll does not support the judgment of conviction, nor was any such suggestion made in the oral argument. We have examined the judgment roll, and find no defect in it. It results, therefore, that the judgment must be affirmed.

We may say, in conclusion, that the only matters complained of are alleged errors in the admission and rejection of testimony, and in overruling defendant's motion for a new trial, based on affidavits of newly-discovered evidence. These are matters, clearly, that can only be brought before this court for review by a bill of exceptions duly settled and allowed. This question is fully considered and decided in the case of *People v. Pettit*, 5 Utah, 241, 14 Pac. 337. We adhere to the rule laid down in that case. In fact, our statutes on the subject are so plain as to leave no room for discussion. See 2 Comp. Laws Utah, §§ 5085-5087. The judgment is affirmed, and the cause remanded to the court below with directions to carry the judgment into effect.

It being represented to the court by the district attorney that the bail bond of defendant upon appeal is quite defective, it is ordered that remittitur issue forthwith.

MERRITT, C. J., and KING, J., concur.

(11 Utah, 432)

PEOPLE v. MARCH.

(Supreme Court of Utah. June 12, 1895.)

CRIMINAL LAW—APPEAL—REVIEW.

Rulings on matters of law cannot be reviewed, exceptions not having been saved by bill of exceptions or otherwise.

Appeal from district court, First district; before Justice W. H. King.

William March appeals from a judgment of conviction. Affirmed.

Warner & Knight, for appellant. J. W. Judd, U. S. Atty., for the People.

SMITH, J. This case is in all respects like the case of *U. S. v. Duggins* (just decided) 40 Pac. 707, except that the offense for which this defendant was indicted, tried, and convicted was a different offense from that in the *Duggin* Case. All the matters assigned as errors in the brief of defendant are decisions made upon the trial, in matters of law. No attempt was ever made to save exceptions to such a ruling, by bill of exceptions or otherwise. Under such circumstances

there is nothing for this court to review. The judgment of the district court is affirmed, and the cause remanded to that court, with directions to enforce its judgment.

MERRITT, C. J., and BARTCH, J., concur.

(11 Utah, 433)

UNITED STATES v. SMITH.

(Supreme Court of Utah. June 17, 1895.)

EMBEZZLEMENT OF MAIL.

An indictment under Rev. St. U. S. § 5469 (Act March 3, 1825, § 22; 4 Stat. 109), providing that "any person who shall take the mail * * * from any postoffice, * * * and * * * embezzle * * * such mail," containing "any note, draft," etc., "shall be punished," etc., which failed to allege that the taking was wrongful and unlawful, is defective.

Appeal from district court, Third district; before Justice Bartch.

John W. Smith was indicted for taking mail from the post office. From a judgment sustaining a demurrer to the indictment, the government appeals. Affirmed.

J. W. Judd, U. S. Atty. J. A. Williams, for appellee.

KING, J. The only question presented by this appeal is as to the sufficiency of the indictment. Section 5469, Rev. St. U. S., being section 22, Act March 3, 1825 (4 Stat. 109), provides that "any person who shall take the mail, or any letter or packet therefrom, or from any postoffice, or other authorized depository for mail matter, with or without the consent of the person having the custody thereof, and open, embezzle, or destroy any such mail, letter or package, which shall contain any note, draft, check," etc., " * * * shall be punishable," etc. Under this section an indictment was found against the defendant, which charged that he " * * * did take from the United States post office at Salt Lake City a certain letter, intended for one James W. Smith, addressed, 'J. W. Smith, Salt Lake City, Utah,' which had come into said post office in the regular course of mail. * * * and did open, and willfully, unlawfully, fraudulently, and feloniously embezzle, and convert to his own use, said letter, and a certain draft contained in said letter." Respondent demurred to the indictment, alleging that it failed to state facts sufficient to constitute a public offense, and the demurrer was sustained. The point of controversy between counsel for the respective parties relates to the omission of the indictment to charge that the taking of the letter from the post office was wrongful and felonious. Counsel for the government admits in his brief that, to constitute the offense, "the taking must be felonious, wrongful, and unlawful," but contends that "the subsequent embezzlement is the evidence that the taking was felonious, was wrongful, was unlawful; it is not necessary to charge that the taking was done felon-

ously or wrongfully or unlawfully, because the indictment charges that he took it from the post office, and opened and embezzled the letter and its contents; it charges an unlawful taking." It is impossible to understand how counsel reconciles the views expressed, that the taking must be unlawful and felonious, but that the indictment is sufficient without charging that it was unlawful and felonious. The words characterizing the embezzlement as unlawful, fraudulent, and felonious cannot, by any rules of grammatical construction or any canon of interpretation, relate back to the word "take," in the indictment, and impress it with the criminal character implied by the words "unlawful" and "felonious." When it is admitted that, in order to constitute the offense, the taking must be of a wrongful and unlawful character, then such words must be incorporated in the indictment, characterizing the word "take," as clearly import a felonious, unlawful, and wrongful taking. We think there can be no question as to the meaning of the statute referred to. To constitute an offense under it, there must be an unlawful and felonious taking of the letter from the post office, and a wrongful and felonious opening, or an embezzling fraudulently and feloniously, or an unlawful and wrongful destruction thereof. To allege a wrongful, unlawful, and felonious embezzlement, without alleging an unlawful and felonious taking, fails to charge an offense. There can be no crime or public offense unless a union or joint operation of act and intent or criminal negligence exists. 2 Comp. Laws, § 4383; *State v. Smith*, 11 Or. 207, 8 Pac. 343. It is elementary that an indictment must be so drawn as to exclude any assumption that the indictment may be proved, and the defendant still be innocent. In this case the taking may have been innocent. If so, no offense was committed under this section upon which the indictment was based. If it was a felonious and unlawful taking, then the indictment must so charge. It is not sufficient, as counsel contends, to simply follow the language of the statute. An indictment alleging that A. did then and there murder B., or that C. did assault E. with intent to commit murder, would state no offense, although the words of the statute are employed. But it is unnecessary to elaborate the question, for the reason that this section has been passed upon repeatedly by the federal courts. In *re Burkhardt*, 33 Fed. 27, speaking of this section, the court says: "The expression, 'take the mail, or any letter or packet therefrom,' * * * means a wrongful and unlawful taking. If the accused had authority to take, and with such authority did take, Brideman's mail from the post office, and, having thus obtained the letter in question, subsequently opened it, and embezzled its contents, such embezzlement was not an offense against the United States, though it would be against the state. To constitute the offense made punishable by the

clause in section 5469 referred to, the taking of the mail or of a letter from the post office must be with criminal intent, not a taking by the authority of the person to whom the letter is addressed, although there is a subsequent embezzlement, nor a taking by mistake, or with an innocent intent." See *U. S. v. Inabnet*, 41 Fed. 130; *U. S. v. Driscoll*, 1 Low. 303, Fed. Cas. No. 14,994; *U. S. v. Marshalls*, 2 Blatchf. note p. 112, Fed. Cas. No. 15,724; *U. S. v. Pearce*, 2 McLean, 14, Fed. Cas. No. 16,020; *U. S. v. Parsons*, 2 Blatchf. 104, Fed. Cas. No. 16,000; *U. S. v. Sander*, 6 McLean, 601, Fed. Cas. No. 16,219. From these authorities it is clear that the felonious intent at the time the letter is taken from the post office is an indispensable ingredient of the offense. That being true, the indictment must allege the taking to have been felonious, or it is defective. The judgment of the lower court is affirmed.

MERRITT, C. J., and SMITH, J., concur.

(11 Utah, 438)

SULLIVAN et al. v. NORTHERN SPY MIN. CO.

(Supreme Court of Utah. June 17, 1895.)

PUBLIC LANDS—APPROPRIATION OF WATERS—NATURAL SOURCE OF SUPPLY.

1. Rev. St. U. S. § 2339, provides that whenever rights to the use of water have vested, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the owners of such rights shall be protected in the same. Section 2340 provides that all patents shall be subject to rights of ditches, reservoirs, etc., used in connection with such water rights. *Held*, that the discoverer of percolating waters on public lands, by digging a well for the purpose of collecting the same for use, acquires an easement in the land for the maintenance of his well, and a right to the water as an appropriator thereof from a "natural source of supply" (Comp. Laws, § 2780), as against a subsequent locator of the land on which the well is situated.

2. The right of one who discovers and appropriates percolating waters on public lands by digging a well to collect the water is subject to the right of a subsequent locator of the land to sink a well adjoining such well, though it dry up the one first located.

Appeal from Third district court; before Justice George W. Bartch.

Action by M. C. Sullivan and others against the Northern Spy Mining Company. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Powers & Straup, for appellants. Marshall & Royle, for respondent.

SMITH, J. The main question in this case, and the only one, in fact, which we deem it necessary to consider, is, can the discoverer of a flow of percolating waters on the public lands, by digging wells and improving them, and constantly using the water for beneficial purpose, acquire a right to the water from such wells as against an owner

of the land on which the well is located, where the owner of the land acquired title by a location made subsequent to the digging of the wells? Many other questions are raised on this appeal, but their materiality all depends on the answer to the question just stated. If this question is answered in the affirmative, the judgment must be affirmed; if answered in the negative, it must be reversed; so we do not deem it necessary to examine the other questions presented.

We are not aware of any case having been decided in these arid regions, in which this precise question has been passed upon. The doctrine may be said to be settled that the owner of lands has a right to dig thereon, and to appropriate and use percolating waters therein, although by so doing he may dry up the wells or spring of an adjacent proprietor. See *Hanson v. McCue*, 42 Cal. 303; *Kinney, Irr. §§ 49, 298*; *Railroad Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783. But this rule does not determine the case at bar. The facts here, so far as necessary to be stated, are: The plaintiffs are the owners of a mining claim in Tintic mining district, located in 1889. When this claim was located there was a well dug in the ground, and one Barney had a house at or near this well, and was engaged in hauling water from the well to the defendant. The defendant continued to procure water from the well, and plaintiffs bring this suit to recover damages, alleging trespass. The undisputed facts are that the predecessors in interest of Barney and the defendant, in about 1870, discovered evidences of percolating waters at the point where the well was dug, and by digging a hole about three feet deep procured a supply of water. These discoverers were miners, and were working a mine, part of which, at least, the defendant now owns. It seems that this hole or well, if it may be called such, was so shallow that cattle and horses on the range came to it and trod down its banks, so that the discoverers arranged with one Barney that if he would repair the well, wall it up, and protect it, he might use water therefrom. Barney did this, and put in a pump. For about 20 years it remained in this condition. The well, being in the midst of a desert, was used as a source of water supply for several mines in the neighborhood, and was all the time on public lands of the United States. In 1889 the plaintiffs located the ground, including the well and Barney's house, as a mining claim. In 1890 Barney conveyed whatever right he had in the premises to the defendant, and it continued to procure water from the well. The well is shown to be from 10 to 15 feet deep, and to furnish a very abundant supply of water. The question is, has the defendant an easement in plaintiff's land to continue to take water from the well constructed by its predecessors? The federal government, as proprietor of the public lands, early recognized the necessity of permitting persons in this arid

region to acquire an interest in water sources on the public lands distinct from the lands themselves. It had always been the settled law that the owner of land was likewise the owner of all waters situate thereon or percolating therein. This may be said to have been the universal rule in the United States, prior to the settlement of California. Local decisions, arising from the necessities of the people, soon altered it there, and in 1866 congress passed an act (14 Stat. 253; Rev. St. § 2339), which provided, among other things, as follows: "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." By the act of July 9, 1870 (16 Stat. 218; Rev. St. § 2340) it was further provided: "All patents granted, or pre-emption, or homesteads allowed, shall be subject to any vested and accrued water right, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section." The question is, then, is the right of defendant to use water, under the facts stated, one that is recognized by the local customs and laws? Section 2780, Comp. Laws Utah, provides: "A right to the use of water for any useful purpose, such as domestic purposes, irrigating lands, propelling machinery, washing or sluicing ores and other like purposes is hereby recognized and acknowledged to have vested and accrued as a primary right to the extent of and reasonable necessity for such use thereof under any of the following circumstances: First, whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake or spring or other natural source of supply." We think it would be a very strained construction to hold that a hole dug three feet deep, into which the waters naturally gathered, was not a natural source of supply, while it is conceded if the water come to the surface and flowed along a few feet, and was then collected in a like hole, it would be a natural source of supply. We are inclined to give these statutes a much broader construction. In our opinion, wherever the industry of the pioneer has appropriated a source of water, either on the surface of or under the public lands, he and his successors acquire an easement and right to take and use such water to the extent indicated by the original appropriation, and that a private owner who subsequently acquires the land takes it burdened with this easement, and we also hold that this easement carries with it such rights of ingress and egress as are necessary to its proper enjoyment. This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on

his own premises, although he should thereby dry up that of the first appropriator. The determination of this question disposes of the whole case, and it is therefore ordered that the judgment be, and it is, affirmed.

MERRITT, C. J., and KING, J., concur.

(11 Utah, 444)

McCORNICK v. SADLER.

(Supreme Court of Utah. June 3, 1895.)

BURDEN OF PROOF.

Where, in an action by the assignee of the claim of a building contractor for the balance of the contract price after an accounting, defendant admits that such sum was due, but claims that it has been paid to a person having a mechanic's lien for lumber furnished, the burden is on defendant to show the amount of lumber actually furnished, and that he was warranted in making the payment, as plaintiff sues as the assignee of an account stated. 37 Pac. 332, overruled.

On rehearing. Modified.

For former opinion, see 37 Pac. 332.

KING, J. This case was decided during the June term, 1894, the Chief Justice and Mr. Justice Smith concurring in the judgment of reversal. Mr. Justice Miner dissented. Thereafter a rehearing was granted, and the points involved in the opinion of this court (*McCornick v. Sadler*, 37 Pac. 332) were very exhaustively argued by counsel for the respective parties. The reversal of the judgment of the lower court was predicated upon two grounds: (1) That the testimony of the witness Taft in relation to the lumber furnished by Mason & Co., and used in the construction of defendant's residence, was hearsay and incompetent; (2) that the charge of the court upon the question of the burden of proof was conflicting, and calculated to confuse the jury. Upon the rehearing, the discussion was confined to these questions. Respondent's counsel earnestly insisted that the view taken by this court in respect to each proposition was erroneous.

To better understand the decision, a brief reference to the pleadings is necessary. Plaintiff alleged in his complaint that Taft and Kropfganz performed work and furnished materials in building defendant's house, for which the latter became indebted to them, and that on January 12, 1891, a balance of \$2,325 was found due from defendant, which amount he promised to pay; that Taft and Kropfganz sold and assigned (on said day) the whole of said sum so found due, to plaintiff; and that defendant had due notice thereof. Defendant answered, denying the indebtedness, assignment, and notice. "By way of affirmative defense," defendant further answered, and alleged "that on January 10, 1891, he and Taft and Kropfganz had a settlement for the labor performed and materials furnished by the latter, at which it was agreed that the amount

due from defendant was \$2,325, and that he should pay to the material men and subcontractors the amount due each respectively, and the balance, if any, to Taft and Kropfganz, they to release their mechanic's lien and dismiss the suit for its foreclosure; that, by said agreement, a sufficient sum was assigned to defendant to discharge all claims of the material men and employes, and that said sums were then appropriated by Taft and Kropfganz to the use and benefit and for the payment of certain persons, naming them, among whom was Mason & Co.; that, by virtue of said agreement and settlement, defendant paid on January 17, 1891, Mason & Co., who had furnished lumber for said house, and who had given notice that payment was expected from defendant; that the amounts so paid exhausted the sum found due at the settlement; and that the payments made were to persons who were entitled to liens."

The trial court instructed the jury, in substance, that the burden of proof was on the plaintiff to establish that the amounts paid to the various persons, after notice, were not valid liens against the building. Later the jury were told that the burden of establishing this issue rested on the defendant. This court held that the first instruction given correctly stated the law. There can be no doubt of the incongruity of those instructions. They are clearly repugnant to each other. The jury are told that the burden of proving the only real issue in the case is with the plaintiff. Then, without any explanation, they are charged that the burden rests upon the defendant. I think, however, this was error of which plaintiff alone could complain. It seems clear to me that, when plaintiff proved the assignment and notice, a case was made, under the pleadings. Defendant admitted the account and indebtedness, but, to defeat plaintiff's right to recover, pleaded payment to various persons. Plaintiff was not the assignee of a contract between Taft and Kropfganz and Sadler; no contract is pleaded by him. Plaintiff is the assignee of an account stated. Defendant confesses the settlement; admits that upon such settlement he was owing a balance of an account,—the sum claimed by plaintiff. He justifies his refusal to pay plaintiff by alleging payment to persons entitled to liens. He must defend from their bulwarks. If such persons had no claims against Taft and Kropfganz, which would enable them to secure mechanics' liens upon defendant's house, his efforts to avoid payment would be futile. In order to defeat plaintiff, it was incumbent upon defendant to establish a lien claim against this assigned fund, which was representative of the building. This was defendant's "affirmative defense," and the burden of sustaining it could not, under the pleadings, be shifted. If suit had been brought by the assignees against Sadler to recover a balance due, and the material men

had intervened, before the court would have subjected this fund to their demands, they would have been required to establish, by a preponderance of the evidence, the rightfulness of their claims. "The burden upon the plaintiff is coextensive only with the legal proposition upon which his case rests. It applies to every fact which is essential or necessarily involved in that proposition. It does not apply to facts relied upon in defense to establish an independent proposition, however inconsistent it may be with that upon which plaintiff's case depends. It is for the defendant to furnish the proof of such facts, and, when he has done so, the burden is upon the plaintiff not to disprove those particular facts, nor the proposition which they tend to establish, but to maintain the proposition upon which his own case rests, notwithstanding such controlling testimony, and upon the whole evidence in the cause." *Wilder v. Cowles*, 100 Mass. 490. The rule announced by Mr. Wharton is especially pertinent to this case. He says: "The defendant, on the other hand, seeks to relieve himself from the plaintiff's case, either by direct traverse or through a plea of avoidance, in which he sets up conflicting claims to bar the plaintiff's demands. If he take this second attitude, he is in the same attitude as the plaintiff, and he must assume the burden of the proof in making good his defense. Whenever, whether in plea or replication or rejoinder or surrejoinder, an issue of fact is reached, then, whether the party claiming the judgment of the court asserts the affirmative or negative proposition, he must make good his assertions. On him lies the burden of the proof." *Whart. Ev.* § 354. Where one seeks to release himself from another's claim, he must produce the proof necessary to make good his contention. This proof may be either affirmative or negative. "It makes no difference, therefore, whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertake to make out a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him." *Id.* § 357. Our Code permits the answer to contain "a statement of any new matter constituting a defense or counterclaim." 2 Comp. Laws, § 3226. And "the statement of any new matter * * * in avoidance or constituting a defense * * * must be deemed controverted by the opposite party." *Id.* § 3248. A defense which pleads matter in avoidance seems to be regarded in the same light as an original demand or complaint, so far as the burden of proof is concerned. The statute gives the plaintiff a denial of the affirmative or avoiding defense. It would seem the purpose of the statute is to place the defendant pleading in avoidance in the position of the plaintiff respecting the questions contained in the plea; and, the affirmative of such issue thus raised having been asserted by the defend-

ant, the obligation would rest upon him to prove it.

Appellant's argument proceeds upon the assumption that the same rule prevails in this case as would obtain if Sadler were defending against an action brought by Taft and Kropfganz upon a contract containing provisions for the delivery of the building free from all liens or possible incumbrances. No doubt, if suit were brought on such a contract, as a condition precedent to recovery, plaintiff would be required to prove a negative, i. e. the nonexistence and impossibility of liens. But there is a broad distinction between a case founded on a contract of the character suggested and the case at bar. Appellant's counsel insist that, when the means of proving facts are peculiarly within the knowledge of one of the parties to the controversy, the onus then rests upon him to make the proof. Applying this rule to the facts of this case, what is the result? Sadler, to maintain his defense, must rely upon the validity of the claim of Mason & Co. He assumes the company's position. It is a fact peculiarly within the knowledge of Mason & Co. how much lumber was furnished Taft and Kropfganz. The knowledge of the company upon this matter is presumed to be defendant's knowledge. As above stated, the principal question of fact in the case was concerning the payment made to Mason & Co. by defendant, after notice of the assignment. This feature of the case is fully discussed in the opinion of this court before mentioned, and does not demand extended consideration.

Respondent's counsel insists that the witness Taft did not testify as stated by the court. A careful examination of the record demonstrates that the succinct statement in this court's opinion is substantially correct. I am satisfied that the testimony of this witness was hearsay, and the refusal of the trial court to strike it out was error. The purpose of Taft's testimony was to contradict the statements of defendant's witnesses as to the value of the materials (lumber) used in the house, and supplied by Mason & Co. He was plaintiff's only witness upon this question. It is insisted that the testimony is inadmissible because (1) it is within the principle of declarations against interests, and (2) it is a part of *res gestae*. Whether the witness' testimony relative to the bills which he claimed accompanied the materials furnished by Mason & Co., and were received principally by the foreman of Taft and Kropfganz, is competent as a part of the *res gestae*, it is not necessary to determine; but I am of opinion that if bills were sent by Mason & Co. with the lumber delivered, and were marked so as to indicate the amount so furnished, they would be admissible as declarations against interest, because, as I view it, defendant, to defeat plaintiff's claim, must prove that the amount paid was justly due, and might be the basis of a subcontractor's lien upon defendant's building. But, conceding the cor-

rectness of counsel's position, does it alter the situation? These bills—declarations against interest—were not offered in evidence by plaintiff. Some were lost, as stated by Taft; how many it does not appear. The contents—that is, the total value of the materials furnished—of these written instruments (bills) were admitted, and the instruments themselves not offered; and this is true with respect to those which were lost. No foundation was laid for the introduction of secondary evidence. I think the bills were admissible, but not the testimony of Taft as to their contents. If Mason & Co. had made a verbal admission concerning the amount of lumber furnished, it would have been competent proof, if Taft had heard it, to offer. But this illustration suggested by counsel presents a different question from that raised by the proposition to admit parol evidence of the contents of the bills. I am of opinion that this court erred in holding that the burden was on the plaintiff "to show that the claim of Mason & Co. was not a claim that might be a lien on defendant's house," and think that part of the decision should be overruled. With that portion of the decision holding that the testimony of Taft was hearsay and incompetent, and reversing the cause, with instructions to grant a new trial, I agree.

My brethren concurring, the order will be that the portion of the former decision of this court respecting the burden of proof, as stated, be overruled, and the remaining portion stand as the decision and judgment of this court.

MERRITT, C. J., and SMITH, J., concur in the judgment.

(11 Utah, 452)

ELLIOTT v. BASTIAN et al.

(Supreme Court of Utah. June 17, 1895.)

JUDGMENT AGAINST DECEASED PARTY—VALIDITY—MOTION TO SET ASIDE—WHEN TO BE MADE.

1. Where a court has jurisdiction of the parties and subject-matter of an action, a judgment rendered therein against a party after his death is not void, if his death does not appear from the judgment roll.

2. Comp. Laws, § 3256, limiting the time within which a party or his representatives may be relieved by the court from a judgment taken through mistake, inadvertence, surprise, or excusable neglect to six months after the term at which the judgment was rendered, applies to a motion by the representatives of a deceased party to set aside a judgment entered against him after his death, where the death of the party does not appear from the judgment roll.

Appeal from district court, First district; before Justice Smith.

Action by Claude Hamilton and another against John Bastian and others to recover possession of a mine. Plaintiff Hamilton having died, the action was continued in the name of his coplaintiff, John Elliott. The American Eagle Mining Company, having succeeded to the interest of the original defendants, was made defendant, and judg-

ment by default was entered in its favor. Plaintiff Elliott having died, Edward Austin and W. F. Tipping, claiming to be his representatives, moved to set aside the judgment, and from an order denying the motion, they appeal. Affirmed.

C. S. Varian, for appellants. Arthur Brown and C. C. Dey, for respondents.

KING, J. On the 2d day of May, 1883, Lord Claude Hamilton and John Elliott commenced suit against John Bastian, John Firth, and Arthur Brown, to recover possession of a certain mining property in Juab county, Utah, commonly called the "Copperopolis Mine," and which plaintiffs allege they owned in fee simple and were entitled to the possession of. Plaintiffs further alleged that defendants ousted them therefrom on the 25th day of March, 1883, and have extracted ores from said mine, of the value of \$20,000. Defendants' answer contains a specific denial of plaintiffs' averments, and alleges ownership of the property in themselves. No further proceedings were had in the case until some time in 1889, when it appears that a supplemental complaint, which cannot be found, was filed. From the answer to the same, it is apparent that the supplemental complaint alleged the death of Hamilton, one of the plaintiffs, and asked to continue the cause in the name of the surviving plaintiff; and also averred that the American Eagle Mining Company, a corporation, had succeeded to the interest of the defendants, and asked that said corporation be made a party defendant. The American Eagle Mining Company answered and averred that in pursuance of the statute it had made great improvements on the property, and was holding under color of title adversely to the plaintiff's claim, and in good faith. It also pleaded the statute of limitations. No further steps were taken in court until September 23, 1893, when, upon application of defendants, the case was regularly set for trial on October 3d of the same year. At the time designated for the hearing, defendants appeared. A jury was called, and verdict rendered for defendant. No one represented the plaintiffs at the trial. On November 5, 1894, more than six months after the adjournment of the term at which the trial was had and judgment rendered, Edward Austin and W. F. Tipping served defendants with notice of motion, accompanied with affidavits, to set aside and vacate the judgment, for the reason that at the time the judgment was rendered John Elliott was dead, and no substitution of party plaintiff was had, and the cause was called and submitted without notice and in violation of an agreement of defendants for settlement; and also to substitute said parties as plaintiffs on the ground that they were the duly constituted and appointed trustees for the interests represented by the late Mammoth Copperopolis Mining Company and the

late British Tintic Mining Company, and of the share and debenture holders of said companies; and also for leave to file a supplemental complaint. In Austin's affidavit it was stated that in 1874 the property in question was conveyed to Hamilton and Elliott as trustees, to secure debentures issued by the Mammoth Copperopolis Mining Company, and that later, said company being involved, further debentures were issued, and in 1877 the British Tintic Mining Company was organized to acquire said property and take up the outstanding debentures or claims against the property; that the necessary steps were taken in the English courts, and by proper indentures, to extinguish the debentures and obligations of the first-named company, and to transfer them to the latter, which thereupon issued debentures to discharge said obligations and to revest the legal title to said property in said Hamilton and Elliott, to be by them held as trustees for the debenture and stockholders of said last-named corporation; that judgment was obtained in Utah against said company, and the property sold under execution, and purchased by defendants Bastian, Firth, and Brown, and was subsequently by them transferred to the defendant the American Eagle Mining Company; that in 1883 the said British Tintic Mining Company having defaulted in the interest on said debentures, said trustees were required to proceed under said trust and take possession of and sell said property; that notice was thereupon given by said trustees to said company, and thereafter this action was brought to eject defendants from the property in controversy; that in 1884 Hamilton died, leaving Elliott sole trustee, and in April, 1891, Elliott died intestate, having appointed his wife executrix; that by the terms of the indenture creating the trust the legal title to the property vested in the executrix of Elliott, and, upon request of the directors of the British Tintic Mining Company, she duly appointed Austin and Tipping trustees, and transferred the title of the property to them; that, prior to the demise of Elliott, negotiations had been entered into with the defendants, and a contract signed by the latter and Elliott, by the terms of which all claims against the property both of defendants and the debenture holders and stockholders were to be extinguished; the legal title by deeds and otherwise perfected in Elliott, a new corporation organized under the laws of England which should issue stock to defendants, and also to the debenture holders, and as soon as all obligations were fully discharged, the defendants were to allow judgment in the case in favor of Elliott as trustee, damages for extracting ores being waived, and he was to lease the property to the new company for 99 years for a nominal consideration. That Elliott entered upon the labors necessary to perfect this arrangement, but died before consummating them; thereafter the stock and debenture holders of the English companies

aforesaid continued the labors and were ready and willing to fully carry out the terms of said contract, when defendants broke off said negotiations, and in violation of the agreement procured said judgment; that it was believed that all differences between the parties would be settled in accordance with said contract, and the application for substitution of the proper parties as plaintiffs was delayed in order to settle the entire matter; that affiant had no notice or knowledge of the judgment until May, 1894, and believes that the other parties in interest, including his cotrustees, were unacquainted with the facts until advised by affiant; that all parties interested, except this affiant and defendants, reside in England, and that the affiant has used reasonable diligence to procure the necessary information in order to make this application. The affidavit of Van Horn, of the late firm of Baskin & Van Horn, was also submitted, in which it was stated that said firm were attorneys for plaintiff, and that they had no notice or knowledge of the setting of the cause or of the judgment therein, until October 10, 1894. There was also presented an affidavit by the present attorney, showing the diligence used by him in making this application. Defendants filed counter affidavits stating that after said judgment was rendered the property was sold for \$55,000, and that since then it had been twice sold, and the vendees had enjoyed peaceable possession thereof, and had expended nearly \$40,000 in improvements thereon. The affidavit of one of the defendants denied many of the allegations in Austin's affidavit, and stated that after fruitless negotiations for an amicable settlement affiant wrote Austin that defendants did not care to continue further negotiations for a compromise, and that in August, 1893, Austin knew that there would be no amicable settlement. The affidavit of the clerk of the court recited that after the case was set for trial plaintiffs' attorneys were immediately notified, and that before the day of hearing affiant's impression was a letter was received from one of the attorneys stating that his firm had no further connection with the cause. Austin filed a rebutting affidavit, denying that he had received the letter claimed to have been written by one of the defendants, or that he had any notice that defendants would proceed to trial. Affiant also stated that the various indentures creating the trust referred to in his first affidavit were duly recorded in Juab county, Utah, and that purchasers of the property knew of the condition of the title to said property. Another affidavit was filed reciting the facts tending to show that the vendees of said property had knowledge of the liens upon said property, and the trust title vested in Elliott and his successors. The trial court refused to set aside and vacate the judgment, and from the order denying the motion this appeal is taken.

We think the only points presented that require consideration are: First. Was the

judgment rendered in the case void or voidable? Second. If voidable only, had the lower court the power to grant the motion and vacate the judgment? Third. If it had such power, did appellants invoke the proper remedy? Appellants' contention is that the judgment rendered herein, being against a deceased person, is absolutely void, and that in a direct proceeding such as this, it must be vacated. It is to be observed that there is nothing in the judgment roll or any of the proceedings of the court to indicate the death of the plaintiff Elliott, and not until after the expiration of 13 months from the rendition of the judgment is it assailed. Four terms of court had passed in the meantime, and more than six months had expired after the adjournment of the term at which the judgment was rendered. The court's attention was not called to the death of Elliott until said affidavits were filed. Whether a judgment is void when an inspection of the judgment roll reveals the death of one of the parties to the controversy, or a lack of jurisdiction of the person or subject-matter of the action, it is not necessary for us now to determine, although it has been held in California that such a judgment is a nullity, and can be assailed either in a direct or collateral proceeding. But Mr. Freeman announces the rule to be that a judgment obtained upon a record which disclosed the death of one of the parties prior thereto is not void, but only erroneous, and can only be corrected on appeal. 1 Freem. Judgm. § 153. In 1 Rolle, Abr. 746, it is said that, "If in a *cui in vita* the tenant dies, and afterwards judgment is against him which is erroneous, an execution is sued against the heir, he shall not avoid the judgment in assize without error." Again: "So in a *scire facias* by an executor upon a judgment in ejectment by his testator against B, execution shall not be avoided nor judgment stayed by saying that the tenant died *pendente lite*, for he ought to avoid it by error." Id. 742.

Appellants' counsel, in his very able brief, presents the authorities from which various text writers deduce the rule that judgment given after the death of a party is only voidable, and after an analysis of these decisions counsel declares that such a judgment is in fact void, but, being valid on its face, the rules of law preclude any attempt to make it appear as a nullity and attach inviolability to it against collateral attack. But he says that when directly assailed, either by motion, bill of review, or writ of *coram nobis*, then it must be vacated, because it is void. We are not able to fully concur in this view. It is true that some courts hold that such a judgment is absolutely void, while expressions of others afford ground upon which to predicate this view. We think the better rule to be that when a court has acquired jurisdiction of the subject-matter and the person during his lifetime, and a hearing is had and judgment rendered, and the judg-

ment roll does not disclose the death of either party to the controversy, then such a judgment is not void because one of the parties may have died prior to its rendition. Such judgment, while erroneous, is not void, and, "While the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so does not render such a judgment void; it is voidable when properly assailed." Mr. Freeman announces the rule in these words: "If jurisdiction is obtained over the defendant in his lifetime, a judgment rendered against him subsequently to his death is not void." 1 Freem. Judgm. § 140. A different rule we think would be mischievous and fraught with evil results. A judgment free upon its face from every infirmity ought to possess some degree of sanctity. Especially should this be the rule in those jurisdictions where the statute limits the time within which applications can be made to the court to vacate and set aside judgments rendered therein. We think the weight of authority clearly supports the view herein expressed. 1 Black, Judgm. § 200, and cases cited in note; Hayes v. Shaw, 20 Minn. 405 (Gil. 355); Stocking v. Hanson, 22 Minn. 545; Yaple v. Titus, 41 Pa. St. 203; Coleman v. McAnulty, 16 Mo. 177; Mitchell v. Schoonover, 16 Or. 216, 17 Pac. 867; Jennings v. Simpson, 12 Neb. 565, 11 N. W. 880; McCormick v. Paddock, 20 Neb. 486, 30 N. W. 602; Ried v. Holmes, 127 Mass. 326; Tapley v. Martin, 116 Mass. 275; New Orleans v. Gaines' Adm'r, 138 U. S. 595, 11 Sup. Ct. 428. And this view is strengthened by the statute of this territory which provides that the death or disability of a party to any action or proceeding does not result in its abatement. 2 Comp. Laws, § 3187.

The second and third questions presented are so closely connected we will not attempt to discuss them separately. Formerly a judgment rendered after the death of one of the parties to the action was assailed by a writ of *coram nobis* or *coram vobis*. Tidd, Prac. 1136; 3 Bl. Comm. 407; Freem. Judgm. §§ 93, 94. But we agree with appellants' counsel that these writs have fallen into desuetude in most of the states, and that the proper way to call the court's attention to a party's death, and to have an erroneous and voidable judgment vacated, is by motion supported by affidavits or otherwise. Park v. Higbe, 6 Utah, 416, 24 Pac. 524; Bronson v. Schulten, 104 U. S. 417.

We have no doubt of the power of the court to vacate and set aside an erroneous and voidable judgment such as was rendered in this case, and of the correctness of the procedure adopted by appellants to accomplish this result, but the important question is, was the application made in time? Section 3256 of the Compiled Laws provides that, "The court may likewise in its discretion after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading, * * * and may also, upon such terms

as may be just, relieve a party or legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and when for any reason satisfactory to the court or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court or judge thereof in vacation, may grant the relief upon the application made within a reasonable time, not exceeding six months after the adjournment of the term." It is clear that this section controls the power of courts to grant relief against judgments of the character shown in the case at bar, and limits their discretion. It is unnecessary to discuss their power at common law or in the absence of statutory provisions. This section is a part of our civil procedure. It is concerning a matter which is a rightful subject of legislation. Though our courts possess common law and chancery jurisdiction, the Code prescribes limitations beyond which they cannot go. The time within which such relief can be given is six months after the adjournment of the term at which the judgment was rendered. The reason of this statute is obvious. There ought to be some fixed time within which the court can exercise this discretion upon the application of the aggrieved party; and there ought, in the interest of the public, to be some period when persons could purchase property which has been the subject of litigation, and have some assurance that the title, while perhaps vulnerable, could not be assailed upon a motion, and the judgment which had given title be vacated, without making them parties and affording an opportunity to meet the allegations of the moving party upon which the application was based to set aside a solemn and formal judgment. The theory of the statute is that within the six months mentioned application can be made in an informal manner, by motion, without bringing in the parties who may have acquired an interest in the property subsequent to the judgment, but that after the lapse of six months, if the judgment is assailed and relief sought, then steps which are more formal must be taken. The application is *prima facie* too late, as it was *prima facie* within time when made prior to the six months, and after such delay the court cannot proceed to act in the premises without an opportunity for all persons interested to present regularly an issue and be heard thereon. The moving party must not only make the application, but must set up the facts excusing the delay, and the adverse parties have the right by answer to present an issue for determination. Whether the court would have power to set aside the judgment in this case after the six months mentioned in the statute if the judgment roll disclosed the death of the plaintiff, we are not called upon to determine, but we think this provision of the statute prohibits the court in a case of this character from vacating the

judgment after the expiration of six months from the adjournment of the term at which it was rendered.

It may be asked, is there no possibility of relief in cases similar to the one now under discussion? Of course, it would be improper for us to adjudicate that question at this time, but we feel there is no impropriety in observing that the bill of review so common to chancery practice seems peculiarly fitted to bring before the court all the parties, and to present all the facts connected with the litigation, including those which are explanatory of the judgment and the delay, if there be any, in making the application to have it vacated; and the enforcement of equitable principles, if the facts presented warrant relief, would move the court, and, with the power which it possesses, justice would be done to all the parties.

Appellants' counsel contends that it is unnecessary to remit the parties to another action; that the court where the cause was determined, having chancery jurisdiction, can determine this question now as well as when presented before it in a more formal manner by bill of review. While there is some force in this contention, we think the statute above referred to is decisive of the question. It would seem from the record that interests have been acquired in the property since the judgment, and, as above stated, it is apparent that one of the purposes, if not the chief purpose, of the statute is to protect purchasers of property, and not in a summary and informal manner dispossess them. Appellants' application for relief is in its nature *ex parte*, and after so long a time, in justice and in reason, the relief demanded ought to be given only upon a full showing, after sufficient explanation for the delay, and after all the parties interested in the controversy and the property in question have had an opportunity to present their claims and all the facts to the court. Section 473 of the Code of Civil Procedure of California is substantially the same as the section above quoted. In referring to the power of the court to vacate the judgment, the supreme court of California say: "It is provided by section 473 * * * that the relief which formerly could be had during the term may be sought within a reasonable time, which is to be defined to be six months. * * *" *People v. Greene*, 74 Cal. 404, 16 Pac. 197. And the same court in the case of *People v. Temple*, 103 Cal. 453, 37 Pac. 414, construe section 473. It is said: "What is a reasonable time within which a motion may be made to set aside a judgment not void upon its face, must depend somewhat upon the circumstances of each particular case, and is not definitely determined further than that it will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure. When a judgment is not void upon its face, the court has no power to set it aside on motion, unless the motion is made within a reasonable time, but resort should be had to an

action, and all the parties interested should be notified and have an opportunity to be heard." To the same effect are the cases of *People v. Harrison*, 84 Cal. 608, 24 Pac. 311; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *People v. Goodhue*, 80 Cal. 200, 22 Pac. 86. And it is clear that the reasonable time mentioned is the six-months limit prescribed by the statute. "The time within which such an order could be vacated must be held to be limited by section 473. * * * The court had no jurisdiction after the expiration of six months to vacate the order made on a mere motion for that purpose, the order not being void on its face." *Moore v. Superior Court*, 86 Cal. 496, 25 Pac. 22. We are of the opinion that the lower court has no authority to vacate the judgment rendered in this case upon the application made. The judgment is affirmed, with costs.

MERRITT, C. J., and BARTCH, J., concur.

(11 Utah, 467)

RICHEY v. CLARK.

(Supreme Court of Utah. June 6, 1895.)

PAYMENT UNDER MISTAKE—RECOVERY.

Plaintiff, who had purchased certain land, which she believed free from incumbrances, but which the grantor supposed, but did not so inform plaintiff, was covered by a mortgage previously executed by him to secure his note, was informed by an attorney subsequently employed by her to examine the title that the deed was subject to the mortgage. Plaintiff induced defendant, the assignee of the mortgage, who believed it covered this land, to release the mortgage, as to her land, for \$400, which amount defendant immediately credited as a payment on the note. Subsequently defendant, in foreclosing the mortgage, discovered that the land was not included in the mortgage. Judgment in that suit was rendered for the amount of the note, less the amount paid for the release. The land remaining as security did not fully satisfy the judgment. *Held*, that since the mistake was attributable to plaintiff, rather than defendant, and the parties could not be placed in statu quo, plaintiff could not recover the amount paid for the release. Batch, J., dissenting.

Appeal from district court, Fourth district; before Justice J. A. Miner.

Action by Edith B. Richey against Joseph Clark to recover money paid by mutual mistake. From a judgment for plaintiff, defendant appeals. Reversed.

Evans & Rogers and A. G. Horn, for appellant. O. R. Leonard and Brerdon & Gunnell, for respondent.

KING, J. The record in this case discloses the following facts: William Stowell on the 1st day of September, 1888, sold a tract of land to W. R. Swan, taking in part payment therefor a note secured by a mortgage on the land. The mortgage was duly recorded on the 12th of the same month. For a valuable consideration, Stowell assigned, on October 29, 1888, the note and mortgage to defendant. A few days prior thereto, Swan conveyed, by warranty deed, 40 lots to plaintiff, the latter believing them

free from all incumbrances. Swan supposed they were covered by the mortgage to Stowell, but omitted to inform plaintiff of this. In October, 1890, plaintiff and her husband desired to mortgage the lots in order to secure merchandise for their business. An abstract was required, and they employed an attorney to examine the record and secure one. A few days thereafter the information was conveyed to plaintiff by her attorney that the lots were embraced within the mortgage then held by defendant, which had been given by Swan to Stowell. She thereupon went to Swan, in "order to pay the mortgage off," and to secure a release of the lots from defendant's mortgage. Swan could do nothing, and she called on defendant. He declined for some time to execute a release, but plaintiff's husband, who was acting for her, insisted, and stated that, with the lots freed from all liens, they could obtain \$4,000 worth of merchandise to aid them in their business. Plaintiff fully believed that the mortgage held by defendant embraced the lots, and defendant entertained the same view. In fact, it seems clear from the record that it was the design of the mortgagor and mortgagee that the mortgage should cover the lots in question, as the security was somewhat inadequate without them; and it was supposed by all the parties to the transaction that the lots were subject to the mortgage. Clark purchased the note and mortgage with this understanding. After some negotiations between plaintiff and defendant, it was agreed that the latter should release the lots from the supposed incumbrance, and the former should pay him \$400; and on December 24, 1890, plaintiff's husband, together with her attorney, went to Swan's office, and there paid, either to defendant or Swan, the amount agreed upon, and the release was then and there executed by Clark. Both parties acted in good faith. The money was paid in order, as plaintiff supposed, to disincumber her property, and was received by defendant only at the solicitation of plaintiff's husband, in order to aid them in their business, and recompense him for the supposed loss of security. As soon as the money reached defendant he gave Swan credit for it upon his note, relieving the maker pro tanto. In January, 1892, appellant obtained a decree of foreclosure of the Swan mortgage. Plaintiff was not made a party to the foreclosure proceedings, because of the release theretofore executed, although Clark, who had, when he brought his suit, discovered the omission of the lots from the mortgage, asked for a correction of the mortgage so as to include them. In the suit upon the note and mortgage the judgment against Swan did not include the \$400. The court treated it as a payment on the note. While the record is not clear, it appears that after exhausting the security there was still a balance due Clark on the note. In the latter part of 1892, plaintiff learned of the mistake in the mortgage, and

demanding that defendant return the \$400. He refused, and in December of the same year this action was commenced, to recover said amount, the complaint alleging payment by mistake. The trial judge held "that defendant was more negligent than plaintiff," and instructed the jury to find for the latter.

Plaintiff contends that where money is paid by mutual mistake an action will lie for its recovery. Defendant does not controvert this general rule, but claims that the case at bar comes within well-recognized exceptions. It is apparent that one of the parties to the controversy must suffer loss, unless plaintiff could recover from Swan, as suggested by appellant's counsel, for a breach of warranty, or from her attorney, for negligence. But that question is not before us. Each having acted honestly and in good faith, we think equitable principles would require that the misfortune be visited upon the one contributing more to the mistake; in other words, the one whose conduct was the more negligent. Defendant, in receiving the money, seems to be free from fault or negligence. Plaintiff was the actor. Her representations induced the payment. They were the proximate cause of defendant's passive conduct, which resulted in his receiving the money. She, by her agent, searched the records, and reached the conclusion that the title was not clear. She then approached Clark. He was guilty of no fraud or deceit. He made no representations, except, when interrogated, to state that he would execute no release, unless paid, and concealed no facts known to him. There was an apparent cloud upon plaintiff's title. It was important that it be removed, and at once, as her business demanded the immediate purchase of goods, and this could not be done without the lots as security. Defendant was asked, as a favor, to relinquish his supposed lien. If negligence is to be imputed to either, it must be charged to plaintiff. Her agent made the mistake. His examination of the records was faulty, and plaintiff was thereby misled. No relation of trust or confidence existed between the parties. They were dealing as strangers, "at arm's length." Plaintiff did not rely upon defendant. Her conduct was the outgrowth of her own investigations, and the knowledge of the existence of supposed facts, which resulted from her own inquiries. The mistake did not proceed from a violation of obligations imposed by law upon defendant, and his conduct is not inconsistent with good faith. "When each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria*." 1 Story, Eq. Jur. § 151. It would seem that reasonable diligence upon plaintiff's part would have avoided the mistake. And when the fact is equally unknown to both

parties, or where each has adequate and equal means of information, or where the fact is doubtful from its nature, in every such case, if the parties have acted in entire good faith, a court of equity will not interfere; for in such case the equity is deemed equal between the parties, and where it is so a court of equity is generally passive, and rarely exerts an active jurisdiction. Id. § 150. There ought to be finality to transactions between parties. The law does not tolerate carelessness and indifference in settlements between individuals. In disputed questions, where all parties have full opportunity to investigate and ascertain the facts, and where there is no fraud or misrepresentation, and when, after such investigation, they become satisfied as to their respective rights, and thereupon adjust them, neither law nor equity will countenance efforts to revive and litigate the controversy. Even if there were no negligence on plaintiff's part, in her investigations concerning the title, it would seem that there was laches in waiting for nearly two years before making any demand for restitution of the money. The law sometimes imputes laches, even in the absence of knowledge. But what appears to us to be the strongest reason for denying plaintiff relief is found in the changed condition of the parties. A restoration of the parties to their original position is impossible. It has been held that equity will not decline to afford relief, in cases of mutual mistake, merely because of the intervention of circumstances which render it difficult to restore parties to their original position. *Beauchamp v. Winn*, L. R. 6 H. L. 223. But the rule which has received approval in the supreme court of the United States is that "mistake, to be available in equity, must not have arisen from negligence, when the means of knowledge were easily accessible. * * *

A court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the strongest and clearest equity imperatively demands it." *Grymes v. Sanders*, 93 U. S. 61, 62. When an insurance company purchased, received the assets, and assumed the liabilities of another company, and the transaction was afterwards declared to be *ultra vires*, it was held that, while the mistake was one equity would have the power to relieve against, yet, as it was impossible to restore both companies to their original situation, this was an insuperable objection to allowing the purchasing company to prove against the selling company an excess of debts over assets received. *In re Saxon Life Assur. Soc.*, 2 Johns. & H. 408. "The rule is general that money paid under a mistake of material facts may be recovered back, although there is negligence on the part of the party making the payment; but this rule is subject to the qualification that the payment cannot be recalled when the situation of the party receiving the money has been changed in consequence of

the payment, and it would be inequitable to allow a recovery. The person making the payment must, in that case, bear the loss occasioned by his own negligence." *Walker v. Conant*, 65 Mich. 195, 31 N. W. 786. When the contract had been fully performed by the defendant, relief predicated on the sole ground of mutual mistake of fact was denied because the "situation of the parties had been so changed by reason thereof as to render it impossible to restore them to their situation at the time the contract was made. A court of equity will not interfere to rescind a contract, on the sole ground of a mutual mistake of fact, unless the parties can be restored substantially to their situation at the time the contract was made; for to so interpose would not cure the mischief, but simply shift it." *Eastman v. Water-Power Co.*, 24 Minn. 437. And the illustration employed by the court of Tennessee seems to square with the case under consideration. It is said: "To illustrate the principle, take the case of a payment, without knowledge of the facts, made, not to the original creditor of the party paying, whose debt had been previously satisfied, but to a creditor of his, who received the money in good faith, ignorant of the mistake, and in satisfaction of a just demand, and who, in consequence of such payment, may have waived or lost his remedy against his debtor. In such case it is clear, upon well-established principles, that the plaintiff would not be entitled to recover. The defendant, in the given case, would be equally innocent as the plaintiff of the mistake; and, having lost his remedy upon the faith of such payment, it would not be against conscience for him to retain the money, and the loss must fall upon the plaintiff, by whose act, though innocently done, it was occasioned." *Gullid v. Baldrige*, 2 Swan, 295; *McArthur v. Luce*, 43 Mich. 437, 5 N. W. 451; *Sanger v. Mellon*, 51 Wis. 560, 8 N. W. 487; *Boas v. Updegrave*, 47 Am. Dec. 425; *Hall v. Shultz*, 4 Am. Dec. 270; *Moyer v. Shoemaker*, 5 Barb. 319; *Espy v. Allison*, 9 Watts, 462. The rule is not changed because the party receiving the money has no interest whatever in the property. *Manzy v. Hardy* (Neb.) 13 N. W. 12.

Defendant herein, acting upon the strength of plaintiff's conduct, credited Swan with the money paid. Plaintiff caused defendant to change his position with Swan, and long before plaintiff commenced this action the rights of Clark and Swan had become fixed by decree of court. Applying the principle announced in the case of *Grymes v. Sanders*, *supra*, to the facts in this case, it is obvious that the plaintiff is not entitled to recover. It cannot be said that the "clearest and strongest equity" demands a rescission of the contract made. Indeed, we think it would be inequitable, and against good conscience, to uphold the judgment of the lower court. In view of the facts that the parties cannot be placed in statu quo, and that the mistake is attributable to plaintiff, rather than de-

fendant, we are of the opinion that the court erred in directing a verdict for plaintiff. Its judgment is therefore reversed, and the cause remanded, with directions to grant a new trial.

MERRITT, C. J., and SMITH, J., concur.

BARTCH, J. (dissenting). I do not agree with my brethren in reversing this case. It is admitted, and shown by the record, that the plaintiff purchased the lots in question, in good faith, for a valuable consideration, believing them to be free from all incumbrances. Some time afterwards, desiring to mortgage the lots, it became necessary to ascertain the state of the title; and therefore she procured the services of an attorney, who, within a few days, informed her that the lots were covered by a "blanket mortgage." Thereupon she represented the matter to Clark, the appellant herein, who was the owner of the mortgage, which was supposed to include the lots. There is some conflict in the evidence as to what representations Clark then made to the plaintiff, but it is clear that he claimed his mortgage covered the lots in question. The plaintiff becoming satisfied that such was the case, it was agreed between her and Clark that she should pay him the sum of \$400 to release them, which sum having been paid, they were released on December 24, 1890. Up to this time it is conceded that both parties were mutually mistaken, and were acting in good faith. On March 13, 1891, Clark began foreclosure proceedings upon the mortgage, and then learned that the lots were not covered by the mortgage; but although he knew that the plaintiff was in ignorance of that fact, and that she had paid \$400, as a result of such ignorance, which he was not entitled to, under the facts as they then actually existed, he made no attempt whatever to inform her that the lots were not included in the mortgage. Nor did he make her a party to the foreclosure suit, and the only reason which he assigns, according to the admissions of his counsel, for not making her a party to that suit, and consequently for withholding from her his subsequently acquired knowledge, is that the plaintiff had received the release from him. He made an effort, however, in court, at the time of the foreclosure proceedings, as is admitted by his counsel, to have the mortgage reformed so as to include the property in question, but failed in such effort. Some time after the foreclosure of the mortgage the plaintiff ascertained the facts so withheld from her by Clark, and thereupon demanded a return of the money which she had paid him for the release, which demand was refused; and she was then, for the first time, informed that he had placed that money to the credit of the mortgagor. It will be noticed that Clark discovered the mutual mistake between the parties before the mortgage was foreclosed,

at a time when he was yet in a position to return the money paid by mistake for the release, and recover it from the mortgagor, and thus, without loss to himself, save the plaintiff from loss, it not appearing from the record that the mortgagor was unable to pay his debts. Failing to inform the plaintiff of the discovery of their mutual mistake, he rendered himself more negligent and more at fault than the plaintiff was, and should, therefore, not be heard to complain when he is asked to refund the money. From the facts and circumstances as they appear from the record in this case, I am unable to see upon what principle of justice and fair dealing the appellant can be permitted to prevail. I therefore dissent.

(11 Utah, 480)

ADAMS et al. v. REED et al.

(Supreme Court of Utah. June 3, 1895.)

GRANT TO RAILROADS — MINERAL LANDS — CONSTRUCTION OF DEED — RESCISSION OF CONTRACT — PLEADING.

1. Under Act Cong. July 1, 1862, granting certain lands to the Union Pacific Railway Company, "provided, that all mineral lands shall be excepted from the operations of this act," the grantee, upon identification of the land, and prior to issuance of patent and examination as to minerals, takes a defeasible title, and, after issuance of patent, a fee simple.

2. A deed reserving the right to prospect for "coal and other minerals," and to mine and remove the same, if found on the land conveyed, does not convey a fee-simple; and a quitclaim deed releasing the right reserved as to coal, only, does not cure the defect.

3. Where one, without fraudulent intention, represents that he holds a fee simple to land, when in fact he does not, and executes a warranty deed of the same, equity will treat the deed as an executory contract to convey, the rescission of which may be decreed.

4. Where a grantor executes a warranty deed for land of which he does not hold a fee simple, on suit for cancellation of notes and mortgage given as the purchase price of the same the grantee need not offer to reconvey.

Appeal from district court, Fourth district; before Justice J. A. Miner.

Action by Louis B. Adams and Watson N. Shilling against Edward A. Reed, H. H. Henderson, and others, for the reformation and foreclosure of a mortgage. Defendants filed a cross complaint asking for the cancellation of the mortgage and notes given as part of the purchase price, on the ground of failure of title. From a judgment for defendants, plaintiffs appeal. Affirmed.

Bennett, Marshall & Bradley and Kimball & Kimball, for appellants. Richards & MacMillan and H. H. Henderson, for respondents.

KING, J. The plaintiffs allege in their complaint that in March, 1890, they were the owners and entitled to the possession of certain land in Weber county; that on the 27th of said month they sold said estate to defendants, and executed a warranty deed, but by mistake said property was described

as being in township 6, instead of 5; that on the 29th of September, 1891, as soon as said mistake was discovered, they made a quitclaim deed to defendants, correctly describing the land intended to be conveyed, which they tendered to defendants, and now bring into court; that, in part payment for said land, defendants executed two promissory notes, which were secured by a mortgage on the land, but which mortgage contained the same error in description as said deed. Plaintiffs pray for the reformation of the mortgage, and for its foreclosure. Defendants answered and filed a cross complaint, in which they averred that relying upon the representations of plaintiffs that they owned, and had a good title in fee simple to, 440 acres of land lying near Ogden city, and without investigating the title or seeing the land, they purchased an undivided two-thirds interest, and executed the mortgage described in plaintiffs' complaint in part payment of the purchase price; that subsequently they ascertained that plaintiffs were not the owners of, and did not have an indefeasible and fee-simple title to, said land, or any title to the land conveyed; that thereupon they demanded back the amount paid to plaintiffs, and the surrender and cancellation of the notes given in part payment; that said representations as to title were false and fraudulent, which plaintiffs then and there knew, and were made to deceive defendants. There are further allegations in the cross complaint with respect to the character of plaintiffs' title and the fraudulent representations. Defendants pray that the mortgage and notes be canceled and delivered up.

The principal questions presented for our determination are: (1) Did the Union Pacific Railway Company have a fee-simple title to the land claimed in township 5, which plaintiffs attempted to convey to defendants? (2) If so, was this title conveyed to defendants? (3) If the above questions are determined negatively, then was there such fraud upon the part of plaintiffs as to be the foundation for the rescission of the contract between plaintiffs and defendants? (4) Do the facts of the case show a rescission?

1. By the act of congress passed July 1, 1862, certain lands were granted to the Union Pacific Railroad Company for the purpose of aiding in the construction of a transcontinental railroad. The language of the grant is: "There be and is hereby granted to the said company . . . every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile on each side of the railroad on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead claim would have attached at the time the line of said road is definitely fixed: provided that all mineral lands shall be ex-

cepted from the operations of this act." It is admitted that the land in controversy in this suit is within this grant, and that no patent has ever been issued therefor. The court below, adopting the findings of the referee, found that the land has been and still is used for agricultural purposes; also that no exploration or examination has been made for coal or minerals of any kind. Appellants' contention is that the act of congress above referred to was a grant in present, and passed the present legal title—at least as soon as the road was constructed, and the identification of the sections became possible—to all of the lands embraced within it, except those to which a pre-emption or homestead claim had attached, and which were not known to contain mineral. Respondents' claim is that no exploration or examination having been made by the government to ascertain whether the lands were mineral or nonmineral, and no patent having been issued, an imperfect and defeasible title passed by the grant to the railroad company.

Our attention is invited to numerous cases decided by the supreme court of the United States, and other courts, wherein this and similar grants to railroad companies are construed. The language of these decisions seems, to the writer of this opinion, clear and unambiguous. By many it is declared that by their terms these grants import a grant in present, carrying at once the interest of the grantor in the lands described, and, while the grant is in the nature of a "float," when the route of the road is definitely fixed the lands granted become susceptible of identification, and the title attaches as of the date of the grant, and has the same effect upon the selected parcels as if they had been specifically described in the acts of congress. To me it seems there is much force in this contention of appellants. The Union Pacific Railroad has been completed for more than a quarter of a century. The government has not explored the lands to ascertain whether they contain minerals. There is nothing to evidence a purpose upon its part to make such exploration. The railroad was entitled to a patent as soon as the commissioners appointed by the president of the United States reported the completion and equipment of the road. The supreme court of the United States has declared, in effect, that patents are unnecessary to divest the United States of its title, and invest the grantee therewith. Patents " * * identify the lands as coterminous with the completed section, but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with. * * * As deeds of further assurance, they would thus be of great value, in giving quiet and peace to the grantee's possession." *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389. The decisions cited by appellants seem to have regarded the mineral reservations in

these grants as reaching only such lands as were known to contain minerals at the time of the grant. But it would be profitless to enter into a discussion of this phase of the subject, and analyze the authorities collated, for the reason that they are ably considered and exhaustively treated by Mr. Justice Brewer in his dissenting opinion in the case of *Barden v. Railway Co.*, 154 U. S. 332, 14 Sup. Ct. 1030. The writer of this opinion acknowledges the almost unanswerable arguments adduced by the learned justice, but recognizes that this court is bound by the majority opinion in that case. But it must be confessed that this opinion cannot easily be reconciled with very many utterances of that high tribunal. Appellants' counsel insist that the case last cited is not decisive of the point now under consideration. Counsel for respondents contends, with equal vehemence that under this decision, until patent issues, no indefeasible title to the lands within the grant passes to the grantee. An examination of the grant to the Northern Pacific Railroad Company shows that the words there employed are almost identical with those found in the grant to the Union Pacific. The words in the former are, "to every alternate section of public land not mineral"; and the following proviso is attached to the granting section of the act: "Provided, that all mineral lands be and the same are hereby excluded from the operations of this act," etc. Applying the doctrine enunciated in the *Barden* Case, it would seem that, at any time before exploration for minerals and the issuance of patents, the government can, upon the discovery of minerals within the land granted, not only refuse patent for such lands as contain mineral, but dispose of them to others than the grantee or its vendees, and that such grantee or vendees would not possess an indefeasible title to all the lands embraced within the grant. In the *Barden* Case, just cited, the court held that the words quoted were an exclusive reservation of all minerals to the United States, and that it was immaterial whether there was knowledge of the existence of mineral deposits; if discovered at any time before patent, no title passed from the government. Some of the cases upon which appellants rely are considered and explained. Speaking of *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, and *Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, the court say: "In both of these cases the writer of this opinion had the honor to write the opinions of this court, and it was never asserted or pretended that they decided anything respecting the minerals, but only that the title to the lands granted took effect, within certain designated exceptions, as the date of the grant. They never decided anything else; and what was that title? It was of the lands which at the time of the location had not been sold, reserved, or to which a pre-emption or homestead right had not attached. * * * It

seems to us as plain as the language can make it that the intention of congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. * * * Mineral lands were not conveyed, but by the grant of congress itself, and the subsequent resolution of congress cited, they were specifically reserved to the United States, and excepted from the operations of the grant. Therefore they were not to be located at all, and, if in fact located, they could not pass under the grant. * * * When the act was passed it would have been impossible to state with any accuracy what parts of the tract contained minerals, and what did not. That fact could only be ascertained after extensive and careful explorations. * * * The determination of the character of the land granted by congress in any case, whether agricultural or mineral, is placed in the hands of the officers of the land department, whose action is subject to the revision of the commissioners of the general land office, and an appeal lies from them to the secretary of the interior. Under their direction and supervision the actual character of the land may be determined and fully established." The court then quotes from the opinion of Mr. Noble, late secretary of the interior, in the case of Railroad Co. v. Valentine, 11 Land Dec. Dep. Int. 238. The language is as follows: "Moreover, I am informed by the officers in charge of the mineral division of the land department that ever since the year 1867 * * * it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent, or certification, where patent is not required."

It seems very clear from these decisions that while the grant to the Union Pacific Company was one in praesenti, and, as to the lands embraced within its limits which were not within the exceptions or reservations, the title took effect, upon identification, as of the date of the grant, but as to lands containing minerals, whether known or unknown, no title passed, and the failure of the government to explore, or issue patents, and the great lapse of time, have not ripened a defective title into an indefeasible one. This being true, until patent issues there would be uncertainty as to the character of one's title. The land might be used exclusively for agricultural purposes; the grantee and its vendees might regard it as utterly devoid of mineral, men of science might unanimously agree that it was barren of mineral wealth; still, it is possible mysterious nature may have impregnated the soil with its richest wealth. While the patent does not change the character of the land, it is more than an assurance of title. It is conclusive evidence, when no fraud exists, that the government regards the land as freed from the reservation, and it is a remission of

any claim the government may possess by reason of mineral deposits upon the land. There can be no doubt but that this view attaches an element of uncertainty to the land granted, as well as the holdings carved out of it. Mr. Justice Brewer, in his dissenting opinion, says: "Take any particular mile of the road, on either side of the line, as located, there are twenty alternate sections within the place limits. By the rule now laid down [speaking of the majority opinion of the court] the title to no one of these twenty sections passes to the company, because it is not known absolutely which are mineral lands. So far as known, none may be mineral, and yet, as in this case before us, six years after that line of definite location and exploration develops the fact of minerals, and then it is declared that the title did not pass. When you simply say, as the court does in this opinion, that out of those twenty sections there shall pass the title to such lands as shall thereafter be found or be determined by the secretary of the interior to be nonmineral lands, you say, in effect, that there is no identification of a single tract."

It is claimed by counsel for appellants that the supreme court of the territory, in the case of Tarpey v. Salt Co., 5 Utah, 494, 17 Pac. 631, decided that all lands, whether surveyed and selected, or not, within the grant limits, passed to the grantee, and clothed it with a perfect legal title. An examination of that case does not fully sustain counsel's statement. The court regarded the grant as conferring a perfect legal title in praesenti, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government. But this declaration is somewhat modified by the expression which is the important announcement in the opinion. It is this: "We think it is now beyond controversy that, where the question is presented as it is here,—where no right of the government, reserved in the act making the grant, is involved,—it grants the legal title in praesenti to all the lands included in the grant, whether surveyed or selected, or not." A right of the government is involved in the reservation found in the act of July 1, 1862. The minerals were reserved to the sovereign. We agree with this view, that, aside from the reservations in the grant, a legal title passed to the grantee for all the lands covered by the grant. If the Union Pacific obtained a title, less than fee simple by this grant,—and we think it did,—the exact character of it is not now in question. We will observe, however, that under the authority of Tarpey v. Salt Co., supra, the delay in issuing the patent, or omission of the government to explore and decide as to the mineral character of lands, would not prevent the grantee from occupying and holding the lands, and maintaining possessory actions against trespassers. A fee-simple estate is the largest in land known to the

law. It is an absolute estate in perpetuity, and excludes any qualification, restriction, or limitation. From the foregoing it is apparent that, if the lands in controversy in this case are devoid of minerals, then the grantee possesses a perfect legal title. If they contain minerals, aside from coal and iron, the railroad company has no title whatever. Yet, as stated above, the Barden Case leads to the position that, if there be undiscovered mineral when patent issues, the presumption becomes conclusive that it is barren of mineral wealth. The failure to discover minerals, and the conclusiveness of this presumption, confer an indefeasible title, though in fact deposits of mineral wealth may abound in greater quantities than in the famous El Dorado. The railroad's title, then, to this land, is subject to be defeated. At most, its title is a base or determinable fee. It may continue forever, or it may be determined at any moment, prior to the issuance of patent, upon the discovery of mineral. And the case of *Ankeny v. Clark*, 148 U. S. 345, 13 Sup. Ct. 617, supports the view announced in the Barden Case, viz. that until patent issues the title is imperfect in the grantee.

2. Respondents contend that, even if the title of the railroad company were free from imperfections, the various conveyances executed by it and its trustees and grantees did not pass a fee-simple title to plaintiffs. We think the evidence clearly establishes the truth of this contention. It is not necessary to examine all the defects in the chain of title between the railroad company and the plaintiffs, but we will content ourselves with a single reference. In the deed from the railroad company to plaintiffs the following reservation appears: "Reserving, however, to the said Union Pacific Railway Company the right to prospect for coal and other minerals within and underlying said lands, and to mine and remove the same, if found; and for this purpose it shall have the right of way over and across said lands, and space necessary for the conduct of said business thereon, without charge or liability for damage therefor." This is an incumbrance—an easement—upon the land. The grantee's title did not protect it from invasions and trespasses as oft-repeated as the grantor desired. While the fee passed to the grantee, assuming that it was held by the grantor, it was a servient estate. The mere statement of the reservation suffices to show the incompleteness of the estate conveyed to plaintiffs. But counsel insist that the deed executed by the railroad company on the 2d of November, 1891, cured this defect. The findings show that after the defendants had claimed a rescission of the contract, because no fee-simple title passed to them, the railroad company executed a quitclaim deed to plaintiffs, wherein it released "all right, claim, * * * it may have in or to any coal which may thereafter be found upon or beneath the surface of said land. * * * It being the

intention of this deed to relinquish any rights which the said Union Pacific Railway Company may have retained in said land by virtue of the coal reservation * * * included in said deed of October 18, 1889." It will be observed that the company not only reserved the right to enter upon the lands and prospect and mine for coal, but "other minerals within and underlying said lands." The quitclaim deed only relinquished the right to prospect and mine for coal. It is clear that, even if the release had been in time,—that is, prior to defendants' notice of rescission,—it is insufficient. It releases less than was reserved.

3. The finding of the referee upon this question was that the plaintiffs informed defendants that they owned, and had a good title in fee simple to, 440 acres of land lying west of Ogden city, which said land so referred to was the land intended to be conveyed to defendants, and that the defendants had not seen said land, and were not acquainted with the title, but that plaintiffs promised that they would furnish defendants with an abstract of title to said land; that defendants believed, relied and acted upon, the representations of plaintiffs, and, without investigating the title, purchased an undivided two-thirds interest therein, which purchase defendants would not have made if they had not believed said representations; that said representations were untrue. The conclusion of law based upon this finding is that the representations made to defendants concerning the title were untrue, and a fraud, in law, upon the defendants. Appellants contend that this finding and conclusion show that there was no "moral" fraud; that there was simply innocent misrepresentation as to title; and that where there is a partial failure of title, or a defect therein, coupled with innocent misrepresentation as to such title, a court of equity will not rescind, where the contract has been executed. The learned counsel for plaintiffs insist that the findings and conclusions of law show that the plaintiffs are entirely exonerated from moral turpitude, or anything that indicates mala fides. It is true, there is no direct finding of a scienter in the misrepresentations, but it seems equally clear that plaintiffs are not wholly exculpated from wrong in the transaction. Plaintiffs knew that defendants had never seen the land, and that they were unacquainted with the title. They knew that the purchase was being made entirely upon their representations respecting the title and its indefeasibility. The conclusion of the referee is not equivalent to a declaration that plaintiffs were innocent in their affirmations of the unimpeachable character of their title. But, conceding the construction placed upon the findings and conclusion of law above referred to is the correct one, the question presents itself whether, under the facts, there is ground for equitable relief in behalf of defendants. Counsel for appellants assume

that the facts in this case show an executed contract, and learnedly argue that equity will not decree rescission of an executed contract, in the absence of moral fraud, and that where the contract is a warranty deed, and it is executed by the necessary parties, the purchaser has no remedy, either in law or in equity, in respect of defects in the title, or quantity or quality of the estate, which are not covered by the vendor's covenants. If the facts of this case show an executory contract only, it is not necessary to the determination of this case that we decide whether there is "legal," as distinguished from "moral," fraud, or what remedies are afforded the purchaser in executed contracts, where there is fraud or breach of covenants, because it is conceded, when the contract is still executory, the power of equity to decree rescission is ample. Is the transaction between the parties to this suit an executed or executory contract? "A contract is executory when the thing agreed has not been done. It is executed when the thing has been done. * * * One who has begun to do what he promised, but has not finished, has executed his undertaking in part." *Bish. Cont. § 624.*

Conceding that plaintiffs had a fee-simple title to the land intended to be conveyed, the deed contained a description of wholly different land. The land which defendants agreed to purchase was not conveyed. They contracted for a warranty deed to a certain tract of land. The contract was not fully performed by plaintiffs. It was executory. The writing or deed amounted to only a contract to convey the land which plaintiffs claimed to own, and in equity would be enforceable, and, if the evidence was sufficient, would warrant a decree of specific performance. It was a contract executory, conveying a chose in action, not a contract executed, conveying a chose in possession. 2 Bl. Comm. p. 443; *McDonald v. Hewett*, 15 Johns. 349. No right in rem was created. The only rights existing were in personam. If the contract between the parties had been executed, they would no longer have been bound by a contractual tie. Rights would have been acquired in property which would have extinguished the contract, on showing that it was incomplete. Executory, the rights were in personam. They were seeking to enforce a chose in action. "An executory contract is one in which a party binds himself to do, or not to do, a particular thing." *Fletcher v. Peck*, 6 Cranch, 137. Plaintiffs' warranty deed was a contract, in which they bound themselves to convey the land. Defendants agreed to purchase. But parol evidence would be required to establish the correct description. It was a defective deed, containing land which neither of the parties understood was conveyed or agreed to be conveyed. It was therefore only a contract to convey, and was executory. A defective deed is an executory contract, and "it is a familiar rule that a defective deed may be treated in eq-

uity as an agreement to convey, and performance enforced; and, where it is, we think * * * that it stands on the same footing as an executory contract to convey." *Hanson v. Michelson*, 19 Wis. 535; *Petesich v. Hamsbach*, 48 Wis. 447, 4 N. W. 565; *Eaton v. Eaton*, 15 Wis. 284; *Mastin v. Halley*, 61 Mo. 200; *Fitch v. Gosser*, 54 Mo. 274. In the case of *Hunt v. Rousmanier's Adm'rs*, 1 Pet. 13, the court say: "There are certain principles of equity applicable to this question which, as general principles, we hold to be incontrovertible. The first is that where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to equity or law, does not fulfill, or violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements fairly and legally entered into is one of the peculiar branches of equity jurisprudence; and if the instrument which intended to execute the agreement be, for any cause, insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement." And in the case of *Walden v. Skinner*, 101 U. S. 585, this language is adopted, and the principle reaffirmed. In the case of *Conrad v. Schwamb* (Wis.) 10 N. W. 396, plaintiffs brought an action to recover a tract of land. A deed had been executed to defendant. The grantors intended to convey certain land in fee, but, by mistake, it was described as being in a different quarter section. The court say: "The deed, * * * although it did not convey the land intended, must be treated, in equity, as an executory contract * * * to convey such land. * * * Hence * * * Schwamb might have maintained an action against Felton * * * to compel Felton specifically to perform his executory contract to convey the land claimed, so far as he could perform it." And the quitclaim deed, correctly describing the land, tendered to defendants after the discovery of the mistake in the first deed, did not answer the contract and fully execute it. Besides, the defendants had, a few days prior thereto, elected to rescind the contract, and had demanded back the amount paid, and the surrender of the notes held by plaintiffs.

From the foregoing authorities, we are of the opinion that the facts in this case do not constitute an executed contract. The transaction between the parties, we think, evidences an executory contract, and that equity has power to decree a rescission. We are not determining what mala praxis is sufficient to entitle one to rescind an executed contract; for, as stated, the transaction in this case shows an executory contract, and we believe the rule to be well settled that material rep-

representations which are untrue, though innocently made, or the concealment of material facts by mistake or inadvertence, when relied on and which have become the foundation of the active relations between the parties, operate as a "surprise and imposition," and constitute such fraud as will move a court of equity to decree a rescission of an executory contract.

1 Story, Eq. § 193; 1 Beach, Eq. Jur. §§ 69, 93; Bish. Cont. § 662; Clark, Cont. p. 339; 2 Pom. Eq. Jur. §§ 883, 887, 889; Derry v. Peek, 14 App. Cas. 337; Arkwright v. Newbold, 17 Ch. Div. 320; Trall v. Baring, 4 De Gex, J. & S. 318; Ship v. Crosskill, L. R. 10 Eq. 73; Cooley, Torts (2d Ed.) p. 582; Hexten v. Bast, 125 Pa. St. 52, 17 Atl. 252; Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769; De Frees v. Carr (Utah) 33 Pac. 217; Cotzhausen v. Simon, 47 Wis. 106, 1 N. W. 473; Grant v. Law, 29 Wis. 99; Knowlton v. Amy, 47 Mich. 204, 10 N. W. 201; Bullitt v. Farrar (Minn.) 43 N. W. 566; Litchfield v. Hutchinson, 117 Mass. 195; Smith v. Richards, 13 Pet. 26; 2 Warv. Vend. § 18. "As a rule, all representations which are untrue, and which materially affect the value of the property which forms the subject of the contract, will furnish grounds for a rescission, even though they may have been made without fraudulent intent." 2 Warv. Vend. § 18; Allen v. Hart, 72 Ill. 104; Bennett v. Judson, 21 N. Y. 238; Mulvey v. King, 39 Ohio St. 491; Wilcox v. University, 32 Iowa, 369; Alvarez v. Brannan, 7 Cal. 503. The facts in this case show that the representations of plaintiffs as to the character of their title to the land were more than mere expressions of opinion. They were affirmations of a material fact, and inducements to the contract. Being untrue and material, they are fraudulent. Cressler v. Rees, 27 Neb. 515, 43 N. W. 363; Conlan v. Roemer, 52 N. J. Law, 53, 18 Atl. 858.

4. There is no controversy in regard to the materiality of the representations made respecting the title, nor is it contended that defendants did not act in due season, in giving notice of the rescission after the discovery of the defect in the title; but plaintiffs urge that, the defendants not having tendered back a deed of the property conveyed, there was no rescission. The rule is, no doubt, that the parties must be placed in statu quo before a rescission can be effectuated. Having decided that the warranty deed executed by the plaintiffs was merely an executory contract, it follows that defendants had nothing to return to plaintiffs in order to place them in statu quo. The referee found that the land described in the warranty deed was not owned by plaintiffs, and the conveyance executed by them certainly created no cloud upon the owner's title, if there was an owner. Plaintiffs conveyed nothing to defendants. Their deed was worthless, except that it might be the basis of an action in equity for specific performance, or the foundation of a

suit at law, after reformation, for a breach of the vendor's covenants. Plaintiffs having parted with nothing of value, defendants had nothing to return, and in such case the failure to tender that which was valueless cannot be interposed to prevent a rescission of the contract. Bish. Cont. § 679. The referee finds that the defendants never actually occupied any of the land sought to be conveyed, but that plaintiffs were in possession of the same. We think that the record clearly discloses that the defendants did all that was required by law, upon their part, in order to justify a decree of rescission by the court. We find no error in the record, and therefore affirm the judgment of the lower court, with costs.

MERRITT, C. J., concurs. BARTCH, J., concurs in the result.

(12 Wash. 196)

DICKSON v. MATHESON et al.

(Supreme Court of Washington. June 28, 1895.)

JUDGMENT—MOTION TO VACATE—INCLUSION OF IMPROPER COSTS.

The fact that there were included in a judgment improper costs does not authorize a petition to vacate the judgment under 2 Hill's Code, tit. 14, providing that the court may, for certain reasons, set it aside, where no fraud was practiced on the court, and in the statement for judgment the costs were specifically set forth. Hoyt, C. J., dissenting.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by G. E. Dickson against David Matheson and another on a note. Defendants confessed judgment, and filed a petition to set the same aside because it included costs to which plaintiff was not entitled. A demurrer to the petition was sustained, and defendants appeal. Affirmed.

Edward Prunyn, for appellants. Wager & Graves, for respondent.

GORDON, J. An action was commenced by the respondent in the superior court of Kittitas county against David Matheson and Charles Dickson, partners as Matheson & Dickson, upon a promissory note, and personal service of summons in said action was had upon each of said partners on August 11, 1894. On the 18th day of August, 1894, the said Charles Dickson made, subscribed, and acknowledged a written statement and confession, consenting to and authorizing the entry of judgment in favor of plaintiff for the amount claimed in the complaint, which amount included the sum of \$68 attorney's fees, provided in the note to be paid in case of suit or action being brought. The written instrument and confession thus made set out the facts upon which the indebtedness arose in compliance with the statute, and authorized the entering of a judgment in favor of the plaintiff and against the defendants for the sum aforesaid; and upon such statement judgment was duly entered in favor of re-

spondent against appellants, David Matheson and Charles Dickson, and said judgment provided that the same should be satisfied out of the joint property of Matheson and Dickson and the separate property of said Charles Dickson, in compliance with 2 Hill's Code, § 416. Thereafter a petition was filed by appellants to vacate and set aside said judgment, and from an order sustaining respondent's demurrer to an amended petition filed therein this appeal is taken.

The principal ground relied upon by the appellants for the reversal, and the only one that need be considered, is that the court erred in including the sum of \$68 as attorney's fees in said judgment upon confession, inasmuch as respondent had not appeared by attorney in said action. Assuming, without deciding, that respondent was not entitled to any allowance as attorney's fees in said judgment, we think that appellants have mistaken their remedy, and that the demurrer to the amended petition was properly sustained. The statement made by Dickson, upon which the judgment was entered, sets out fully each of the items going to make up the amount for which judgment was entered, viz. principal, interest, and attorney's fees. Nothing was withheld or concealed from the court. And upon this statement judgment was entered. No fraud was practiced, and, at most, there was simply error of law upon the part of the court in giving judgment for the amount claimed as attorney's fees. But we do not think that a petition to vacate the judgment is the proper proceeding for the purpose of correcting an error of law, and the statute which authorizes proceeding by petition to vacate and modify a judgment in the court in which it is rendered (2 Hill's Code, tit. 14)¹ does not include an "error of law" within the causes for which such proceedings may be taken. The final judgment pronounced upon a hearing upon the merits cannot be set aside by the petition under the statute for mere error into which the court may have fallen. "It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari, according to the case; but it is no ground for setting aside the judgment on motion." 1 Black, Judgm. § 329. The order appealed from is affirmed.

DUNBAR, ANDERS, and SCOTT, JJ., concur.

HOYT, C. J. (dissenting). I am unable to agree with the foregoing opinion. The rights of Matheson, the real appellant, had been decided in the court below without notice to

him, and for that reason the question which the court passed upon, as it affected his interests, had never been called to the attention of that court. This being so, this court could not rightfully give him any relief against such ruling until he had first asked for it in the court below; and, if he must first apply there, the ruling obtained upon such application ought to be reviewed here.

(12 Wash. 135)

RAUH et al. v. SCHOLL et al.

(Supreme Court of Washington. June 19, 1895.)

BEST AND SECONDARY EVIDENCE.

It is error to admit in evidence a purported copy of an assignment of a lease and surrender of the premises, when no notice to produce the original has been given, or foundation laid for the production of secondary evidence.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by John B. Rauh and another against John D. Scholl and another for rent. From a judgment for defendants, plaintiffs appeal. Reversed.

H. L. Lueders, for appellants.

GORDON, J. On the 5th day of February, 1891, appellants executed a written lease of certain real property to the respondents for the term of three years, at a monthly rental of \$35 per month; said lease containing a provision authorizing and permitting a subletting of said premises during the whole or any portion of the term, and also containing an express covenant on the part of the respondents to pay said rental for the full period, and as provided in said lease. Thereupon, respondents went into possession of said premises. This action was brought by appellants to recover the sum of \$525, being the rent of said premises for 15 months. The complaint sets out a copy of the lease, and contains the usual allegations, including that of a demand and refusal to pay. The answer of respondents admits the execution of the lease, and, for a defense, alleges "that on or about the 31st day of March, 1891, it was mutually orally agreed and understood by and between plaintiff John Rauh, acting for himself and his wife, and defendants, that the said instrument [lease] and property therein described should be surrendered to plaintiffs, and said instrument and property was wholly surrendered to plaintiffs, and they accepted the surrender of the same, and at all times since said date have acquiesced in said surrender, and collected rent from other parties, and leased the premises to other parties at different rates of rent, and had the full and complete control and management of said premises, free and clear from any claim of defendants, or either of them." Plaintiffs replied, denying the matter set up by way of defense, and the cause proceeded to trial before the court and a jury duly impaneled, and

¹ 2 Hill's Code, tit. 14, provides that after the term at which a judgment is rendered the court may, for certain reasons, set it aside.

resulted in a verdict for defendants; and from an order denying the motion for a new trial, and the judgment upon said verdict, this appeal is taken.

Respondents have filed no brief and entered no appearance in this court. Only one assignment of error will be discussed, as the conclusion which we have reached concerning it makes it decisive of the case. Upon the trial of the cause the lower court, over the objection of appellants, permitted a paper to be given in evidence, which paper purports to be a copy of an assignment of the lease and a surrender of the demised premises to the appellants; said release and surrender purporting to have been executed on March 30, 1891. The signatures to said purported copy are typewritten, and the signature of the notary before whom the acknowledgment of the original was taken was not attached to said copy until the same was offered in evidence upon the trial. In permitting such copy to be received in evidence and read to the jury, the court committed reversible error. We do not think that the original of this paper could have been received as evidence, under the issue raised by the answer of respondents. As has been noticed, respondents set up a verbal surrender and acceptance, and neither sought nor obtained leave to amend their pleading in that regard. But, in any view of the case, this purported copy was wholly inadmissible, under the circumstances attending its reception in evidence, because no foundation had been laid, no notice to produce the original had been given. To lay a foundation for the introduction of secondary evidence of the contents of a writing, the party offering the same must show that he has done all in his power to produce the original. No authorities need be cited in support of a rule so well settled. To permit a so-called copy of so important a paper to be received in evidence without any attempt to produce or obtain the original, and particularly where the pleading of the party seeking to introduce it does not afford any notice of the fact that such instrument would be relied upon at the trial, would be a most dangerous practice, and cannot be sanctioned. The judgment appealed from will be reversed, and the cause remanded for a new trial.

HOYT, C. J., and ANDERS, SCOTT, and DUNBAR, JJ., concur.

(12 Wash. 154)

WINSOR v. McLACHLAN et al.

(Supreme Court of Washington. June 20, 1895.)

SETTING UP EXEMPTIONS ON GARNISHMENT — APPEAL.

1. A garnishee disclosed an indebtedness to the judgment debtor arising from loss under an insurance policy on household goods, family wearing apparel, etc., and the judgment debtor in his answer alleged that the property insured was exempt, but did not state its value, nor allege that such property was all of the like kind

which was owned or used by him when the loss occurred. Held that, the answer being insufficient to show that the insured property was exempt, the money arising from the insurance was not exempt from garnishment.

2. The record on appeal is conclusive as to the proceedings below, and matters not appearing therein cannot be considered.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Thomas Winsor against Charles McLachlan and another, and the North British & Mercantile Insurance Company, of London and Edinburgh, garnishee. From a judgment for plaintiff, the principal defendants appeal. Affirmed.

Lemman & Brady, for appellants. Winsor, Bush & Morris, for respondent.

GORDON, J. The respondent, Winsor, having obtained a judgment in the superior court for King county against appellants Charles and Matilda McLachlan (husband and wife), thereafter caused a writ of garnishment to be issued against the North British & Mercantile Insurance Company, as garnishee, requiring it to answer as to any indebtedness by it owing to defendants. The answer of the garnishee disclosed an indebtedness due appellant Matilda McLachlan in the sum of \$661.17, being the amount of loss occasioned by a fire occurring under a policy of insurance issued by it in favor of said appellant, upon household furniture, family wearing apparel, books, jewelry, pictures, carpenter's tools, etc. The total amount for which said property was insured was \$700, the amount of the loss having been adjusted in said sum of \$661.17. The appellants (judgment debtors) also answered, claiming that the property so insured was exempt from levy and execution under the laws of the state of Washington, and that the money due appellants from said insurance company was also exempt. Thereafter, by stipulation of counsel in the case, said garnishee paid the amount of its liability under said policy into the registry of the court, and was discharged. The cause was tried by the court without a jury, and findings of fact and conclusions of law made and entered, and judgment rendered in favor of respondent, from which judgment this appeal is prosecuted.

This court, in Packing Co. v. Jeffs, 39 Pac. 962, held that the money paid under an insurance policy on property exempt, to a householder, is itself exempt, and appellants rely upon that case for a reversal of this judgment. The statement of facts contains none of the evidence taken below, and we think that the judgment entered in the cause is sustained by the findings. The value of the property so insured is nowhere stated in the answer of appellants to the writ of garnishment; nor is it alleged that the property so insured was all of the property of like kind and character which was owned or in use by them at the time said loss occurred. Hence it does not appear from their answer

that the property insured was exempt, and if it was not exempt it seems clear that the money arising from the insurance thereon is not exempt.

Upon the argument of the cause before this court, various claims were made by appellants' counsel as to certain stipulations and proceedings occurring upon the trial below; but, in the absence of any proper record from which they are made to appear, we would be unwarranted in giving such matters any consideration. The statute of this state governing appeals to this court has put it within the power of parties to have every material matter occurring upon the trial below made a part of the record, and it must be understood that the record so made is conclusive in this court as to the proceedings occurring below. No error appearing, the judgment appealed from is affirmed.

HOYT, C. J., and SCOTT, ANDERS, and DUNBAR, JJ., concur.

(12 Wash. 160)

EASTER v. HALL et al.

(Supreme Court of Washington. June 22, 1895.)

NONSUIT—NEGLIGENCE—INDEPENDENT CONTRACTOR.

1. Where plaintiff's testimony shows a state of facts upon which he should not recover, a nonsuit should be granted, whether defendant pleaded such facts as a defense, or not.

2. Defendant is not liable for damage done by a boom of logs which broke loose from their fastenings, and injured plaintiff's property, at A., when the logs were under the control of a tugboat with which defendant had contracted to tow the logs to H., though he knew that they had been left at A. until the weather permitted proceeding to H.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by Mary Easter against S. L. Hall and another for damages to property caused by defendant's negligence. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Trumbull & Trumbull, for appellant. W. L. Marquardt and R. C. Wilson, for respondents.

SCOTT, J. This is an appeal from a judgment of nonsuit. The first three paragraphs of the complaint are as follows: "(1) That she (plaintiff) is now, and at all the times hereinafter mentioned was, the owner and in the possession of those certain premises situated in the city of Port Angeles, Clallam county, Washington, known as the 'Port Angeles Cannery,' wherein she had her residence, and carried on the business of canning clams and packing fish for the market. (2) That the defendants, S. L. Hall and William Bishop, Jr., are a partnership doing business as loggers under the firm name of Hall & Bishop. (3) That on or about the 10th day of October, 1893, the defendants were the owners of a certain boom of logs, which they towed, or procured to be

towed, into the harbor of Port Angeles, and which boom of logs they carelessly and negligently caused to be fastened at or near the residence and cannery of this plaintiff, and which boom of logs the said defendants, their servants or agents, carelessly and negligently left, without any one being in the charge of them, or to look after them, and was so insecurely, negligently, and carelessly fastened that on or about the night of the 23d day of November, 1893, broke loose from their fastenings, and were driven with great force and violence against the piles and timbers upon which the residence and cannery of this plaintiff rested, knocking out a great many of said piles, and utterly wrecking and ruining said premises, and endangering the lives of the occupants, to her damage in the sum of three thousand dollars." An answer was filed, admitting the ownership of the logs by the defendants, but denying all the other matters alleged in the third paragraph of the complaint. Two affirmative defenses were pleaded,—the first being that the logs were securely fastened, and were broken loose by a storm of unusual violence; and the second, that the damage was caused in part by the negligence of the plaintiff.

It is claimed that the court granted a nonsuit on the ground that it appeared from the testimony that the defendants had entered into a contract with the owners of a certain tugboat to tow the logs in question to Port Hadlock, and that the defendants were not responsible for their failure to do so, or for their action in the premises in leaving them at Port Angeles. It is contended by appellant that the evidence in this particular was inadmissible—First, because a defense that the injury was caused by an independent contractor must be specially pleaded, and there was no such defense set up in the answer; and, second, that there was no proof that the tugboat company were independent contractors, on the ground that it appeared that all the defendant Hall, who was called as a witness by the plaintiff to prove her case, knew as to this matter, was what had been told him by his codefendant and partner, and on the further ground that the testimony relating to this matter was wrongfully admitted on his cross-examination. These questions are not raised by the record, and it is unnecessary to determine whether it was incumbent on the plaintiff to prove that the defendants towed the logs, or caused them to be towed, into the harbor at Port Angeles, as she had alleged, for upon the direct examination of defendant Hall the following testimony was drawn out by the plaintiff, and was uncontradicted: "Q. I will ask you to state, Mr. Hall, whether or not, on or about the 10th day of October, 1893, your firm had a boom of logs towed up into the harbor of Port Angeles? A. About that time; yes, sir. The tug Discovery towed them up. Q. The tug was in

the employ of the firm of Hall & Bishop, was it? A. No, sir; not in our employ at all. We contracted to have the logs towed to Port Discovery,—to pay them so much a thousand to tow them to Port Hadlock, I should say." As this testimony was introduced by the plaintiff, it was entirely immaterial whether the defendants had pleaded the fact or not. If the plaintiff herself showed a state of facts upon which she should not recover, the defendants were entitled to the benefit of it, although they had not pleaded the same as a defense.

There was no proof of negligence. It appears that, although the defendants knew the logs had been left at Port Angeles, the tugboat company represented to them that they would be taken away immediately, or as soon as the weather would permit. The defendants had not resumed control over the logs in any manner. Upon cross-examination it appeared that substantially all the witness knew with regard to the employment of the tugboat was what his partner had told him. But this testimony was not objected to in any way, nor was any motion made to strike it on the ground of its being hearsay, and, being in the case, it was some proof of the facts stated. There was no other proof in the case upon the points in question, and we are of the opinion that the nonsuit was properly granted. Affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

(12 Wash. 190)

WILLAMETTE CASKET CO. v. CROSS UNDERTAKING CO. et al.

(Supreme Court of Washington. June 26, 1895.)
CHATTEL MORTGAGE—FAILURE TO RECORD—RIGHTS OF RECEIVER OF MORTGAGOR.

Under Gen. St. § 1648, making a mortgage of personal property void, as against creditors, unless recorded, a receiver of the mortgaged property, appointed in an action on a debt incurred by the mortgagor after the mortgage was made, but before it was recorded, has a right thereto prior to the mortgagee, though he was appointed after the mortgage was recorded.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by the Willamette Casket Company against the Cross Undertaking Company. R. E. McCoy was appointed receiver of defendant, and the Histogenetic Medicine Company filed a petition claiming defendant's property under a chattel mortgage. Judgment was rendered in favor of the Histogenetic Medicine Company, and the receiver appeals. Reversed.

Clise & King and Shank & Smith, for appellant. Stratton, Lewis & Gilman, for respondent.

HOYT, C. J. The Willamette Casket Company commenced an action against the Cross Undertaking Company, a corporation organ-

ized under the laws of this state, to recover certain moneys alleged to be due from said corporation. In this action a receiver was appointed on the 7th day of May, 1894, and took possession of all the property of the corporation. Thereafter the Histogenetic Medicine Company filed a petition in said action, setting up the fact that it was the holder of a certain note and chattel mortgage made by said Cross Undertaking Company, and by virtue thereof, entitled to the funds, in the hands of the receiver, derived from the sale of the property covered by the mortgage. The receiver, by way of answer, alleged that the note and mortgage were made without consideration; that the mortgage was made and delivered on the 22d day of December, 1893, and was not recorded until the 4th day of May, 1894; that between said dates the said Cross Undertaking Company had become indebted to the Willamette Casket Company for the moneys sought to be recovered in the action in which he had been appointed; that during the same time other debts had been contracted by said Cross Undertaking Company, which had been allowed by him as such receiver; that the amount of the claims so contracted and allowed was over \$4,000; that the persons and corporations to which the indebtedness had been contracted, at the time of extending credit, had no knowledge of the existence of said chattel mortgage, or of the indebtedness thereby secured. These allegations were put in issue by a reply, and the cause was tried by the court without a jury. The court found the facts substantially in accordance with the allegations of the answer of the receiver upon all the issues, excepting as to the sufficiency of the consideration to support the note and mortgage. As to this question the court found that the mortgage was, in the hands of the petitioner, a valid obligation against the said mortgagor, the Cross Undertaking Company. Upon these facts it found, as conclusions of law, that the Histogenetic Medicine Company was entitled to the relief prayed for in its petition, and from a judgment entered in pursuance of such finding the receiver has appealed to this court.

No exceptions were taken to the findings of fact by either party; hence the only question presented for our consideration is as to whether or not such findings support the conclusions of law and judgment. Upon the part of the respondent, it is claimed that it did not sufficiently appear from the proof that the indebtedness for which claims had been allowed by the receiver had been contracted between the date of the execution of the mortgage and that of its being recorded. But, in view of the tenth finding, this fact, if fact it was, is not available as a support for the conclusions of law and judgment. Said finding, when fairly construed in the light of the allegations of the answer, must be held to have established, for the purposes of this case, the allegations of such answer, not only

as to the amount of the indebtedness which had been allowed by the receiver, but also as to the dates between which such indebtedness had been created. It is not claimed that there was any proof tending to show that those who had extended such credit had any knowledge of the existence of the mortgage in question. Under this state of facts, it is contended by the appellant that, under the provisions of section 1648 of the General Statutes, the mortgage could not have been enforced as against the creditors, and for that reason could not be enforced as against him, as their representative. That part of said section material to this question is as follows: "A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrancers of the property for value and in good faith, unless * * * it is * * * recorded in the same manner as is required by law in conveyance of real property." And, if the language used be given its ordinary significance, it would seem to fully warrant such contention. It is claimed, however, by the respondent, that only such creditors are protected by the provisions of this section as, before the time of the recording of the mortgage, have obtained some specific lien upon the property. But such construction would do violence to the language used. The statute makes no distinction as to the creditors who are to be protected, and we see no good reason for holding that one class, rather than another, was intended. One is as much a creditor before his claim has been made a specific lien upon certain property as after, and for that reason a simple unsecured creditor is as well described by the language of the section as one who had procured a specific lien as security for his claim. The intention of the legislature was to protect those who should give credit upon the faith of property owned by one to whom it was extended, and to give force to such intention the term "creditors," as used in the act, must be held to cover all classes of creditors. The cases cited by the appellant from this court, while not directly in point, are sufficiently so to justify their citation in support of the contention. The cases so cited are *Baxter v. Smith*, 2 Wash. T. 97, 4 Pac. 35; *Darland v. Levins*, 1 Wash. St. 582, 20 Pac. 309; *Hall v. Matthews*, 8 Wash. 407, 36 Pac. 262; and *Radebaugh v. Railroad Co.*, 8 Wash. 570, 36 Pac. 460. The language of the statute, and these authorities, satisfy us that it was the intention of the legislature to give no preference to a chattel mortgage over the claims of creditors who should become such after its execution, unless it was recorded within a reasonable time after its execution, and that the mortgage in question was not recorded within such reasonable time.

As to whether or not creditors whose claims existed at the time the mortgage was executed could take advantage of the failure to record, it is not necessary for us to decide,

for the reason that, as we have seen, the court found that these creditors became such after the date of the mortgage. If the mortgage was thus inoperative as to creditors, we do not think it will be seriously contended that it would not be inoperative as to the receiver, as their representative; for, while it is true he also represents the corporation itself, yet his appointment prevented them from protecting themselves, and must be held to have fully protected their rights.

The other question discussed was as to the effect of the alleged insolvency of the corporation upon the mortgage, but it is not necessary that we should say anything upon that subject. The judgment must be reversed, and the cause remanded, with instructions to proceed in the matter of the claim of the petitioner in accordance with this opinion; the appellant to recover costs of the proceeding in the court below, and upon this appeal.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

(12 Wash. 658)

STODDARD v. SEATTLE NAT. BANK.
(Supreme Court of Washington. June 19, 1893.)

REVIEW ON APPEAL.

Under Laws 1893, c. 60, §§ 2, 3, findings of fact by a court without a jury, to which no exceptions have been taken, will not be reviewed.

Appeal from superior court, Columbia county; R. F. Sturdevant, Judge.

Action by Helen G. Stoddard against Wyatt S. George and others to foreclose a mortgage securing a note and coupons. The Seattle National Bank, as owner and holder of certain of the coupons, intervened. From a judgment for plaintiff, intervenor appeals. Affirmed.

Knapp, Foote & Knapp, for appellant. Edmiston & Miller, for respondent.

DUNBAR, J. This is an equitable action, and no exceptions were taken to the findings of fact or conclusions of law made by the trial judge. Under the Laws of 1893,¹ and in accordance with the decision of this court in *Washington Brick, Lime & Manuf'g Co. v. Pullman Lodge No. 29*, 1 O. O. F. (decided May 24, 1895) 40 Pac. 383, and further in accordance with the uniform holdings of this court, the evidence upon which the findings of fact were based cannot be reviewed here. The result will be that the statement of facts must be stricken from the record, and, as it is conceded that no questions of law arise upon the pleadings in this case, the appeal will be dismissed, and the judgment of the lower court affirmed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

¹ Laws 1893, c. 60, §§ 2, 3, require exceptions to be taken to the findings of fact or conclusions of law by a court or judge, on trial of a cause without a jury.

(12 Wash. 188)

CITY OF MONTESANO v. BLAIR et al.
(Supreme Court of Washington. June 26, 1895.)

EXCEPTIONS TO FINDINGS—REVIEW—COMPLAINT—SUFFICIENCY AFTER JUDGMENT—ACTION TO FORECLOSE ASSESSMENT—COSTS.

1. Findings of fact not excepted to as required by St. 1893, c. 60, will not be reviewed on appeal, though they are incorporated in the decree. *Manufacturing Co. v. Adler* (Wash.) 40 Pac. 383, and *Stoddard v. Bank* (Wash.) 40 Pac. 730, followed.

2. Where the objection to the sufficiency of a complaint is not raised till after judgment, the complaint will be very liberally construed.

3. Under the statute providing for the allowance of a reasonable attorney's fee in an action to foreclose a street-grade assessment, a party to such action who is allowed an attorney's fee is not entitled to the statutory fee of \$10 allowed to a prevailing party.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by city of Montesano against W. H. Blair and another to foreclose street-grade assessments. Judgment was rendered for plaintiff, and defendants appeal. Judgment modified.

T. D. Scofield, for appellants. Austin E. Griffiths, for respondent.

GORDON, J. This action was brought in the court below to foreclose certain street grade assessment liens. There was a decree for the plaintiff, from which this appeal was prosecuted. Counsel for respondent, in his brief, insists that this court cannot consider any evidence, because no exceptions were taken to the findings and conclusions of the lower court, nor were findings tendered or requested by appellants. This court has repeatedly held that, under the act of 1893, it could not consider evidence, where exceptions had not been taken to the findings. It is true, there were no findings of fact made in this case, other than those incorporated in the decree, and in this respect the condition of the record is precisely as was presented in the cases of *Washington Brick, Lime & Manufacturing Co. v. Pullman Lodge* (decided May 24, 1895) 40 Pac. 383, and *Stoddard v. Bank* (decided June 19) Id. 730. This court held in those cases that it could not review the evidence. The statement will therefore be stricken.

The only points that remain for determination arise from a consideration of the pleadings, and objections taken thereto, and the ruling of the court upon a motion to retax costs. No demurrer to the complaint was made, but it is strongly insisted in this court that it is insufficient. In the absence of a demurrer, the complaint, after judgment, should receive a very liberal construction. We think it states a cause of action, and is sufficient to support the judgment entered. *Town of Elma v. Carney*, 4 Wash. 418, 30 Pac. 732; *Paving Co. v. Bolton* (Cal.) 31 Pac. 625.

The court committed no error in striking paragraphs 7, 10, and 11 of the answer. The matters set up in these paragraphs were whol-

ly immaterial, and constituted no defense to the cause of action set out in the complaint; and they were insufficient, in form or substance, to constitute a counterclaim, even if we were to assume that appellants had the right to offset damages in this form of action.

Appellants were not prejudiced by the court's refusal to strike out portions of respondent's reply. At most, the court's refusal was harmless error.

We think, however, that the court erred in refusing, upon appellants' motion to retax costs, to exclude the sum of \$10 taxed by the clerk, and allowed, as attorney's fees. In this form of action the statute makes provision for a reasonable attorney's fee, to be fixed by the court, and in this case the court allowed the sum of \$25 for that purpose. We hold that a party is not entitled to the attorney's fee thus provided and also to the statutory fee of \$10 allowed as costs to the prevailing party. To this extent the decree must be modified. In all other respects it will be affirmed. Neither party will recover costs in this court.

HOYT, C. J., and DUNBAR, ANDERS, and SCOTT, JJ., concur.

(12 Wash. 167)

RABURN v. MISH, Treasurer, et al.

(Supreme Court of Washington. June 25, 1895.)

ORDINANCES—ENACTMENT.

Act March 9, 1893, § 4 (Laws 1893, p. 158), providing that "no ordinance and no resolution granting any franchise for any purpose shall be passed * * * on the day of its introduction, nor within five days thereafter, nor at any other time than a regular meeting," etc., does not apply to ordinances other than those granting franchises.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by Henry Raburn against W. W. Mish, treasurer of Snohomish county, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Bell & Austin and Crowley, Sullivan & Grosscup, for appellant. Alex. Akerman, for respondents.

GORDON, J. This action was brought by appellant against the respondent, W. W. Mish, as treasurer of Snohomish county, and the city of Everett, a municipal corporation of the third class, situate in that county, to restrain the collection, and to cancel the apparent lien, of taxes which said city attempted to levy for municipal purposes in the year 1893. The ground upon which relief is sought is that the ordinance of said city under which the tax levy in question was authorized was passed by the city council on the day of its introduction, and without being first submitted to the city attorney. And it is further contended that the meeting at which said

ordinance was passed was not a regular meeting of the council.

Section 4 of the act approved March 9, 1893 (Laws 1893, p. 158), in so far as concerns the present question, is as follows: "No ordinance and no resolution granting any franchise for any purpose shall be passed by the city council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting, nor without being first submitted to the city attorney." That much of said section as is above quoted is a re-enactment, without change, of section 116 of the act of March 27, 1890. In giving said last-mentioned section its place in Hill's Code (section 635), the learned annotator inserted a comma after the word "ordinance" which was not contained in the original act, and which is also admitted from the act of 1893. Learned counsel for the appellant relies for a reversal upon the case of *Vancouver v. Wintler*, 8 Wash. 378, 36 Pac. 278, 685. In that case the sole reference made in the opinion to the law under consideration was to section 635, *supra*. But the ordinance under consideration in that case was introduced more than five days prior to its passage. Hence the case is distinguishable from the present one, in that it did not present the question which we are here called upon to decide; and what is said in the opinion in that case concerning this question is clearly dictum, in no wise affecting the result, and cannot be considered as authoritative. We are of the opinion that the provision in question was intended to apply only to ordinances and resolutions granting franchises, and that the language of the section admits of no other construction. Many good and sufficient reasons might be given for imposing legislative restrictions upon city authorities in the granting of franchises that would not be applicable to their control of the ordinary affairs committed to their discretion. The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and DUNBAR, JJ., concur.

(12 Wash. 138)

**CALIFORNIA SAFE-DEPOSIT & TRUST
CO. v. CHENEY ELECTRIC LIGHT,
TELEPHONE & POWER CO. et al.**

(Supreme Court of Washington. June 19, 1895.)
FORECLOSURE OF MORTGAGE—LITIGATION OF ADVERSE CLAIM.

A claim of adverse title cannot be litigated in a foreclosure suit, where the claimant was not a party to the mortgage, and claims no interest under it, notwithstanding 2 Hill's Code, § 143, providing that all persons interested in the determination of an action shall, unless otherwise provided by law, be joined; and section 150, providing that, when a complete determination of the controversy cannot be had without the presence of other parties, they shall be brought in.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by the California Safe-Deposit &

Trust Company against the Cheney Electric Light, Telephone & Power Company and others to foreclose a mortgage. There was judgment for plaintiff. From an order dismissing the action as to the Edison General Electric Company, plaintiff appeals. Order affirmed.

F. T. Post and A. G. Avery, for appellant. Jones, Voorhees & Stephens, for respondent.

GORDON, J. The record in this case presents but a single question for our determination, viz. can a claim of prior and paramount adverse title be litigated in a foreclosure suit? We think the question must be answered in the negative. The rule is laid down in 2 Jones, *Mortg.* § 1859, as follows: "Only the rights and interests under the mortgage and subsequent to it can properly be litigated upon a bill of foreclosure. One claiming adversely to the title of the mortgagor cannot be made a party to the suit for the purpose of trying his adverse claim. * * * This prior claim is not a subject-matter of litigation in the foreclosure suit, and remains unaffected by it." This rule is upheld by the great weight of authority upon the question. *Dial v. Reynolds*, 96 U. S. 340; *Peters v. Bowman*, 98 U. S. 56; *Hambrick v. Russell*, 86 Ala. 199, 5 South. 298; *Bank v. Thomson*, 55 N. Y. 7; *Pelton v. Farmin*, 18 Wis. 234; *Lyman v. Little*, 15 Vt. 576; *Banning v. Bradford*, 21 Minn. 308; *Bank v. Goldman*, 75 N. Y. 127; *Wilkinson v. Green*, 34 Mich. 220; *Cody v. Bean*, 93 Cal. 578, 29 Pac. 223; *Lange v. Jones*, 5 Leigh, 192; *Bogey v. Shute*, 4 Jones, Eq. 174. We do not think that the provisions of sections 143 and 150, 2 Hill's Code, justify a different course of procedure. Indeed, substantially like provisions of statute are found in most of the states. The mortgage which appellant is seeking to foreclose is simply a contract between itself and the Cheney Electric Light, Telephone & Power Company, under which contract the appellant has obtained a lien upon the estate of such mortgagor. The respondent, the Edison Company, is not a party to such contract, and claims no rights under it. Between respondent and appellant there is no privity of contract, and respondent's claim of title can be divested only in an action at law. The only proper parties to a foreclosure suit are the mortgagor, the mortgagee, and those who have acquired any interest from either of them subsequently to the mortgage. The order appealed from is affirmed.

HOYT, C. J., and ANDERS, J., concur.

(12 Wash. 152)

BUCKLIN v. MILLER.

(Supreme Court of Washington. June 20, 1895.)
LIABILITY OF MASTER TO SHIPOWNER—REVIEW ON APPEAL.

1. Where a vessel owner has been compelled to pay a fine imposed by reason of the master's negligence, the latter will be liable to such owner for the amount so paid.

2. A verdict will be sustained if there is any testimony to warrant it, however much the testimony to the contrary may preponderate.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Eben F. Bucklin against Edward Miller for the recovery of money due for services. From a judgment for plaintiff, defendant appeals. Affirmed.

W. D. Lambuth and Winsor, Bush & Morris, for appellant. Robinson & Rowell, for respondent.

HOYT, C. J. This action was brought to recover an amount alleged to be due for services as master of a steam tug owned by the appellant. Among the items sought to be counterclaimed by the defendant was one for about \$400, which he had been compelled to pay as a fine imposed upon said tug for violation of the revenue laws of the Dominion of Canada, which it was alleged had been so imposed by reason of the gross negligence of the respondent as master of the steamer. The jury returned a verdict in favor of plaintiff for the entire amount claimed, and the only ground relied upon for reversal is that this counterclaim was so fully established by the proofs that the verdict of the jury, which disallowed it, was unsupported by the evidence, and should not be allowed to stand. It is practically conceded by both parties that the plaintiff, as master of the vessel, would be liable to its owner for a fine thus imposed if the liability therefor was occasioned by his negligence. The undisputed proofs established the fact that the owner had paid the amount on account of the imposition of such fine, and the disputed question, as to which it is necessary for us to examine the proofs, is as to whether or not it so clearly appeared therefrom that the plaintiff's negligence was the cause of the imposition of the fine that the verdict of the jury finding to the contrary must be set aside. This being so, under well-settled rules the verdict and judgment must be sustained, if there was any testimony which would warrant the jury in coming to the conclusion to which it did, however much the testimony to the contrary might preponderate. An investigation of the proofs in the record in the light of this rule will lead to an affirmance of the judgment. The evidence of the plaintiff so explained his conduct at the time the fine was imposed that the jury might reasonably infer therefrom that his action on that day was with all the care and prudence which he was called upon to exercise; for, while it is true that the fact that the fine was imposed might prima facie establish the fact of fault on the part of the master, yet this prima facie presumption could be explained, and, in our opinion, the testimony of the plaintiff so explained it that the jury were justified in coming to the conclusion that they did. Besides, the fact that the plaintiff was not informed that the amount of this fine had been or would be

charged against him until long after he had quit the employ of the appellant, as to which there is such proof in the record as to warrant the jury in so finding, was so suspicious a circumstance that it, to a certain extent, discredited the claim of the appellant, and warranted the jury in interpreting the testimony in relation thereto as favorably for the plaintiff as its tenor would permit. Judgment affirmed.

ANDERS, DUNBAR, SCOTT, and GORDON, JJ., concur.

(12 Wash. 140)

KLEEB v. BARD et al.

(Supreme Court of Washington. June 20, 1895.)

BOND—CONDITIONS—INTERLINEATION—AMENDMENT OF PLEADING—CHANGING CAUSE OF ACTION—INJUNCTION BOND.

1. An interlineation in a bond changing the conditions only by providing that costs, as well as any judgment that might be obtained, should be paid, is immaterial, as costs would be included in the conditions without the interlineation.

2. Defendant, after admitting the execution of a bond pleaded in the complaint, including interlined words, cannot claim that the interlineation was after the execution thereof.

3. An interlineation in an instrument will be presumed to have been made before its execution, so that one claiming the contrary must prove it.

4. Plaintiff sued his vendees, and one to whom they had sold an interest in the land, for specific performance of the vendees' contract of purchase, which provided for a mortgage on the land for deferred payment, and obtained an injunction against the removal of timber from the land, which was dissolved on the giving of a bond by all the defendants conditioned for payment of any judgment that might be obtained against defendants in the action. *Held* that, the debt to be secured by the mortgage having become due before determination of the suit, an amendment asking for a money judgment was not a change of the cause of action, and therefore such a judgment could be enforced by action on the bond.

5. The dismissal of the action, at the time of the amendment, against the person to whom plaintiff's vendees sold an interest in the land, was not such a change in the conditions of the action as to relieve the parties to the bond from liability, such person having been a principal in the bond.

6. A bond given to plaintiff to secure dissolution of an injunction cannot be discharged without notice to plaintiff, and an order attempting to do so is void.

Appeal from superior court, Pierce county, W. H. Pritchard, Judge.

Action by John W. Kleeb against F. M. Bard and others on a bond. Judgment for plaintiff. Defendants appeal. Affirmed.

John A. Shackelford, Thos. Carroll, and Hagerman & Carroll, for appellants. Parsons, Corell & Parsons and Govnor Teats, for respondent.

HOYT, C. J. In October, 1888, the plaintiff sold to the defendants F. M. Bard and H. C. Patrick a certain sawmill, with its appurtenances, together with certain timber land and stumpage, for the agreed price of \$4,000, of which \$2,000 was to be paid at the time the

mill was to be delivered, \$1,000 in six months, and \$1,000 in nine months,—the last two payments to be secured by mortgage upon the property. Soon after the sale was made the said defendants paid the most of the cash payment agreed upon, and took possession of the mill. They withheld a part of the cash payment, and refused to make the mortgage or insure the property, on the ground that plaintiff was not the owner of all the property sold them. In the meantime said defendants had sold to defendant Stout an interest in the property. In April, 1888, plaintiff commenced an action to compel specific performance of this contract. To this suit he made said Bard, Patrick, and Stout defendants. A few days later a supplemental complaint was filed by plaintiff, in which it was prayed that a temporary restraining order might issue to prevent defendants from disposing of the timber, or running the mill. Whereupon said defendants asked leave to file a bond to secure to plaintiff the satisfaction of whatever judgment he might recover in said suit, and, having obtained such leave, executed a bond by themselves, as principals, with the other defendants as sureties, the conditions of which, so far as they are necessary to be stated for the purposes of this discussion, were as follows: "Now, therefore, if said defendants, or either of them, * * * shall pay, or cause to be paid, to said plaintiff, * * * the full amount of any final judgment that may be rendered against said defendants in the above-entitled action, and shall fully perform and satisfy said judgment in all things, and shall pay such attorney's fees and other costs as may be awarded by this court in case suit is brought to enforce this bond, then the above obligation is to be void and of no effect; otherwise to be and remain in full force and virtue." Upon the filing of this bond the court, on the application of the defendants, made an order vacating the temporary restraining order. The cause then proceeded, and, the time at which the last payment became due according to the terms of the contract having elapsed before it was finally tried, it was treated as an action at law for the recovery of money, and judgment in a certain sum rendered therein in favor of the plaintiff. From this judgment defendants prosecuted their appeal to this court, where it was reversed, and the cause remanded, with instructions to allow a supplemental complaint to be filed, setting out the fact of the payments having become due, and praying for a money judgment. 25 Pac. 467, 27 Pac. 273. This direction was complied with, but the supplemental complaint was so filed against only the defendants Bard and Patrick, and the action was dismissed as to defendant Stout. Upon the issues joined on such complaint a money judgment was recovered by the plaintiff, which was affirmed by this court (34 Pac. 138), and, not having been paid in accordance with the alleged con-

ditions of the bond above referred to, this action was brought thereon to recover the amount due upon such judgment, with interest and costs. In such suit judgment was rendered as prayed for by the plaintiff, from which this appeal has been prosecuted.

It is claimed by the appellants that this judgment must be reversed, for several reasons. These reasons have been stated with much particularity in the brief of counsel, but, in our opinion, can be properly considered under three heads. When the bond was offered in evidence it appeared that certain words had been interlined, and, no proof having been offered to explain this interlineation, it is claimed by the appellants that no recovery could be had thereon. The respondent claims that this contention cannot be sustained, for three reasons: (1) The words interlined were immaterial; (2) the execution of the bond as pleaded, including the words interlined, was admitted by the answer; and (3) the burden of proving that the interlineation was made after execution was upon those attacking the bond. In our opinion, any one of these reasons is a sufficient answer to the contention of the appellants. The interlineation changed the conditions only by providing that costs, as well as the judgment, should be paid, and as costs, being incident to the judgment, would have been included in the conditions of the bond without the interlineation, their being provided for therein in no manner changed its legal effect. As to the second reason, the defendants must be presumed to have known whether or not the bond pleaded was the one which they signed; and, having admitted its execution with the interlined words therein, they cannot, in the face of such admission, be heard to deny its execution. As to the other question, it may now be considered the settled law of this state that it will be presumed that an interlineation was made before the execution of the instrument, unless the contrary is made to appear. See *Wolferman v. Bell*, 6 Wash. 84, 32 Pac. 1017; *Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834; *City of Fairhaven v. Cowgill*, 8 Wash. 686, 36 Pac. 1093.

Was the cause of action changed by the course which it took after the giving of the bond? If it was, then we must agree with the contention of the appellants that the judgment rendered therein after such change was not within the contemplation of the makers of the bond at the time of its execution. If it was not so changed, the fact that the judgment took one form, rather than another, would be immaterial, so far as the makers of the bond were concerned. The real object of the suit, as originally instituted, was to secure the full performance of the contract on the part of defendants Bard and Patrick, including the payment of the money to be secured by the mortgage to be given upon the property. It is true that in the first complaint no money judgment was asked,

but this was for the evident reason that at that time no money was due. But when, during the pendency of the proceedings to secure the specific performance of the contract as to the execution of the security, the debt became due, a judgment in form therefor would be so connected with the relief originally prayed for that the allowance by the court of a supplemental complaint, under which such money judgment could be rendered, would have been proper, and would not have so changed the original cause of action as to make it a new one. By the default of the defendants they had made it impossible that any security should be given for the purposes contemplated by the original contract, and it would have been an idle thing for the court to have directed the giving of such security, and to have then dismissed the parties, and required the commencing of a new suit by the plaintiff to enforce the payment of the money which was due and payable at the time the first judgment was rendered. The cause of action should be looked upon as one by the plaintiff against the defendants, to secure to him the benefits of the contract, and to be founded thereon, and the fact that by the wrongful acts of the defendants a change in the form of the judgment was necessary to attain that object should have little force in determining the cause of action.

The other claim which we deem it necessary to notice is that the dismissal of the defendant Stout from the action relieved the defendants from liability on the bond. If the conditions of the bond could be construed as contended for by defendants, there might be force in this contention, their claim in that regard being that such conditions only required of them the satisfaction of a judgment rendered against all of the defendants. But, in any case, such a construction of the bond would be more technical than courts should approve, and especially in this case, where it was evident from the complaint of the plaintiff that entirely different relief was sought against the defendant Stout from that which was sought against the other defendants. It appeared from such complaint that there was no privity of contract between plaintiff and defendant Stout, and that the only reason for his being made a party to the action was that he might be bound by the judgment rendered therein, so far as it should affect the title to the property in question. It clearly appeared therefrom that, as against the defendant Stout, the plaintiff sought no substantial relief. This being so, it cannot be held, in an action upon the bond, that a dismissal as to him so changed the conditions surrounding the action as to relieve defendants from liability. If, under some circumstances, there might be force in the contention of the defendants, growing out of the fact that they might have depended upon the responsibility of the defendant who was afterwards dismissed from the action, in this particular case it had no

force, for the reason that Stout was one of the principals in the bond.

Aside from these questions, it was claimed that the bond could not be enforced because of a certain order made by the judge of the trial court discharging it; but, since the order which he made in the premises was without any notice to the plaintiff, it was, in our opinion, not only voidable, but absolutely void. The bond did more than to take the place of the restraining order. By virtue of its execution the defendants were put in a situation which enabled them to dispose of the property against which relief in the original action was sought. And, this being so, it must be held that the bond took the place of such property. Hence the court could make no order in reference thereto which would be binding upon the plaintiff, except in the proper progress of the cause. We find no substantial error in the record, and the judgment must be affirmed.

DUNBAR, ANDERS, SCOTT, and GORDON, JJ., concur.

(12 Wash. 169)

STATE v. HOLMES.

(Supreme Court of Washington. June 26, 1895.)

SUPERIOR COURT JUDGE — RIGHT TO HOLD COURT IN OTHER COUNTY — PRESUMPTION — HOMICIDE — JUROR'S MISCONCEPTION AS TO PENALTY — EXAMINATION OF JURORS IN DEFENDANT'S ABSENCE — INDORSEMENT OF NAMES OF WITNESSES ON INFORMATION — CHARGE — SUFFICIENCY OF EVIDENCE.

1. Const. art. 4, § 7, providing that the judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, is self-executing, though no penalty is imposed for the refusal of the judge to act.

2. It will be presumed that a judge of the superior court who tried a murder case was authorized to try it where no objection to his authority was made before the trial.

3. Where, in a murder case, jurors failed to appear when drawn, it will be presumed that they were excused by the court, and that the court properly drew other jurors, under Code Proc. § 339, providing that, if jurors be excused, the court may direct the sheriff to summon from the bystanders as many qualified persons as may be necessary to complete the jury.

4. A verdict of murder in the first degree will not be set aside because one of the jurors informed the others that on such a verdict defendant might be sentenced to life imprisonment instead of death.

5. The supreme court will not consider an affidavit to the effect that some of the jurors were examined in defendant's absence, where the record does not show that defendant was absent during the examination.

6. The allowance of the indorsement of names of witnesses on an information shortly before the trial is within the discretion of the trial court.

7. On trial for murder, an instruction that, "in considering the question as to whether or not defendant had time to cool his passions between the quarrel and the killing, they must * * * believe beyond a reasonable doubt that the defendant * * * did cool his passions," was properly refused, as the question is not whether he did cool his passions, but whether he had time to cool them.

8. On trial for murder, it appeared that defendant was a weak, colored boy, and of no great strength of mind, and that he was engaged as a miner, and roomed with deceased, who was a powerful and brutal man. On the day of the homicide, deceased left his pistol on the table in his room, and defendant took it with him to a saloon, and gave it to another boy. Deceased accused defendant of stealing the pistol, and defendant denied the accusation, and allowed deceased to search him. Deceased then struck him across the face with his hand, and defendant, on recovering from the blow, overtook the boy to whom he had given the pistol, and obtained it from him, and, returning to the saloon, fired at deceased without warning. The shot not taking effect, deceased jumped towards defendant, who then fired the fatal shot. The time between the assault on defendant and the shooting was from 10 to 15 minutes. *Held*, that a verdict of murder in the first degree would not be disturbed.

Appeal from superior court, King county; James Z. Moore, Judge.

William Holmes was convicted of murder, and appeals. Affirmed.

Melvin G. Winstock and Frank B. Ingersoll, for appellant. A. W. Hastie, for respondent.

DUNBAR, J. This was an information against the defendant, charging him with murder in the first degree. Upon the trial a verdict was rendered in accordance with the charge. Judgment was entered upon the verdict, from which judgment an appeal is taken, seeking a reversal upon several errors assigned.

The first error assigned is a want of jurisdiction in the trial judge. It is conceded that Judge J. Z. Moore, who tried this case, is not one of the superior judges elected for the county of King, where the cause was tried, and which was the home of the defendant. There is nothing in the record in this cause to show in what manner Judge Moore was authorized to hold court in King county at the time of the trial of this case, except a nunc pro tunc order made by Judge Humes on the 26th of March, 1894, to the effect that an order be entered on the records of March 3, 1894 (a date prior to the trial of the cause), setting out that "the Honorable James Z. Moore, judge of the superior court of the state of Washington, for Spokane county, is requested to sit as judge of this court, and to hold a session thereof commencing March 12, 1894, and to transact such business as may come before him as such judge in the criminal department thereof." There appear in the record affidavits of Richard Osborn and J. W. Langley, who are the two other superior judges of King county, to the effect that they did not at any time join in a request to Judge Moore to hold said term of court. Upon this state of affairs, it is contended by the appellant that the acts of Judge Moore in the premises were without jurisdiction, and therefore void.

Section 7 of article 4 of the constitution provides that "the judge of any superior court may hold a superior court in any coun-

ty at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so." It is the contention of the appellant that this provision of the constitution is not self-executing, but that all the authority which can be conferred upon a judge who resides out of the county where the cause is tried is conferred by sections 1 and 2 of chapter 43 of the Laws of 1893. Those sections provide, in substance, that whenever a judge of the superior court of any county, or a majority of such judges in any county in which there is more than one judge of said court, shall request the governor of the state to direct a judge of the superior court of any other county to hold a session of the superior court in the county mentioned, after the governor shall have so requested him, it shall be the duty of the judge to hold such session; or that, whenever a like request shall be addressed by the judge or by a majority of the judges (if there be more than one) of the superior court of any county to the superior judge of any other county, the judge addressed is empowered, if he deem it consistent with the state of judicial business in his own county, to comply with such request, to hold the session, etc. We are of the opinion that the provision of the constitution empowering the judge of any superior court to hold court at the request of the superior judge of any county is self-executing. This provision not being a limitation, but being in the nature of a legislative enactment, it follows that, if the enactment could be sustained and made self-executing if it had been a statutory enactment, it is self-executing as a constitutional enactment. There can be no question of the validity of the action of the courts under such statutory enactments where no penalty is provided in case of a failure of the court to comply with the requirements of the law. In fact, it is not common for laws of this kind, conferring jurisdiction upon courts, to provide penalties for the nonperformance of the duties imposed. The presumption is that the judge will assume the jurisdiction which the law gives him, and, if he willfully violates his duties under the law, the remedy is by impeachment. Indeed, the statute upon which the appellant relies, and the provisions of which he contends must have been complied with to give the court jurisdiction, and which he admits would have given the invited judge jurisdiction, is a common example of this character of legislation concerning courts; for while, as in the constitutional enactment, it is made the duty of the judge to whom the request is addressed by the majority of the judges in the county to hold said court, and it is also made his duty to hold said court when directed so to do by the governor, it nowhere imposes any penalty for his refusal so to do, and provides no means of compelling him to hold said court. The logic of the appellant, then, would abro-

gate both constitutional and statutory enactments.

It follows that, the superior courts being courts of general jurisdiction, it will be presumed that the court in each instance acted within its jurisdiction, in the absence of an affirmative showing to the contrary. The acts of the judge were of an official nature, and the rule of construction is found in the maxim, "Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium." It will be presumed, said Judge Story in *Bank v. Dandridge*, 12 Wheat. 64, that a man acting in a public office has been rightly appointed; that entries found upon public books have been made by the proper officer; even that the same presumptions apply to corporations; and that persons acting publicly as officers of the corporations are to be presumed rightfully in office; and that the acts done by the corporations, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. How much more strongly, then, will the maxim apply to the acts of a court of general jurisdiction where the act done by the court presupposes the existence of other acts to make them legal, presuming, for the sake of the argument, that the provisions of the statute are mandatory. It will be observed that neither the constitution nor the statutes in this state make provision for the spreading upon the record of the fact that the visiting judge has been called to hold court either by the governor or by the judges in the county where the term of court is held.

Most of the cases cited by the appellant are cases where the statute requires a record to be made of the request or acceptance. The first case cited, viz. *Gresham v. Ewell* (Va.) 6 S. E. 700, held, it is true, that the action of the invited judge was void in a case where the record did not show that an order had been entered of record calling the judge according to the provisions of the statute. But in that state the statute provided that it must be entered of record, and the case was decided especially upon the provision of the statute requiring the entry upon the record. The court, among other things, in the decision of the case, said: "It is only when such entry is made that the law gives the authority. The jurisdiction and authority from any other source is merely self-assumed. The legislature, doubtless, had reasons satisfactory to that body when this provision was inserted in the law, for the provision 'and it be so entered of record' is an amendment to the former law." So that it seems that, if the provision "and it be so entered of record" had not appeared in the statute of that state, the decision in the case would have been in favor of the jurisdiction of the acting judge. *Nelms v. Vaughan* (Va.) 5 S. E. 704, seems to us to be opposed to the contention of appellant. There it was decided that under an act which provides that the returns of county elections shall be subject to

the inquiry of the county court, upon the complaint of qualified voters, to which two shall take and subscribe an oath, the omission to subscribe as required does not deprive the court of jurisdiction, such provision not being essential to the validity of the proceedings unless so declared by statute; and the whole tenor of the decision is to the effect that a statute like ours is directory, and not mandatory. The court in that case says: "We are authorized to regard the directions as to form as merely directory, as there is no intimation that they must be done or all will be vitiated, or else no proceedings shall be further had." And it quotes Justice Taunton in *Pearse v. Morrice*, 2 Adol. & E. 94, where he says: "I understand the distinction between directory and imperative statutes to be that a clause is directory when the provisions contain mere matter of deduction, and nothing more; but not so when they are followed by such words as are used here, viz. that anything done contrary to such provisions shall be null and void to all intents. These words give a direct, positive, and absolute prohibition." Continuing, the court says: "A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute,"—citing *People v. Cook*, 8 N. Y. 87. Many other cases are cited in this opinion sustaining the view that such statutes as ours are purely directory. The citation of this case by the appellant must have been a mistake. *American Loan & Trust Co. v. East & West R. Co.* (Cir. Ct. N. D. Ga.) 40 Fed. 182, decides, upon a direct application challenging the jurisdiction of the judge who tried the cause, by petition in advance of the trial, that the judge had no jurisdiction. But the opinion is exceedingly meager, no reason for the decision is given; and the statute is not quoted. It would seem, however, from what little is said in the case, that the statute provided that the outside judge had no authority to act except when there was a vacancy. So that this case is of little or no assistance in the investigation of the case at hand. *Greenwood v. State* (Ind. Sup.) 19 N. E. 333, decided that an appointment without writing, as required by law, of an attorney to try a case on the incompetency of the judge, confers no authority when seasonably objected to. In this case it appeared that objection was duly made to the judge of the court, and that he called a member of the bar to preside as judge, but made no written appointment, as the law required. The appellant at once objected to the competency of the attorney called by the judge, "and thus," said the court in rendering the opinion in that case, "presented the question at the earliest opportunity. As there was no written appointment, and as the objection was promptly interposed, the appeal must be sustained." So it will appear that the appeal was sustained in that case because the objection was made before the judge as-

sumed jurisdiction. In fact, the court, continuing, says: "In sustaining this appeal, we do not mean to hold that an oral appointment is absolutely void. On the contrary, we do hold, as we did in *Schlunger v. State* [15 N. E. 269], *supra*, that it is not absolutely void, and that an objection to the method of appointment may be waived, and will be deemed waived unless seasonably made. The person appointed is at least judge *de facto*, and, in order to make availing an objection to the competency of a judge *de facto*, it must be promptly interposed, for the acts of such a judge may be valid, and so they will be regarded where there has been a waiver of objections,"—citing *Smurr v. State*, 105 Ind. 125, 4 N. E. 445. The court adds: "The term 'void' is improperly used in some cases, for the acts of a *de facto* judge are at most only voidable. We cannot approve of some of the expressions found in the cases upon this question, for we are convinced that, upon principle and authority, the acts of a *de facto* judge will stand unless promptly and properly assailed." Thus, it will be seen that this case is squarely and forcibly against the contention of the appellant that the action of the judge was void, as no objection was raised in the case at bar to the jurisdiction before the trial of the cause. *Smith v. State* (Tex. App.) 6 S. W. 40, like *Gresham v. Ewell*, *supra*, is decided squarely upon the ground that the statute provides that the selection of the judge by the parties, or appointment by the governor, and the fact that the oath of office was administered to the invited judge, shall be entered upon the minutes of the court as a part of the record in the cause, and is, consequently, not applicable to a case under our statute.

As no cases sustaining the contention of appellant have been cited, it will be presumed that none can be found. There is an abundance of authority, however, to the effect that the acts of a *de facto* judicial officer will be presumed to have been done with jurisdiction, unless it affirmatively appears to the contrary, and that, in any event, objection to the jurisdiction of the court must be seasonably urged. In *Smurr v. State* (Ind. Sup.) 4 N. E. 445, it was held that, if a defendant voluntarily appears and goes to trial without objection at an adjourned term irregularly held, he will be deemed to have waived all objections to the irregularity. In *Venable v. Curd*, 2 Head, 582, it was even held that where no objection is made, and there is color of authority for holding the term, although the statute under which the judge assumes to act had been repealed, still the proceedings were not void. It was there said: "There can be no doubt whatever, upon reason and authority, that a judgment given by a judge *de facto*, sitting and holding a court at the proper time and place, is as valid and free of error as a judgment pronounced by a judge rightfully in office." This case is cited in *Smurr v. State*, *supra*, in which case the

authorities generally are collated and discussed. "Where the regular judge of the court to which a cause has been remanded, being of counsel for one of the parties, is disqualified to preside, and a special judge is called, without objection being made at the time to his appointment or to his sitting at the time he assumes jurisdiction, all objections to the regularity of the appointment will be deemed waived." *Lillie v. Trentman* (Ind. Sup.) 29 N. E. 405. In *State v. Lewis* (N. C.) 12 S. E. 457, it was held that, under a statute which provided that the governor had power to appoint any judge to hold special terms of a superior court in any county where the elected judge had died or resigned, a judge of one district who assumes the functions of a judge of another court by virtue of a commission of the governor to hold specified terms of court in lieu of the regular judge thereof, who had died, is a judge *de facto*; and so long as he exercises those functions, even though the commission was invalid, that his acts as such are conclusive as against the defendant put on trial before him who pleads not guilty, and is tried without raising any objections; and that a motion in arrest of judgment after verdict, on the ground that the case is *coram non iudice*, should be overruled. To the same effect are *Craig v. Somers* (N. J. Sup.) 27 Atl. 639, and *Cox v. Manufacturing Co.* (Neb.) 60 N. W. 933. In *Railway Co. v. Rowland* (Tex. Civ. App.) 22 S. W. 134, it was held that the trial of a cause before a special judge without objection is in itself an agreement to submit the case to him, and no objection as to qualification can thereafter be made. In *Canal Co. v. Engley* (Colo. Sup.) 23 Pac. 452, it was held that, where a district judge holds a term of court outside his own district, his authority so to do and to try the causes pending in said court will be presumed unless the contrary appears. It was held by this court in *State v. Superior Court*, 3 Wash. St. 696, 29 Pac. 202, that, where the attorneys of the parties to an action agree upon a member of the bar as a judge *pro tem* for the trial of a cause, and such agreement is approved by the judge of the court, and the approval entered upon the journal, and the judge *pro tem* properly sworn to try the case, the presumption arising from the journal entries is that a written stipulation, as required by law, was entered into for the appointment of such judge *pro tem*.

The rule compelling the defendant to raise timely objections to the jurisdiction of the court is based upon principles of right and fair dealing. The statute is liberal in protecting the real rights of a defendant in criminal actions, and ample opportunity is given him to present objections to anything which is prejudicial to his rights. Knowing the ineligibility of the judge who tries his case, and yet submitting himself to the jurisdiction, being ready to avail himself of the action of the court if the verdict should be in his favor, he should not, in justice, be permitted to

object to such jurisdiction when it eventuates that the verdict is against him. Such a practice would tend to defeat justice, rather than to secure to the defendant his substantial rights.

The next assignment of error is that the law was not observed in impaneling the jury. The statute, in section 339 of the Code of Procedure, provides that if the ballots become exhausted before the jury is complete, or if, from any cause, a juror or jurors be excused or discharged, the sheriff, under the direction of the court, shall summon from the bystanders as many qualified persons as may be necessary to complete the jury. This was what was done in this case, and, if any of the jurors failed to appear when drawn by the clerk, the presumption is that they had been properly excused by the court, under the provisions of the law.

It seems that, while the jury was deliberating, three of the members resisted a verdict of murder in the first degree until one juror, who claimed to know the law, informed the doubtful jurors that it was in the power of the trial judge to sentence the defendant, upon conviction of murder in the first degree, to life imprisonment, instead of to death, and that by reason of this information the doubtful jurors consented to a verdict of murder in the first degree. This alleged misconduct was brought to the attention of the court through the affidavit of one of the jurors, and also by the affidavit of persons who heard the statements that passed between the jurors. It is a very grave question whether or not jurors would be allowed to impeach their own conduct, but it is not necessary for us to decide that question in this case, for with the question of penalty the jury has nothing to do. Their province is to decide, under the testimony and under the law as given by the court, of what crime, if any, the defendant is guilty. If they thought, under the testimony adduced and the law delivered by the court, that the defendant was guilty of murder in the first degree, it was their duty to render a verdict of murder in the first degree, regardless of the powers of the court to change the degree of punishment; and it is evident, even from the affidavits, that they did think so, but that they simply would not have agreed to the verdict of murder in the first degree except upon the understanding that it was within the power of the court to sentence the defendant, upon conviction of murder in the first degree, to life imprisonment instead of to death. As we have before said, they were not properly interested in the penalty which could be imposed by the court. That was a question which the law decided without their aid.

We think there was no substantial harm or any harm done to the defendant by the alleged misconduct of the bailiff in this case.

An energetic argument is made by the attorney for the appellant in this case to the effect that the court erred in compelling the

defendant to proceed to trial with a jury which had been partially examined during the absence of the defendant. This would, indeed, be a serious question if it were properly before this court. The affidavit of Attorney Winstock is to that effect, but this is an affidavit that is made outside of the statement of facts, and after the settlement of the statement of facts, and some seven months after the trial of this cause; and this sort of extraneous testimony cannot be admitted to contradict the record, and there is nothing in the record to show that the prisoner was absent during the examination of the jury.

It is again urged that the court erred in allowing the names of certain witnesses to be indorsed upon the information shortly before the trial. We think this was a matter in the discretion of the court, and that, under the circumstances as shown by the record, the discretion was not abused.

Several errors are predicated upon the instructions given by the court, and upon the refusal of the court to give certain instructions asked by the defendant. To those instructions asked by defendant in regard to intoxication, or conditions of mind brought about by intoxication, being a defense to crime, we think it is hardly worth while to revert. The law, for reasons which are so manifest and which have been so often expressed that a repetition of them here would be useless, is well settled that intoxication is not a defense to a charge of crime. The court properly instructed the jury on this subject, and the instructions which were asked for by the defendant were either not pertinent under the testimony or were not the law.

One instruction in regard to the cooling time, which was asked by the defendant, and refused by the court, was as follows: "The jury are instructed that, considering the question as to whether or not the defendant had time to cool his passions between the quarrel and the killing, they must take into consideration the mental power, habits, circumstances, and situation in which the defendant was at the time; and the jury must believe beyond a reasonable doubt that the defendant, under the circumstances, did cool his passions before they can find him guilty of murder in the first degree." It is strongly insisted by the appellant that the court erred in refusing this instruction. We cannot agree with this contention. It is not the question of whether or not the defendant did cool his passions that the jury is to consider, and which is the logic of this instruction, but the question is whether, under the circumstances, he had time to cool his passions; for, if a reasonable time for cooling the passions has occurred, the defendant cannot rely upon the fact that his passions, as a matter of fact, did not cool.

We do not think there was any prejudicial error incurred by the defendant from the fact that the testimony tending to impeach Chapman was excluded. In the first place, we do not think that the testimony was proper-

ly offered; and, in the second place, the jury would, in all human probability, have come to the same conclusion without the testimony of Chapman, as the main facts in the case were testified to by so many other witnesses.

We think the court properly overruled the motion for a new trial on the ground of newly-discovered evidence, as such evidence was purely cumulative, and was not of a character to be distinguished from the ordinary cumulative evidence.

It is earnestly contended by the appellant that the testimony in this case conclusively shows that the defendant should not have been convicted of murder in the first degree, and this is a question which has given the court more trouble than all the technical questions which have been raised in the case. The facts conclusively proven are that the defendant was a colored boy, of weak physical structure, and possibly of no very great strength of mind, who was engaged as a miner in the coal mines of the Oregon Improvement Company, at Franklin, King county, Wash., and William Russell, a large, powerful man, of some 200 pounds weight, roomed with this boy; that the day upon which the killing occurred was pay day in the mines; that these two men, in company with most of the other miners, had congregated at the company's saloon, as was the custom of the miners, to spend their wages and dethrone their reason by drinking whisky. Russell, as is shown by the testimony, was, in common parlance, a bully, and an overbearing, brutal man. On that day he had left his pistol on the table in their room, and Holmes had taken it with him to the saloon, and had given it to another boy, named Evan John, and told him to take it home. Russell accused the defendant of stealing his pistol, which the defendant denied, telling him that he could search him. Search was made, and the pistol was not discovered on the person of defendant. Russell then, in a most brutal and cowardly manner, assaulted the boy, slapping him with his heavy hands, first on one side of the face, and then on the other. The testimony shows that he rather gloried in being a ruffian, said that he did not care for death, and that he calculated to have a nigger before the day was over. As soon as he was released from the hands of Russell, the defendant immediately started to overtake the boy who had the pistol. He overtook him, and asked for and obtained the pistol; then returned to the saloon, and, without any warning, deliberately fired at Russell, who evidently did not see him as he approached. The first shot failed to take effect; whereupon Russell, turning, jumped towards the defendant, who fired again, striking him in the forehead. Russell then fell, and immediately expired. The time elapsing between the assault upon the defendant and his return is variously estimated by the witnesses at from 10 to 20 minutes. Much excitement naturally prevailed, so that it is diffi-

cult to fix the time with any definiteness; but, from the distance the defendant went to get the revolver, we conclude it was something like 10 or 15 minutes. This is a hard case, and the condition of the defendant is touching; and whether or not, if this court had sat as jurors in the case, under the testimony, they would have felt justified in returning a verdict of murder in the first degree, is questionable. But that matter having been submitted to the jury upon what we deem proper instructions, and it being a close question under the facts as shown by the record, we do not feel justified in disturbing the verdict rendered. There is therefore nothing left for this court to do but to affirm the judgment, and it is so ordered.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

(12 Wash. 149)

WILSON et al. v. WALDRON.

(Supreme Court of Washington. June 20, 1895.)

ACCOUNT STATED—PLEADING AND PROOF—EVIDENCE—NEW TRIAL—SURPRISE—NEWLY-DISCOVERED EVIDENCE.

1. To recover on an account as one stated, plaintiff must declare on it as such, and, having merely alleged an indebtedness on an account for merchandise sold and delivered, he cannot on the trial, without an amendment, substitute a cause of action founded on an account stated, and thereby exclude evidence to disprove the sale and delivery.

2. In an action for merchandise sold and delivered, the question whether defendant told plaintiff he was going to sell out is immaterial, and therefore properly excluded, as he was under no obligation to tell him.

3. Plaintiff is not "surprised" by evidence consistent with the defense, disclosed by the answer filed months before the trial, within the statute allowing new trial for "surprise which ordinary prudence could not have guarded against."

4. To entitle one to a new trial for newly-discovered evidence, sufficient reason must be shown for not having secured the testimony on the trial.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by Milton H. Wilson and another, partners as Wilson Bros., against R. P. Waldron. Judgment for defendant. Plaintiffs appeal. Affirmed.

T. D. Scofield, for appellants. M. J. Cochran, for respondent.

GORDON, J. We cannot agree with appellants' contention that this action is upon an account stated. The complaint alleges an indebtedness upon an account for merchandise sold and delivered between certain dates, and sets out the items, but nowhere alleges any accounting. The original transactions were still open for proofs, and the court committed no error in failing to charge the jury that respondent was estopped from denying that he ever ordered or received the goods. To enable one to recover upon an ac-

count stated he must declare upon it as such. *Machine Co. v. Wilson*, 39 Minn. 467, 40 N. W. 571. It was not the right of appellants, without amendment, to substitute upon the trial, for the cause of action set out in the complaint, one founded upon an account stated, and thereby exclude evidence tending to disprove the sale and delivery of the goods.

We think the court committed no error in sustaining an objection to the following question, asked respondent on cross-examination, viz.: "Did you notify the plaintiffs that you had sold out?" No obligation rested upon him to do so, and whether he did or not was wholly immaterial. The charge of the court was sufficiently comprehensive to embrace all of the issues raised by the pleadings, and if counsel desired special instructions adapted to particular phases of the case as presented by the evidence he should have submitted requests therefor. This he failed to do. We have examined the record and find that the verdict is not without evidence to support it. Its sufficiency, therefore, became a question for the jury, under proper instructions from the court, which, as has been said, were given.

Nor did the court err in denying appellants' motion for a new trial upon the ground of surprise and newly-discovered evidence. In support of such motion appellants filed certain affidavits and exhibits, which have been brought up in the record, and received our consideration. In one of such affidavits the learned counsel for appellants states that he was "surprised by the testimony given on said trial by the defendant, Waldron, wherein said Waldron swore that he never ordered the goods described in the plaintiffs' bill of account; that he never authorized any one to order said goods, and never received said goods." Such testimony was entirely consistent and harmonized with respondent's defense, as disclosed by his answer in the case. Issue was joined in this cause in June, 1893; the trial did not occur until late in February, 1894; and we think that in contemplation of law appellants could not have been surprised by this testimony, within the meaning of the statute which permits a new trial to be granted "for accident or surprise which ordinary prudence could not have guarded against."

Nor do we think the "newly-discovered evidence" sufficient to have warranted the lower court in granting a new trial: First. Because the affidavit of Hennessy does not show that he was in the employ of respondent at any time during the period embraced within the account as declared upon by plaintiffs. That he had, during the year 1891 and in 1892, been in the employ of respondent was in no wise material, unless he was employed by respondent at the time the account was incurred. This does not necessarily or reasonably appear from his affidavit. Secondly. If material, appellants had ample time to, and by the exercise of due diligence we are bound to presume could, have secured this

testimony upon the trial. At least, the record affords no sufficient reason for their failure so to do.

We are unable to discover any substantial error in the record, and feel that we would be unwarranted in disturbing the verdict of the jury in the cause. The judgment appealed from is affirmed.

SCOTT, ANDERS, and DUNBAR, JJ., concur.

(12 Wash. 163)

CLOUD v. LAWRENCE, Mayor, et al.

(Supreme Court of Washington. June 22, 1895.)

MUNICIPAL WARRANTS—VALIDITY—MANDAMUS TO COMPEL PAYMENT—MONEY LOANED.

1. Where, on appeal in an action against a city to recover on warrants issued to plaintiff, it was adjudged that such action would not lie, because plaintiff already had the city's evidences of indebtedness, the city is precluded, in subsequent proceedings, from denying that the warrants are regular in form.

2. Defendant city, being without funds at the time of its incorporation with which to meet current expenses, issued its obligations for services and supplies, and, by verbal agreement with the relator, such obligations were taken up by him and discharged, the city issuing warrants to relator for the money so advanced. After some payments had been made on such warrants, an ordinance was passed providing that all moneys thereafter coming into the treasury should be applied on relator's warrants till they should be discharged, but after a few more payments thereon further payment was refused, though money was thereafter paid into the treasury and applied on warrants issued after those held by relator. *Held*, that mandamus would lie to compel the city to pay relator's warrants.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Mandamus by J. A. Cloud against Phil A. Lawrence, mayor of the town of Sumas, and others. From a judgment for relator, defendants appeal. Affirmed.

Chambers & Lambert, for appellants. J. T. Ronald, for respondent.

SCOTT, J. This was a proceeding in mandamus, brought against the town council and town treasurer of the town of Sumas, to compel the levying of a tax for the purpose of raising money to pay, and to compel payment of, two certain warrants theretofore issued by the town to the relator. These warrants contained no statement as to the purpose for which they were issued, but were otherwise regular in form. Prior to the present proceeding an action had been brought by the relator against the town to recover upon these warrants. Judgment was obtained by the plaintiff, and the town appealed therefrom. The judgment was reversed on the ground that such an action would not lie, the remedy being by mandamus. *Cloud v. Town of Sumas*, 9 Wash. 300, 37 Pac. 305. Upon this last hearing the relator was again successful, and this appeal has been taken.

Appellants' main contention is that the warrants are void in consequence of not containing a statement of the purpose for which they were issued, but we think they are precluded from raising this point. It was insisted in the other cause that the plaintiff could not bring an action on the warrants to recover a judgment against the city, on the ground that he already had the city's evidences of indebtedness. This objection was sustained, and the effect of it was to decide, for the purposes of this case, that the warrants were regular in form. In fact, it was so stated in the opinion rendered. The point in question was not raised at said hearing. If it had been then made to appear that the warrants were invalid upon their face, and were not presumably entitled to payment, the case would have been decided otherwise.

It is further contended that the claims upon which these warrants were based, and for which they were issued, had never been presented to the town council, and also that they represented a loan of money, and that the council had no authority to borrow money. It was stipulated at the hearing that the evidence introduced in the former case should be considered as the evidence in this case, and a somewhat fuller statement of the facts than was made in the other decision may be desirable. The town of Sumas was incorporated as a town of the fourth class in July, 1891, and during the month of August thereafter, being without funds to meet the corporate current expenses, or for making certain public improvements,—it being desirous of paying cash therefor when made,—the council passed a resolution to borrow so much money as might be necessary for that purpose; and, in pursuance thereof, entered into a verbal agreement with the relator, whereby it was agreed that relator should advance to the town, from time to time as requested, such sum or sums as might be required, not exceeding \$5,000, to meet the current expenses and the cost of the contemplated improvements, until the collection by the town of the next taxes, from which he was to be repaid. The moneys in question were advanced by the relator in pursuance of this agreement, and were placed to the credit of the town in the relator's bank, and the warrants were issued therefor. The amount so deposited to the credit of the town was thereafter paid out by the relator to various persons, to whom the town authorities directed it to be paid, in payment of the current expenses of the town, and for making public improvements. Payments were made on the warrants issued to the relator from time to time until the 14th day of December, 1891, when, some question having arisen as to whether or not the treasurer was paying the warrants fast enough, the council ordered him to pay these warrants out of the first moneys coming into his possession. On the 4th day of January, 1892, the town, through

its mayor and common council, enacted an ordinance providing that from and after the passage thereof, and until such date as the indebtedness of the town to the relator, as evidenced by the warrants aforesaid, should be discharged, all moneys paid into the town treasury should be paid upon said warrants; and payments were made thereafter until July, 1892, since which time no payments have been made, and payment has been refused, and it appears that moneys have regularly come into the treasury since then, and have been applied upon warrants drawn upon the same fund these warrants were issued upon, and subsequent thereto. We think enough appears to show a sufficient presentment and allowance of the claims for which the warrants were issued, and that the proceeding was not so much a loaning of money as it was a contract to pay certain debts of the town. At the time of its organization the town had no funds, and a right to incur indebtedness was necessary to its corporate existence. It did incur indebtedness, and issued its obligations to the respective parties with whom it contracted for services and materials. These obligations were taken up and discharged by the relator. They might have been preserved in their original form, and, if so, would have constituted a valid claim against the town; but, in pursuance of the arrangement between the town authorities and the relator, they were not so preserved, but were treated as canceled, and the warrants issued by the town authorities to the relator, which are in controversy, represent this money, which went to pay valid indebtedness of the town. We are of the opinion that the judgment of the court was right in the premises, and it is affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

(107 Cal. 464)

SKINNER v. CITY OF SANTA ROSA.
(No. 16,003.)¹

(Supreme Court of California. June 22, 1895.)

ISSUE OF CITY BONDS — VALIDITY — COMPLIANCE WITH NOTICE.

To raise money by the issue of bonds, for the purpose of building waterworks, respondent city passed an ordinance calling a special election, and describing the proposed bonds as "payable in gold coin or lawful money of the United States," with interest at 4 per cent., payable "annually," and the notice of election, which contained a description of the bonds as given in the ordinance, stated that such bonds, and the interest thereon, should be payable annually at the office of the city treasurer; and, after the election was had, another ordinance was passed, reciting all previous proceedings, and prescribing the form of bonds in conformity to the particulars stated in the notice of election. Being unable to sell the bonds, the latter ordinance was rescinded, and Ordinance 156 adopted, making the bonds payable at a New York bank, "in gold coin of the United States * * * of the present standard of weight and fineness," with interest at 4 per

¹ Rehearing denied.

cent, "payable semiannually, in like gold coin." *Held*, that the bonds proposed to be issued under Ordinance 156 would be declared invalid, when questioned before their delivery to a purchaser, as conforming neither to the ordinance of submission, nor to the notice of election, nor to the act of March 19, 1889, as amended by St. 1893, p. 61, § 6, providing that such bonds "shall be payable in gold coin or lawful money of the United States."

In bank. Appeal from superior court, Sonoma county; E. D. Ham, Judge.

Appeal by W. G. Skinner, a taxpayer, from a judgment affirming the validity of certain bonds proposed to be issued by the city of Santa Rosa. Reversed.

Rogers & Paterson, A. B. Ware, and C. S. Farquar, for appellant. J. W. Goodwin and W. F. Cowan, for respondent.

PER CURIAM. The controversy herein was submitted to the superior court upon an agreed case, under the provisions of section 1138 of the Code of Civil Procedure. The city of Santa Rosa, desiring to construct a system of waterworks, the estimated cost of which is stated at \$165,000, proposed to raise that sum by the sale of the bonds of the city, to be issued under the provisions of the act of 1889 authorizing the incurring of indebtedness for the construction of waterworks and other improvements. St. 1889, p. 399, as amended by St. 1891, p. 94, and St. 1893, p. 61. The several ordinances required by the statute were duly passed and published, the notice of election given, and the election held, at which more than two-thirds of the electors voting thereat voted in favor of the issuance of the bonds. Ordinance 148, calling said special election, described the bonds proposed to be issued as serials payable in gold coin or lawful money of the United States in the manner following: "One-fortieth part of the whole amount of said indebtedness so incurred, together with annual interest at the rate of four per cent. per annum on all unpaid sums thereof, shall be payable each and every year on a day in each year, and and at a place to be fixed by the common council of said city, until the whole amount of said indebtedness shall have been paid." The notice of election contained the foregoing description of the bonds proposed to be issued, and in addition declared as follows: "Each bond shall have attached thereto a separate coupon for the interest for every year that such bond has to run, and each of said coupons shall be made therein payable, and shall be payable, at the office of the city treasurer of said city of Santa Rosa, on the first Monday of December of the year for the interest whereof it is given. Each of said bonds shall therein be made payable, and shall be payable, at the office of the city treasurer in the city of Santa Rosa on the first Monday in December of each year." The notice of election also stated the precise amount of the annual tax to be levied to pay the annual interest, and the series of bonds falling due each year, thus: "First

year, \$10,725; second year, \$10,560;" and so on down to the "fortieth year, \$1,200,—the aggregate tax levy for the forty years being \$300,300." On June 6, 1893, after the result of the election was ascertained, the city council adopted Ordinance No. 149, which recited all the previous proceedings and prescribed the form of the bonds, in exact conformity to all the particulars stated in the notice of election. The agreed statement then recites the steps taken to sell said bonds, and adds: "That neither said legislative body, nor said city, nor any of the officers, received any bids for said bonds in answer to the notice so published; that said legislative body used strenuous efforts to sell such bonds, but was unable to find any purchaser therefor." The statement then recites that, in view of the great needs of the city for a system of waterworks, the city council, on November 17, 1894, passed Ordinance No. 156 rescinding Ordinance 149, and changing the form of the bonds so as to make them payable at the Chemical National Bank in the city of New York "in gold coin of the United States of America of the present standard of weight and fineness," with interest at the rate of 4 per cent. per annum, "payable semi-annually in like gold coin." The bonds in this new form were executed, and on December 1, 1894, Robert Effey (a party to this agreed case) bid for said bonds their face value in United States gold coin, and the city council, having accepted his bid, were about to deliver the bonds to him, when W. G. Skinner, describing himself as a taxpayer of said city, served upon the city council and each of the officers of said city a protest against the sale of said bonds to Effey, in which he notified them that he would use every lawful means to resist the collection of any tax levied for their payment, and that he would apply to the court for an injunction to restrain the collection of a tax levied on October 5, 1894, of 25 cents on each \$100 to pay the principal and interest due on said bonds for the year 1894 and the interest due June 1, 1895. The city council thereupon passed a resolution directing the city attorney to take immediate steps to unite with such officers and persons as were interested in submitting an agreed case, "so as to obtain as soon as possible the judicial determination of said question, case, and controversy in and by the supreme court of this state."

The foregoing outline of the statement, as originally prepared, contains all of it that is material. It closed with the statement that "the foregoing is a full, true, and correct statement and case, containing all the facts upon which the controversy depends," and signed by counsel for the respective parties, and followed by the affidavit of Skinner to the effect that the controversy is real, and the proceedings in good faith.

The contention on Skinner's part, as appears in the agreed case, is: (1) That the city council have no power to issue the bonds

in the form prescribed by Ordinance 156. (2) That the city council had no power to levy the tax of 25 cents per \$100 on October 5, 1894, the bonds then authorized under Ordinance 149 not having been sold. (3) That Ordinance 153, authorizing the city marshal to collect delinquent taxes by sale of the property, is invalid because in conflict with the city charter which makes it the duty of the city attorney to collect them by suit, the marshal having advertised his property for sale on December 17th. Certain amendments were afterwards made to the statement, viz.: That the said tax levy of 25 cents, together with other city taxes levied for the current year, do not exceed 1 per cent. of the assessed valuation, and are less than the limit fixed by law; that Skinner had tendered all other taxes; that there had been a sufficient amount of said 25-cent tax voluntarily paid into the city treasury to meet the semiannual interest accruing prior to the next annual tax levy; and "that at the time of the levy of said twenty-five cent tax an offer to purchase for the face value thereof, in United States gold coin, said bonds to be issued under Ordinance No. 149, had been presented to said common council, which offer was thereafter withdrawn." Judgment was rendered that bonds issued under Ordinance 156 would be valid, and also affirming the validity of said 25-cent tax, and from this judgment said Skinner appeals.

The question, "Are the bonds which the city council intended to issue valid in the form proposed?" must be answered in the negative.

No question is made as to the regularity of the proceedings up to and including Ordinance No. 149; nor that bonds issued under that ordinance and in the form therein prescribed would have been valid, but the bonds proposed to be issued under Ordinance 153 do not conform to the ordinance calling the election, nor to important particulars specified in the notice of election, and in one of these particulars they do not conform to the statute under which it is proposed to issue them.

The ordinance calling an election and the notice of election each provided that the bonds to be issued, if the qualified voters should authorize their issue, should bear interest at the rate of 4 per cent. per annum, and the principal and interest should be payable "in gold coin or lawful money of the United States," and the notice of election specified, in addition, that the bonds, as well as the interest, should be payable at the city treasury. The statute under which said bonds were proposed to be issued is the act approved March 19, 1889 (St. 1889, p. 399), and the amendments thereof hereafter noticed. By section 2 of said act, as amended in 1891 (St. 1891, p. 94), it is provided, among other things, as follows: "The ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvement, and that the bonds of the municipality shall issue for the payment of the cost of such improvement, as in such ordinance set forth, if the proposition be accepted by the qualified voters as hereinafter provided." Section 3 of said act (St. 1889, p. 400) provides for the publication of said ordinance calling such election, and that after such publication there shall be published, not less than two weeks, "a notice of such special election, the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of the tax levy to be made for the payment thereof." By section 6 of said act, as amended March 1, 1893 (St. 1893, p. 61), it is provided, among other things, that such bonds "shall be payable in gold coin or lawful money of the United States." Section 7 (St. 1889, p. 401) provides: "The legislative branch of any city, town or municipal corporation issuing bonds under the authority of this act shall have the right to determine the rate of interest such bonds shall bear; provided, that in no case shall it exceed seven per cent. per annum, and to name the date and place where such bonds and interest shall be paid; provided, that the place of payment shall be either at the office of the treasurer of the municipality, or at some designated bank in San Francisco, Chicago, New York or Boston. * * *

From this review of the statute it will be seen that the rate of interest the bonds shall bear, and the amount of the tax levy to be made for the payment thereof, are expressly required to be stated in the "notice of election," while the place of payment and the kind of money in which they are to be paid are not. The ordinance calling the election and the notice of election fixed the rate of interest at 4 per cent., payable annually, while Ordinance 156, under which the bonds in controversy are proposed to be issued, fixes the rate at 4 per cent., payable semiannually. It is contended by respondents, if we correctly understand them, that as section 7 of the act above cited leaves the determination of the rate of interest to the common council, and as by section 6 it is provided that interest may be payable annually or semiannually, making the interest payable semiannually instead of annually a "mere matter of detail, to be arranged between the buyer and the city, and, being confided to the discretion of the council, it was not within their domain to limit or circumscribe that discretion in any way, but that it was their duty to use their best judgment when they were called upon to act." That the payment of interest semiannually increases the rate is obvious. If it did not, purchasers would not be likely to insist upon it. It therefore becomes part of the rate, and, while the council are authorized to fix the rate, the rate of interest

est, as well as the main question of incurring the indebtedness for the purposes specified, is required to be submitted to the voters. The maximum rate authorized by the statute is the legal rate of interest allowed in this state, which is now 7 per cent. Putting an extreme case, it will not be contended that if the proposition submitted to the voters at such election specified the rate to be paid at 2 per cent., the common council might, in their discretion, issue bonds bearing 7 per cent. But if the common council can depart at all from the rate of interest submitted to the voters, no limit, save the rate fixed by the statute, can define their power. Counsel for respondent cite the case of *Yesler v. City of Seattle*, 1 Wash. St. 308, 25 Pac. 1014, and quote four or five pages therefrom. In that case the ordinance of submission fixed the rate of interest at 5 per cent. So far as the rate of interest is concerned, that case is not in point, inasmuch as the statute there did not require the rate to be stated in the ordinance of submission or notice of election. In that case, however, other particulars not required to be stated in the ordinance of submission were specified, and some of them were conditions not named in the statute. As to these particulars, which were not required to be submitted to the voters, the case supports respondent's contention, and is in point so far as the place of payment is concerned. The argument upon which that decision rests is that the legislature delegated to the common council, the municipal legislature, with the assent of its constituents, the power to contract the indebtedness, "it being the sole judge of the proper method, whether by bonds or warrants or open account, confidence being reposed in the wisdom and honor of its members that they will act for the best interest of the community. Nor does the law permit the council of a city to delegate to the popular vote the determination of any matter before it, unless the right to so delegate it has been expressly conferred or enjoined by statute. * * * Therefore we conclude that the council could lawfully submit to vote only those matters directed to be submitted by its superior authority,—the legislature." We cannot assent to the conclusion reached by the learned justice who wrote the opinion, nor to the argument by which it is reached. The opinion concedes that under the constitution and laws of the state no indebtedness can be incurred beyond a certain limit, without authority expressed at an election duly held for that purpose; so that the real question to be determined is, has that assent been given? It is quite true that in that case, as in this, particulars were inserted in the submission which the statute did not require to be submitted; but these particulars having been submitted, the vote authorizing the indebtedness to be incurred imports the particulars named as the conditions upon which that assent has been given, and hence no one can say that, without these favorable conditions, the

result of the election would have authorized the indebtedness to be incurred. The rate of interest, the place of payment, the kind of money in which payment must be made, would influence any business man in determining whether he should incur a personal debt, and must do so when he is called upon as a voter to determine whether he will favor his municipality's incurring a debt, for the payment of which, in common with others, his property is liable to taxation. He might readily consent, upon very favorable terms being offered or proposed, and strenuously oppose it if the terms were unfavorable or were uncertain. If the terms and conditions submitted to the electors may be departed from, and such election held to authorize the issuance of bonds under other terms and conditions, a door will be opened authorizing the common council to submit a proposition so favorable as to secure beyond question a favorable vote, and then change the conditions as to rate of interest and otherwise, even without any fraudulent purpose or intent, so that, if again submitted, an overwhelming defeat would result. The logical inference from the case above cited is, however, that, as to all matters required to be submitted, such submission measures the authority of the common council. The case of *Moore v. City of Walla Walla* (C. C., D. Wash.) 60 Fed. 961, so far as the above questions are concerned, follows the decisions of the state court, which are of binding force in the federal court, and is therefore not an independent authority, and lends no weight to *Yesler v. City of Seattle*, supra, which it cites. What has been said applies as well to the place of payment and the exact statement of the amount to be levied each year of the 40 years, as to the interest, so far as its influence upon the vote is concerned.

Upon the question as to the change made in the kind of money in which the bonds and the interest thereon are to be paid, it should be observed that, prior to the amendment of March 1, 1893 (St. 1893, p. 61), the statute was silent as to the kind of money in which payment should be made, but that amendment requires that the bonds and interest "shall be payable in gold coin or lawful money of the United States." Several cases are cited by counsel for respondents to the effect that a grant of power to a municipal corporation to issue bonds, without limitation as to the kind of money in which they shall be payable, confers authority to make them payable "in gold coin of the United States, of the present standard weight and fineness." *Judson v. City of Bessemer*, 87 Ala. 240, 6 South. 267; *Trustees v. Moody*, 62 Ala. 389; *Moore v. City of Walla Walla*, 60 Fed. 961. Prior to the amendment of 1893, above stated, the power to make the bonds payable "in gold coin of the present standard of weight and fineness," or in any other kind of coin or currency, could not be controverted. There was no restriction. The power to

determine that question was as ample as that of a natural person to stipulate in what his personal obligation should be paid. The amendment must therefore have been intended to restrict that power, and this was done by expressly stating the kind of money in which alone they "shall be" made payable. Whether the increased value of the bonds caused by the stipulation that they shall be paid in gold coin of the present standard of weight and fineness would equal or exceed any probable appreciation of gold, cannot control the express provision of the statute in that regard.

But it is contended that if the act gave the council no power to make the bonds payable in gold coin of the present weight and fineness, that clause would be void, and that in such case it would be the duty of the treasurer in paying the bonds to pay them in the kind of money required by the statute, and cites the case of *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. 358. That case, however, related to the place of payment. The court said: "The objection that the bonds are illegally made payable at a bank in Chicago does not invalidate them. The agreement to pay at the place is void, but the balance of the coupons and bonds are not rendered invalid for that reason. In paying the interest the treasurer should not obey that agreement in the bond, but pay it at the treasury of the city." But this does not, nor do any of the cases cited by counsel, meet the question here presented as it is presented. The question in that case, as in the cases cited from the supreme court of Illinois, arose between holders of municipal bonds and the municipality that had issued them and received the value of them. Two of these cases related to the place of payment, and two involved bonds purporting to bear a rate of interest greater than that authorized by the statute, and in these cases it was held that the holder could recover the authorized rate, and no more. The question whether the bonds, if issued, would be void in the hands of a holder for value, is not the test or measure of the right of a taxpayer of the city to enjoin the issue of them. It may well be that the purchaser is bound to know whether the rate of interest specified in the bond is within the limit fixed by the statute; but the rate being within the statutory limit, it does not follow that he may not rely upon the recitals in the bond as to the regularity of the proceedings by the municipality in fixing the rate specified, or that such recitals will not, in favor of the bondholder for value, bind the corporation. The distinction between the question now under consideration and that which would arise in an action by a bona fide holder of one of these bonds is noticed by the supreme court of the United States in the leading case of *Commissioners v. Aspinwall*, 21 How. 539, where, after quoting the recitals of the bond showing that it was issued by authority, it was said: "The purchaser was not

bound to look further for evidence of a compliance with the conditions to the grant of the power;" and afterwards further said: "We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previous to the execution of the power, and before the rights and interests of third parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question." *Commissioners v. Aspinwall*, supra, has been cited and followed in a very large number of cases in that and other courts, and, as applied to the facts of that case, has not been doubted. In a later case, *Town of Colomo v. Eaves*, 92 U. S. 484, the rule was more cautiously stated, thus: "Where legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal."

Respondents' argument that the bonds would be valid, at least to the extent of 4 per cent. annual interest, payable "in gold coin or lawful money of the United States," at the office of the city treasurer, is a virtual concession that the bonds in the form prescribed in Ordinance 156 are not authorized by the proceedings, and if that be true, they should not be issued; while, if they would be valid in the hands of a bona fide holder so that he could compel payment in gold coin of the present standard of weight and fineness, with interest in like coin payable semiannually, in the city of New York, a burden would be imposed upon the taxpayers to which they have not assented, and they should not be allowed to issue. Counsel refer to the case of the controversy between *Derby and the city of Modesto* (Cal., 38 Pac. 900). In that case the bonds had been sold, the purchase money paid into the treasury, and the controversy arose more than a year afterwards. One point then urged by the taxpayer was that the bonds provided for the payment of semiannual interest. In reply to this contention it was said: "The statute provides that the trustees shall have the right to determine the rate of interest such bonds shall bear, provided that in no case shall it exceed seven per centum per annum. The time at which the interest is to be paid, whether annually or semiannually, affects the rate of interest, and is within the power con-

ferred upon the board by the statute, and the rate being within the statutory limit, the bonds are valid as against this objection." The facts should have been more fully stated upon that point. The ordinance of submission and the notice of election both provided for semiannual interest, precisely as stated in the bonds, but the statute at that time was silent as to the payment of interest semiannually, and the contention was that in providing for semiannual interest the statute had not been followed. In the case at bar, where the question arises before the bonds have been delivered, we hold that the city has no power to issue them in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election, and with the statute under which the proceedings were had.

It becomes unnecessary to discuss the remaining questions, brought up by the record. For the reasons given in the foregoing opinion, it is ordered that so much of the judgment appealed from as affirms the validity of the bonds proposed to be issued under said Ordinance 156 be reversed, and cause remanded, with directions to enter a judgment enjoining the sale and delivery thereof.

(5 Cal. Unrep. 45)

CHRISTENSEN v. JESSEN. (No. 15,442.)
(Supreme Court of California. June 4, 1895.)

FRAUDULENT REPRESENTATIONS — LIMITATIONS —
EVIDENCE—WAIVER OF DEFECTS IN PLEADING.

1. Judgment will not be reversed because of a defective allegation which did not mislead the opposite party, and which was not objected to by demurrer, and under which evidence was admitted without objection.

2. Code Civ. Proc. § 338, subd. 4, limiting to three years "an action for relief on the ground of fraud or mistake," applies to an action at law, as well as in equity.

3. Defendant having induced plaintiff to consent to an assignment of a lease by representations that the assignment provided for an annual rent of \$800 to be paid plaintiff, it is unnecessary, in an action for fraudulent representations, that plaintiff prove that \$800 could have been obtained, but if no more than \$500, the amount actually provided for in the assignment, could have been obtained, this was a matter of defense.

Commissioners' decision. Department 1.
Appeal from superior court, Alameda county;
F. W. Henshaw, Judge.

Action by Anna Christensen, as executrix of
P. J. Christensen, against H. P. Jessen.
Judgment for plaintiff. Defendant appeals.
Affirmed.

John J. Roche, for appellant. Joseph Hutch-
inson, for respondent.

HAYNES, C. This action was commenced
August 29, 1891, by Peter J. Christensen
against H. P. Jessen, to recover damages al-
leged to have been sustained by the plaintiff
by reason of fraudulent misrepresentations
made to him by defendant. All the issues,
except that arising upon defendant's plea of

the statute of limitations, were submitted to
a jury, which found a verdict in favor of the
plaintiff for \$2,000 damages; and, the court
having found for the plaintiff upon the plea
of the statute of limitations, judgment was
entered upon the verdict, and defendant ap-
peals therefrom, and from an order denying
his motion for a new trial. Appellant con-
cedes that the evidence was conflicting, and
that the verdict of the jury upon the facts
must be accepted, leaving only questions of
law to be considered. Peter J. Christensen
died since the trial, and his executrix has
been duly substituted; but, for convenience,
he will be referred to as plaintiff and re-
spondent in this opinion, as though still in
life.

Plaintiff was the owner of a salt claim in
Alameda county. In October, 1883, he exe-
cuted to defendant a lease of the same for
the term of five years, commencing January
1, 1884, at an annual rent of \$500, with the
privilege of a renewal for five years more on
the same terms; but the lease prohibited the
defendant from letting or underletting the
whole or any part of the premises without the
written consent of the plaintiff. The defend-
ant also owned a salt claim adjoining that of
plaintiff, and was the lessee of another claim
owned by Peter Mattison. In the early part
of 1887 the Union Pacific Salt Company, the
American Salt Company, B. F. Barton, E. M.
Block, John A. Plummer, and Charles A.
Plummer formed a combination or company
for the purpose of controlling all the salt
claims in that locality, and, among them,
those controlled by defendant. The combina-
tion made defendant a satisfactory offer for
his own and the Mattison claim, but that
offer was conditioned upon securing plaintiff's
claim also, to accomplish which plaintiff's
written consent was necessary, and the com-
pany also desired to have the option of a
second renewal of the lease from plaintiff for
the term of five years. On March 10, 1887,
the defendant called on plaintiff, and inform-
ed him that the company wanted to secure his
(plaintiff's) salt claim, but that he (defendant)
had no right to lease it. There was then
about two years of the original term of five
years of defendant's lease unexpired, and
plaintiff said, "If the company takes it, I
want \$800, and you can have the benefit of
the two years," to which the defendant re-
plied, "All right." Defendant then called on
Mr. Plummer, a member of the company, and
informed him of plaintiff's terms, and he said
he would present it to the other parties. De-
fendant, however, did not wait to know
whether the terms proposed would be accept-
ed, but went to San Francisco, where his
lease was, and had the following consent in-
dorsed upon it: "I hereby consent that said
Hans P. Jessen may underlet or assign this
lease to the Union Pacific Salt Co., American
Salt Co., B. F. Barton, E. M. Block, John A.
Plummer, and Charles A. Plummer. It is
further agreed that said Jessen, or his as-

signs, shall have the privilege of renewing this lease at the expiration of the first renewal thereof. If such first renewal should be made, the second renewal to be for the term ending on the 18th day of March, 1897." The defendant, on his way to Oakland, read the indorsement, and, as he testified, concluded plaintiff "would not stand that," and called upon an attorney in Oakland, and had the following added to the indorsement above quoted: "The annual rent for the term commencing at the second renewal to be eight hundred dollars." The defendant took the lease, with the said indorsement of consent upon it, to the plaintiff, who tried to read it, but was unable to do so, so as to understand it, whereupon the defendant read it to him, and plaintiff asked, "After the two years, then, I can go and collect my \$800 from the company?" and defendant replied, "Yes, that is what it says," and plaintiff signed it. Under the instructions of the court, to which no exceptions were taken, the verdict of the jury is conclusive as to the relations of these parties, and the right of the plaintiff to rely upon the representations made to him by defendant, and hence the evidence upon that point need not be stated. For the two years remaining of the original term, defendant collected the rent, and paid plaintiff annually \$500; plaintiff supposing that defendant received \$800, and retained \$300, according to the said proposition. In January, 1889, the original term having expired, and the first renewal begun, defendant told plaintiff he could go and collect his rent from the company, and then further told him: "There is a misunderstanding in the lease. It only says \$500." Plaintiff asked whether he had not collected \$800, and he said, "No, I let him have mine for the same I had it," and added: "I think you will get your \$800 from Barton, he and his clerk read the lease over several times, and they understand it the same way; and I think, if they pay you once, they will keep on paying you." On applying for his rent the company gave him a check for \$800, but on May 23d he received a letter from the company informing him that they had overpaid him \$300; that until January, 1894, the rent would be \$500, and after that date \$800. Plaintiff then saw the defendant, who claimed that "Plummer done it," and, relying upon his representation that it was a "mistake," commenced an action to reform the indorsement upon that ground. That cause came on for trial on August 19, 1891; and Jessen, being called as a witness by the plaintiff, then first disclosed the manner in which said indorsement was prepared, as hereinbefore recited. Plaintiff was thereupon nonsuited in that action, and 10 days later commenced this action to recover damages for the fraud.

Appellant contends that his demurrer to the complaint should have been sustained. The grounds alleged were that facts sufficient to constitute a cause of action were not stated, and that the cause of action was barred

by the statute of limitations, specifying subdivision 4, § 338, and subdivision 1, § 339, Code Civ. Proc. He insists that the complaint is fatally defective in not negating a discovery of the facts constituting the fraud more than three years before commencing the action. The averments of the complaint objected to are as follows: "That plaintiff did not discover the said fraud perpetrated upon him by defendant until, to wit, on or about the 18th day of August, 1891; that, long prior to the last-named date, plaintiff discovered the true effect and meaning of said indorsement, but, until the last-named date, supposed the same to have been the result of mistake." Plaintiff's allegation above quoted is not as full and specific as it should have been, but no objection upon that ground was taken by demurrer, nor was any objection made to the admission of evidence upon the ground that said allegation was insufficient, or in any respect uncertain or defective. The evidence being sufficient, and having been received without objection, the judgment should not be reversed because of a defective allegation which did not mislead the defendant, and which was treated upon the trial as sufficient. This rule is constantly adhered to in this court, and is applied to cases of this character, as well as to others. See *Sukeforth v. Lord*, 87 Cal. 390, 25 Pac. 497, and cases there cited.

The answer of defendant contained pleas of the statutes of limitation, which, upon the trial, were submitted to the court, and found in favor of the plaintiff; and in so finding, it is contended, the court erred. It is argued that plaintiff's cause of action falls under subdivision 1 of section 339, Code Civ. Proc., which limits an action upon a contract, obligation, or liability not founded upon an instrument of writing to two years, and that it does not fall under subdivision 4 of section 338, limiting actions to three years, which subdivision is as follows: "(4) An Action for Relief on the Ground of Fraud or Mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." His argument is that the "relief" to which reference is made in the section last above cited is "equitable relief," and that this is an action at law for damages, and, in support of that proposition, cites *Piller v. Railroad Co.*, 52 Cal. 42. That was an action against a railroad company for personal injuries received in a collision. The statement there made was that "the first clause of subdivision 1 of section 339 is applicable to all actions at law, not specifically mentioned in other portions of the statute. We say actions at law advisedly, since section 343 fixes the time within which certain bills in equity may be filed." Counsel's argument concedes that an action at law will lie for fraud, and, if so, it is one of these cases "specifically mentioned in other portions of the statute." The sec-

tion of the Code in question applies to any and all actions permitted by the Code for the purpose of obtaining relief upon the ground of fraud or mistake, whether such action be legal or equitable. The Code expressly uses the word "relief" to designate the object of all civil actions. Section 423, Code Civ. Proc., provides: "The complaint must contain: * * *

(3) A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated." Appellant further distinguishes between "knowledge of the fraud," and "knowledge of the facts constituting the fraud," and insists that plaintiff had such knowledge of the facts as charged him with a knowledge of the fraud more than three years before the commencement of the action. The fact that a fraud was perpetrated on the plaintiff by the defendant in March, 1887, is not controverted on this appeal, the jury having so found upon conflicting testimony. It is clear, then, that the knowledge of the facts constituting the fraud came to the plaintiff after the date of the transaction of March 12, 1887; and we see nothing in the evidence which tended to call plaintiff's attention to the transaction, or to disclose the fraud, or to put him upon inquiry, until January, 1889, when defendant told him he could go and get his rent from the company, adding that there was "a misunderstanding in the lease," but he thought they would pay him his \$800. It will be remembered that plaintiff's proposition was that he would consent to the subletting if the company would pay \$800 per annum, the defendant to have the benefit of the \$300 increase of rent for the two years the lease had to run before the first renewal, and that the defendant collected the rent and paid the plaintiff his \$500 per annum until January, 1889, which was the beginning of the first renewal, and the beginning of the increased rent to the plaintiff, when he was told there was a mistake, that "Plummer did it." He was paid \$800, however, and was not informed by the company until May, 1889, that he was overpaid. His discovery of the fact that the lease did not provide for an increase of rent was not made before January, 1889, and this action was commenced in August, 1891, and it was not until 10 days before the commencement of this action that he learned that, instead of a mistake made by Plummer, it was a fraud perpetrated by the defendant. But if it be conceded that he was put upon inquiry, and should have discovered the facts constituting the fraud in January or May, 1889, this action was commenced less than three years thereafter, and was not barred by the statute. Appellant's contention that, if defendant misread the indorsement to plaintiff, the latter was negligent in not reading it himself, or procuring some one else to read it, is not an open question here, either upon the law or the facts.

It is not necessary to determine whether

the court erred in permitting the plaintiff to testify as to the rental paid by the company for other salt claims in the same neighborhood, and the quantity of salt produced by each; for, if it be conceded that defendant's objection should have been sustained, the judgment should not be reversed upon that ground, since the only object of the testimony was to show that the company would have paid the increased rent, and John A. Plummer, one of the assignees of the lease, and one of defendant's witnesses, testified upon cross-examination that he would have consented to pay \$800, "but it was a matter of indifference." Not only so, but, plaintiff's consent to the assignment of the lease having been obtained by defendant upon the representation that the company had agreed to pay \$800 per annum, the allegation of value in the complaint was unnecessary; and if, as a matter of fact, no more than the original rent of \$500 could have been obtained, it was matter of defense to be alleged and proved by the defendant, if, indeed, he were not estopped by his representation from making such allegation and proof. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(107 Cal. 455)

FLYNN v. HITE. (No. 15,805.)¹

(Supreme Court of California. June 14, 1895.)

ACTION FOR DAMAGES—JUDGMENT IN EJECTMENT AS BAR—ESTOPPEL.

1. In an action for damages against the owner of property for failure to put plaintiff in possession under a lease, a judgment for defendant in ejectment by him against plaintiff and another, in which plaintiff pleaded that he was entitled to possession, and in which his lease if introduced in evidence, and shown to have been valid, would have been a good defense, is conclusive against plaintiff.

2. One in possession under a valid lease from the owner is not estopped from defending his possession thereunder because he obtained possession from a former tenant after the term of the latter had expired.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by John Flynn against John R. Hite. Judgment for plaintiff. Defendant appeals. Reversed.

F. J. Castelhun and Lloyd & Wood, for appellant. H. W. Hutton, C. R. Holladay, and Wm. A. Stuart, for respondent.

HAYNES, C. Flynn brought this action against Hite to recover damages, laid at \$7,500, for defendant's failure to put him in possession of certain premises situate in the

¹ Rehearing denied.

city and county of San Francisco, under an alleged lease made by one Coe, as the agent of defendant, on August 11, 1890, for the term of three years from September 1, 1890, at a monthly rental of \$40. At the time this alleged lease was made, one William Cunniff was, and for many years had been, in possession of the property described in the lease, as the tenant of defendant, paying therefor a monthly rent, and during his tenancy had made certain improvements thereon. Hite, the defendant in this action, afterwards commenced proceedings against Cunniff to obtain restitution of said premises; and in November, 1890, it was adjudged in that action that said Cunniff was rightly in possession as tenant of Hite, and that his term would not expire until May 1, 1891. Flynn, the plaintiff in this action, just before the expiration of Cunniff's term, purchased the improvements from Cunniff, and the latter surrendered possession to Flynn on May 1, 1891, but arranged with Flynn that he should occupy certain rooms upon the premises for a month without rent. On May 23, 1891, Hite commenced an action of ejectment against Cunniff and Flynn to recover possession of the same premises; and in that action findings and judgment were made and entered in favor of Hite on December 10, 1891, and, under that judgment, Cunniff and Flynn were ejected from the premises. The present action was commenced in February, 1892, was tried by a jury, and resulted in a verdict for the plaintiff for \$7,500 damages. A motion for a new trial was made, and by the court denied, upon condition that plaintiff would remit all in excess of \$3,960 and costs; and, that being done, the judgment was modified accordingly. This appeal is from the judgment and the order denying a new trial.

Defendant's answer, among other things, alleged that Coe had no authority to make the lease, and also pleaded the judgment in the ejectment suit against Flynn and Cunniff in bar of the action. The first of these defenses need not be considered, as the judgment must be reversed upon another ground. The defendant, in support of his said plea in bar, offered in evidence the judgment roll in the said ejectment suit; and plaintiff's objection thereto, that it was immaterial and irrelevant, was sustained by the court, to which ruling defendant duly excepted, and specified the same as error. Respondent contends that the ejectment case was decided upon estoppel; that the lease was not and could not have been pleaded by Flynn, but that the case was decided upon Cunniff's title or right of possession, and that, therefore, Flynn is not bound by the judgment except so far as his possession was based upon Cunniff's title; that, as Cunniff was estopped from denying his landlord's right to recover possession, so was Flynn; and that Flynn could not plead his lease until he had surrendered possession. The pleadings and findings in that case, how-

ever, show that the learned counsel are mistaken. Flynn, in his answer, denied that he wrongfully or unlawfully withheld the possession, etc., and for a further answer alleged "that at the time of the commencement of this action, and prior thereto, and now, he was and is possessed, and was and is entitled to the possession, of the premises in said amended complaint described." Cunniff answered separately, and alleged that by the findings and judgment of the court in the action against him as a tenant rendered in November, 1890, he was entitled to the possession until May 1, 1891; that, on the day last mentioned, he surrendered the possession to Flynn, "pursuant to the directions of the plaintiff herein, and under a certain indenture of lease dated August 11, 1890, made, executed, and delivered, as defendant is informed and believes, by plaintiff to said Flynn, of and for said premises, for the period of three years from the date aforesaid; and that ever since May 1, 1891, he has had no control of or interest in said premises whatsoever, but that said John Flynn has been, and still is, in possession thereof." The court found, among other things not necessary to be noticed, as follows: "That on the 30th day of April, 1891, said Cunniff, in consideration of the purchase by the defendant, John Flynn, of the improvements upon the said premises of and from said Cunniff, and of being allowed to remain in possession of the house upon said premises rent free for one month by the said Flynn, delivered the possession of the said premises to the said Flynn. That said Cunniff did not surrender the possession of said premises to the defendant, Flynn, on the 1st day of May, 1891, or at any other time at the request of the plaintiff, or under an indenture of lease made and executed by the plaintiff to said Flynn."

If Flynn held a valid lease from Hite at the time the ejectment suit was brought, there could be no question as to his right of possession under it. The term specified in the lease had not expired. He had pleaded a right of possession in himself, and, though he did not mention the lease, he could have put it in evidence under his plea, and, if the lease was valid, must have succeeded in the action. It is therefore immaterial for the purposes of the present case whether he offered the lease in evidence or not, or whether, as a matter of fact, he relied upon it to establish his right of possession, since he put his title in issue, and had the opportunity of doing so. But, were it otherwise, it is not only clear from the judgment roll offered in evidence that the lease was in issue in the ejectment suit, but the record in this case clearly shows that it was in issue, and was relied upon in that case, and that he did not claim to have acquired any right of possession from Cunniff. All that he pretends ever to have bought from Cunniff was certain improvements placed upon the property by Cunniff, and that he

bought them for the purpose of getting possession under the lease here in question. In his testimony in chief in this case he testified: "They told me that the best way to get possession from Cunniff was to go and buy him out. He wouldn't sell until his term was up." Upon cross-examination he was examined as to his testimony upon the former trial, and admitted that upon the trial of the ejectment case he testified that he bought Cunniff's building on the 1st day of May, 1891; that since that time he had been in possession of the property "under this lease." The judgment roll above mentioned was excluded, when first offered, upon the ground that said judgment had not been pleaded. Whether the court erred in then excluding it, it is not necessary to consider; but before it was again offered, the answer had been amended in that regard, and the evidence above mentioned as having been given upon the trial of the ejectment suit had been heard.

Counsel for respondent assume that the ejectment case went off upon the point that Flynn entered under Cunniff, and, as Cunniff had no title or right to the possession after the expiration of his term, he could confer no right of possession upon Flynn; that, claiming under Cunniff, Flynn was estopped to deny Hite's title and right of possession,—and cite *Standley v. Stephens*, 66 Cal. 511, 6 Pac. 420, and other like cases, in support of their contention. These cases have no application here. It is quite true that if Flynn entered under Cunniff, knowing that Cunniff was a tenant, he could not thereby acquire a right of possession adverse to the landlord, or dispute his title, without first surrendering possession; but Cunniff's term having expired, if Flynn had a valid lease from Hite, his possession under the lease could not be adverse, nor could it be necessary that he should surrender a possession held under it in order that he might be put back under the same lease. Being in possession under a valid lease, he was not estopped from defending his possession under it, for the sufficient reason that, if the lease was valid, Hite was estopped from denying his right to possession under a lease expressly conferring such right. If it be conceded that Flynn did not offer his alleged lease in evidence, that fact would not affect the conclusiveness of the judgment, as, under the issues in that case, its validity might properly have been determined. *Gray v. Dougherty*, 25 Cal. 266, 272; *Freem. Judgm.* (4th Ed.) §§ 249, 260. The judgment in that case being conclusive, it is not perceived how the plaintiff is entitled to damages for not being permitted to occupy premises which it had been solemnly adjudged he had no lawful right to occupy.

Many other errors are specified by appellant, but as plaintiff's right of action could not exist unless he had a right of possession under the lease, and that right having been adjudicated in the former action, it is immaterial whether the court erred in other par-

ticulars or not. For the error in excluding said judgment roll when offered in evidence the second time, the judgment and order appealed from should be reversed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

(6 Cal. Unrep. 56)

Ex parte WINTHROP. (Crim. No. 56.)

(Supreme Court of California. June 20, 1895.)

HABEAS CORPUS—COMMITMENT FOR MURDER—EVIDENCE.

A person committed on a charge of murder will not be discharged on habeas corpus where the evidence points to him, and induces a belief that he may be guilty.

O. W. Winthrop was committed on a charge of murder, and applies for writ of habeas corpus. Writ denied.

W. H. Allen and C. W. Kyle, for petitioner. John F. Dare, for the People.

BEATTY, C. J. The prisoner is in custody of the sheriff of San Francisco under an order holding him to answer on a charge of murder, and asks to be released upon the ground that he was committed without reasonable or probable cause. With his return to the writ of habeas corpus the sheriff has submitted a transcript of the evidence adduced at the examination of the prisoner before the committing magistrate, which I have carefully considered. The result is that, while I do not deem it very satisfactory or convincing, I still cannot say that it is legally insufficient to justify the order holding the prisoner to answer. To sustain such an order, it is not necessary that the evidence should be so convincing as to justify a verdict against the suspected party, but it is sufficient if it points to him, and induces a belief that he may have committed the offense charged. It is unnecessary, and would perhaps be improper, to review the evidence in detail; and I content myself with saying that while the conduct and bearing of the prisoner at and subsequent to the time when he was first seen in company with Mrs. Matthews at the cemetery have been those of an innocent and humane man, and while the evidence as to the insurance on her life in his favor, as trustee for her little daughter, is totally insufficient to show any motive for causing her death, there is yet some testimony which, if true, tends to prove that he gave her the strychnine which undoubtedly caused her death. Some of this testimony was perhaps incompetent, but it was admitted without objection, and it is not clear that its competency might not have been shown if the objection had been made. On the whole, I feel obliged to remand the prisoner. So ordered.

(107 Cal. 461)

PEOPLE v. GRESS. (Crim. No. 17.)
(Supreme Court of California. June 21, 1895.)
HOMICIDE—EVIDENCE—DECLARATIONS OF DECEASED.

1. On a trial for murder the declarations of the deceased to third persons prior to the killing as to the designs of the prisoner against deceased's wife are inadmissible against the prisoner.

2. On a trial for murder, self-defense being the only issue, the evidence of deceased's wife that the prisoner tried to induce her to leave her husband is inadmissible.

In bank. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Alfred Gress was convicted of murder, and appeals. Reversed.

F. W. Street, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

VAN FLEET, J. Defendant was convicted of having murdered one Louis Assalena, and was sentenced to imprisonment for life. He appeals from the judgment and an order denying him a new trial. One Kane, a witness called by the state, was permitted, against the objection of defendant, to testify that on the evening of the day preceding the one on which the homicide was committed the witness saw Assalena, the deceased, at La Grange, just before the latter left for Sonora, where the killing took place, and that Assalena then stated that he had discovered that the defendant had been writing to his (Assalena's) wife, and was trying to get his wife and child to run away with him, defendant. And another witness for the prosecution, one Watt, was permitted to state that on the same evening, at La Grange, Assalena told him, "I am in trouble. I have a family in Sonora, and a few months ago I took a young man in as partner with me, and here lately I have discovered that he is about to get away with my wife and child, and I want to get to Sonora as quick as possible. I want to save my boy, and that's my hurry for coming here." This evidence was clearly hearsay, and was wholly inadmissible upon any possible theory of the case, or upon any principle or rule of evidence known to the law. It was no less hearsay because the declarations were those of the deceased, since proof of such declarations is only admissible when made in extremis,—dying declarations, having reference to the circumstances of the death, or when they constitute a part of the *res gestae*. *People v. Carknuff*, 24 Cal. 642. In this case they were neither. The mortal blow had not been struck, nor were they in any manner connected with the rencontre which resulted in Assalena's death. Obviously, the admission of this evidence was highly prejudicial to the defendant, since its inevitable tendency would be to greatly inflame and prejudice the minds of the jury against him. *People v. Carlton*, 57 Cal. 84; *People v. Irwin*, 77 Cal. 494, 20 Pac. 56.

It was also error to admit the evidence of

Mrs. Assalena as to the defendant's efforts to induce the witness to leave her husband. Under the circumstances of this case, the evidence was not pertinent to any issue before the jury. Were the case one of circumstantial evidence, and the fact in doubt as to whether defendant did the killing, such evidence might be admissible upon the question of motive (*Pierson v. People*, 79 N. Y. 424); but here the killing was admitted, and the only issue was whether it was in necessary self-defense. In such a case evidence of this character serves no competent purpose, while its effect was necessarily prejudicial to defendant's case. These errors necessitate a reversal. Judgment and order reversed, and cause remanded for a new trial.

We concur: GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.

(5 Cal. Unrep. 51)

SOUTHERN PAC. R. CO. v. ALLEN. (No. 15,714.)¹

(Supreme Court of California. June 6, 1895.)
CONTRACT TO CONVEY LAND—MUTUALITY—RIGHTS OF PARTIES—AS OF WHAT TIME DETERMINED—CHANGE OF CIRCUMSTANCES BEFORE DECREE.

1. A contract for the conveyance of land within a certain time, if the vendor within that time obtain title thereto by patent from the government, for an agreed price,—money paid on the purchase price to be repaid to the vendee, without interest, if the vendor fail to obtain a patent,—is not void for lack of mutuality or consideration.

2. Plaintiff agreed to convey to defendant certain lands, within five years, if he obtained, within that time, title by patent from the government, for one-fifth cash, and the balance secured by mortgage, with interest. If plaintiff failed to obtain title, he was to repay the money paid by defendant, without interest. Pending suit by plaintiff for the interest due on the mortgage, the five years expired without his having obtained patent. *Held*, that judgment must be rendered determining the rights of the parties as of the time of the expiration of the contract period, and not as of the time of the commencement of the action.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Southern Pacific Railroad Company against Darwin C. Allen for the purchase price of land. From a judgment for plaintiff, defendant appeals. Modified.

Robert Harrison, for appellant. Joseph D. Redding, for respondent.

HENSHAW, J. Appeal from the judgment. The action is to compel the payment of moneys alleged to be due under contracts for the purchase of lands, and, in default of payment, to foreclose defendant's rights under the contracts, and for general relief. The contracts are many, but they are alike in terms, and one will serve as a type of all. Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract, defendant paid one-

¹ Rehearing granted.

fifth of the purchase price, and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract. The time of payment for the unpaid part of the purchase price was "on or before the 1st day of February, 1893"; that is to say, within five years from the execution of the contract. Upon performance by defendant of the conditions of his contract he was entitled—First, to take and hold possession of the land; and, second, to receive a deed for the same, upon demand, and after payment of the remaining four-fifths of the purchase price, which deed plaintiff agreed to make "after the receipt of a patent therefor from the United States." The contract proceeds: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guaranty or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that, said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession." This action was brought upon default of defendant in paying the second, third, and fourth years' installments of interest. It was commenced before the expiration of the five-years limitation, but was brought to trial and decided after the lapse of that period. Defendant, by answer, denied title in plaintiff, and, by cross complaint, alleged false representations by plaintiff of its title, injury to himself therefrom, and concluded with an offer of rescission, and demand for a return of the moneys paid by him. The findings are against the answer and cross complaint, and the decree requires defendant to pay within six months the amount found due as unpaid interest, or be debarred and foreclosed of all right and interest in and to the lands, and in and under the contracts.

The court found plaintiff to be the owner,
v.40P.no.11—48

in fee, of the lands, and much nice argument is advanced for and against the finding. But, under our interpretation of the contract, it is a matter irrelevant. Plaintiff was to convey, not the title it had, nor the title in fee found by a court, but the title evidenced by and under the patent of the United States, and defendant was not to be called upon to consummate the purchase until this muniment of title had issued. The contracts were not void ab initio, for lack of mutuality or consideration. The averments of false representations as to title having been negatived by the findings, the transaction between the parties amounted to this: Plaintiff claimed title to government lands, which claim had not been perfected by the issuance of a patent. The sources of knowledge as to the nature and probable validity of the claim were open to defendant, and he did not, therefore, contract blindly. Under such circumstances, defendant agreed to buy these lands at any time within five years, should defendant's claim ripen into a perfect title by the issuance of a patent. Plaintiff agreed, as the consideration flowing from it—First, to convey to defendant, and thus to forego its right to contract with or sell to any one else; second, to yield in the meantime to defendant such possession, use, and enjoyment of the lands as would otherwise belong to it. Defendant, to secure these advantages to himself, paid one-fifth of the purchase price, and agreed to pay interest upon the remainder of it. If, at any time within five years, plaintiff's title was perfected, defendant had the right to compel a conveyance of it to himself. If, at the expiration of five years, the result had not been reached, defendant was entitled to repayment of his moneys, without interest, while plaintiff, for foregoing its right to make other contracts, and for yielding to defendant its right to the occupancy and enjoyment of the lands, was to be compensated by the use, without payment of interest, of the defendant's moneys held by it. It is true, these terms are not explicitly declared in the contract, as here set forth, but they fairly state the expressed agreement of the parties. Plaintiff, then, being entitled to the use of the moneys annually to be paid as interest, could enforce the collection of them by this action, after persistent refusal to pay, or have defendant foreclosed of his rights under the contract, for violation of its conditions. *Keller v. Lewis*, 53 Cal. 118; *Fairchild v. Mullan*, 90 Cal. 194, 27 Pac. 201; *Hansbrough v. Peck*, 5 Wall. 506. Plaintiff is not asking a rescission. To the contrary, it is demanding that defendant be compelled to perform the conditions of his contract, and that upon his refusal to do so the rights of the parties under the contract be determined in accordance with equity. *Hansbrough v. Peck*, *supra*. The decree gave the defendant the alternative of paying within six months, or suffering foreclosure. It is urged

against it that, since the five years had expired, and plaintiff had not obtained a patent, to compel defendant to pay the delinquent interest would be the requirement of a vain thing, since defendant would be entitled to its immediate return, and that, therefore, the court should not have so decreed, but, to the contrary, should have ordered repaid by plaintiff the moneys of defendant in its hands. The pleadings sufficiently disclose the dates, by which it appeared that the action was tried and determined after the time limited by the contract for its completion. Plaintiff, having failed to secure its patent within that time, was entitled, as has been said—First, to the use of the one-fifth part of the purchase price without payment of interest therefor; and, second, in like manner, to the use of the annual installments of interest as they fell due. Though the decree of the court would have been consonant with equity, had it been rendered before the five years had expired, it failed to do complete justice under the changed situation brought about by the lapse of that time. While a decree in equity generally operates upon the parties and subject-matter as they stood at the commencement of the proceedings, it only does so to subserve the ends of justice. When, as here, a radical change in the status has been brought about by the passing of time, under the very terms of the agreement, and knowledge of this change is, as here, judicially before the court, or is brought in by appropriate pleading, its decree should be addressed to the rights existing, not at the commencement, but at the time of the determination, of the action. The court should therefore decree to plaintiff, in lieu of the use of the interest payments of which it was deprived by the default of defendant, 7 per cent. interest upon each of these amounts from the date upon which they, respectively, fell due, until the date of the decree; should decree the return by plaintiff to defendant of any excess of the moneys of defendant in its hands over the amount found due, or render a judgment in favor of plaintiff for any deficiency, and, upon a compliance with this judgment, terminate the contractual relations of the parties, as provided by their agreement. Let the judgment and decree be modified accordingly.

We concur: TEMPLE, J.; MCFARLAND, J.

(107 Cal. 477)

PEOPLE v. LEE. (Cr. 14.)

(Supreme Court of California. June 22, 1895.

DEMURRER TO INDICTMENT—RIGHT OF APPEAL BY PEOPLE—INTERFERENCE WITH ELECTION
—SCOPE OF STATUTE.

1. An appeal lies by the people from an order of court, made of its own motion, sustaining a demurrer to an indictment, and directing a submission of the cause to another grand jury.

2. Where a penal statute enumerates sev-

eral distinct acts, the commission of each or any of which constitutes the crime, it is not sufficient to charge defendant with being guilty of the crime, without further charging the commission of the particular act or acts on which such crime is based.

3. Under section 23 of the act to promote the purity of elections (St. 1893, p. 24), which enumerates several separate and distinct acts as constituting the crime of preventing an election or canvass "from being fairly had and lawfully conducted," an indictment charging defendant with willfully and unlawfully acting as election clerk is sufficient, though such act is not one of those enumerated in the statute as constituting the offense.

In bank. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

George Lee was indicted for unlawfully acting as election clerk, and from an order sustaining a demurrer to the indictment, and directing the submission of the cause to another grand jury, the people appeal. Reversed.

Atty. Gen. Fitzgerald, for appellant.
Carroll Cook, for respondent.

HENSHAW, J. Appeal by the people from the order sustaining a demurrer to the indictment, and directing the submission of the cause to another grand jury. A motion to dismiss the appeal is made by the respondent, and this motion first invites consideration. Respondent contends that the court having directed the submission of the matter to another grand jury, in the belief that the defect found in the indictment was curable (Pen. Code, § 1008), the right of the people to appeal is thereby cut off. The authority relied upon is the case of *People v. Wooster*, 16 Cal. 435. But the case of *People v. Wooster* is radically dissimilar from the case at bar, as will become patent when it is noted that in the former case the district attorney took no exception to the ruling of the court sustaining the demurrer, while in the case at bar he did. Pen. Code, § 1172. In the *Wooster* Case the district attorney moved for and obtained an order submitting the cause to another grand jury; in the present case he asked for no such order, and excepted to the one made by the court of its own motion. In *People v. Wooster* the court said: "The failure to except and the taking of the order must be considered an acquiescence in the judgment and a waiver of a right of appeal." The circumstances above set forth clearly indicate the absence of waiver, and the inapplicability of the decision. But aside from this, we hold that the right of the people to appeal cannot be lost by an order of the court, made of its own volition, directing a submission to another grand jury. The right of appeal is guaranteed to the people by section 1238 of the Penal Code, and it is an important right. Where the district attorney admits the defect in his pleading, he will avail himself of the opportunity offered by the order for resubmission, and decline to appeal. But in those cases where he is satisfied with the form of the in-

dictment, or where the facts will not permit another and different one to be framed, he has the right, representing the people, to stand upon its sufficiency, and have the matter determined by the appellate court. If, by its order to submit the cause anew, the trial court could deprive him of this right, it must result that he would be compelled to come again into court with the same form of indictment, which would again be overthrown, to the end that the defendant would never be tried, and the people, with the right of appeal secured to them, would never be permitted to have this court pass upon a pleading which was believed to be legally sufficient. The motion to dismiss is therefore denied.

The indictment is founded upon section 23 of the "Act to promote the purity of elections," etc. St. 1893, p. 24. The section declares that "every person who carries away or destroys, or attempts to carry away or destroy, any poll list, or ballots or ballot-box for the purpose of breaking up or invalidating such election, or willfully detains, mutilates, or destroys any election returns, or in any manner so interferes with the officers holding such election, or conducting such canvass, or with the voters lawfully exercising their rights of voting at such election, as to prevent such election or canvass from being fairly had and lawfully conducted, is punishable," etc. After the usual jurisdictional and necessary averments the indictment charged "that after said election had been had in said precinct, and while the votes were being counted and canvassed therein, one George Lee willfully, unlawfully, and feloniously interfered with the regular election officers of said precinct, then and there conducting the canvassing of the lawful votes cast in said precinct, by then and there willfully and unlawfully acting as a clerk in tallying the said votes cast in said precinct, he, the said George Lee, not then and there being an officer nor clerk of the election board of said precinct, either appointed or qualified, as provided by law, and then and there willfully prevented the canvass of the said vote in said precinct from being fairly had and lawfully conducted, contrary to the form, force, and effect of the statute," etc. Defendant demurred upon the grounds that the facts charged did not constitute a public offense, and also under subdivision 2, § 1004, Pen. Code,—a demurrer, in effect, for insufficiency and uncertainty. By appellant it is claimed that the language "then and there willfully prevented," etc., charges the defendant in the terms of the statute, and makes the indictment sufficient; that what precedes it may be treated as surplusage, and ignored. But this solution, while lacking nothing of ease, fails of complete satisfactoriness. Criminal proceedings, it is true, have been much simplified by the Codes, and many offenses may now be charged in the strict language of the statute. Nevertheless, there are certain fundamental principles which have neither been abrogated

nor modified. A defendant is still entitled to be apprised with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense, and, upon acquittal, plead his jeopardy against further prosecution. Where, as under some of our statutes, several separate, different, and distinct acts are enumerated, the commission of each or any of which constitutes the crime, it is not sufficient to charge the defendant with being guilty of the crime, without further charging the commission of the particular act or acts upon which the crime is based. A person, for example, charged with vagrancy, is of right entitled to know whether he is called upon to meet the charge as being a common drunkard, or as being a dissolute associate of known thieves, or being a healthy beggar,—in short, as belonging to what class, or as having done what act, to lay him liable as a "vagrant man." So here the statute enumerates different acts, each one constituting a specific offense, though the same crime, and the defendant, to make his defense, is entitled to know what wrong it is charged he has committed. Thus the averment of the specific act here set forth becomes material, and is not surplusage. But is it legally sufficient? In other words, is the act, which it is charged defendant committed, in violation of the statute? It will be noted that it is not one of those specially described as forbidden, nor is it an act made criminal by any other statute, so that if it be a crime it becomes such under this statute itself, because it is an act which in some manner interferes with the officers so "as to prevent such election or canvass from being fairly had and lawfully conducted." The circumstance that the act complained of is not one of those named and prohibited does not render its commission less a crime, if it belongs to the class or kind of acts made penal by the statute. While all crimes in this state are statutory, it is still within the power of the legislature to embrace all acts of the same general character in one class, and to punish the performance of any of them, without more specific designation, as a crime. Indeed, as to some offenses, description, except in general terms, is impracticable, if not impossible, and the legislature has exercised its undoubted power by grouping them in classes. Thus the man who operates a powder mill in a populous city maintains a public nuisance, as does he who so places electric wires as to endanger life or property; but it would tax the acumen of the wisest body of lawmakers to describe with particularity every act the doing of which, in our complicated civilization, would constitute a nuisance. And the legislature has not attempted to do so, but by general language has declared that anything which is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, etc., is a public nuisance. Pen. Code, § 370. So here, it would be impossible to enumerate the many ways and means which the ingenuity

of men might devise to defeat the orderly or lawful conduct of an election; and without undertaking the task, the legislature has seen fit to make offenses of them all. It is merely for the court to say whether or not the act charged, like the act charged to constitute a nuisance, comes within the class.

Of the sufficiency of the act complained of in the case at bar we entertain no doubt. The law guaranties not only the orderly but the legal conduct of elections. An election legally conducted is carried on by officers duly appointed and under oath for the proper performance of their duties. One who willfully and feloniously usurps the functions of an elective officer, whether he does so by force or guile, is, in either case, interfering with the legal conduct of that election, and is amenable to the law for his conduct.

The judgment is reversed, with directions to the court to overrule defendant's demurrer.

We concur: BEATTY, C. J.; VAN FLEET, J.; GAROUTTE, J.; MCFARLAND, J.

PEOPLE v. HOUSTON. (Cr. 13.)

(Supreme Court of California. June 22, 1895.)

In bank. Appeal from superior court, city and county of San Francisco; George N. Bahrs, Judge.

Albert Houston was indicted for unlawfully acting as election inspector, and from an order sustaining a demurrer to the indictment, and directing the submission of the cause to another grand jury, the people appeal. Reversed.

Atty. Gen. Fitzgerald, for the People. Carroll Cook, for respondent.

PER CURIAM. This case is in all essential features identical with the case of *People v. Lee* (Cr. 14, decided June 22, 1895) 40 Pac. 754. Here the defendant is charged with having unlawfully acted as inspector, while Lee was accused of having acted as clerk. Upon the authority of *People v. Lee*, the motion to dismiss is denied, and the judgment is reversed, with directions to the court to overrule defendant's demurrer.

(5 Wyo. 409)

SEIBEL et al. v. BATH et al.

(Supreme Court of Wyoming. June 25, 1895.)

MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS—REVIEW—FAILURE TO JOIN PARTY IN ERROR—SPECIAL FINDINGS—PRESUMPTIONS IN SUPPORT OF JUDGMENT—ADMINISTRATION—INDIVIDUAL USE OF ESTATE FUNDS—RIGHTS OF THIRD PARTIES—NOTICE OF ESTATE'S INTEREST.

1. Under the rule of the supreme court providing that nothing which could have been properly assigned as a ground for a new trial will be considered in that court unless it shall appear that the same was properly presented to the court below by a motion for a new trial, and that such motion was overruled, and exception was reserved to such ruling, all of which shall be embraced in the bill of exceptions, a motion for a new trial not incorporated in the bill of exceptions will not be considered.

2. To entitle appellant to the consideration of an assignment of error that the judgment is

not sustained by the findings, neither a motion for a new trial nor a bill of exceptions is necessary.

3. Findings of fact will not be reviewed unless a motion for a new trial and an exception to an order overruling the same are embraced in the bill of exceptions.

4. Where a defendant brings error, and fails to join a codefendant, the supreme court may, within the statutory time for bringing error, on motion of the plaintiff in error, with the consent of the codefendant, allow such codefendant to be joined as a plaintiff in error.

5. Where, in an action involving the claims of various parties to property, the court finds as facts all that is essential to show the ownership of the several parties, it will not be assumed on appeal, in support of the judgment, that the court found other facts inconsistent with those contained in the findings.

6. Where one, after erecting buildings on the land of another, dies, and his administratrix purchases the land and takes a deed thereof in her own name, using estate funds for that purpose, and rebuilds the building after its destruction by fire, using insurance money belonging to the estate, a person who, without notice of the rights of the estate, supplies labor and materials for the building, and files a mechanic's lien therefor, acquires a lien on the building and land prior to the rights of the heir.

7. The pendency of administration proceedings is not notice to one dealing with the administratrix in regard to land to which she holds the legal title that the estate has an interest in the land.

Error to district court, Albany county; J. W. Blake, Judge.

Action by Paul F. H. Bath and another against Gustav A. Seibel and others to enjoin the foreclosure of mechanics' liens and mortgages. A decree was rendered in favor of plaintiffs, and defendants bring error. Reversed.

N. E. Corthell, for plaintiffs in error. M. C. Brown, for defendants in error.

POTTER, J. In this case Paul F. H. Bath and Josephine D. S. Bath, minor heirs, by Charles Kuster, their next friend, brought suit in the district court of Albany county to enjoin Gustav A. Seibel, George Berner, and Eli Crumrine from further proceeding to foreclose or enforce certain mechanics' liens claimed by Seibel and Berner, respectively, and two mortgages held by Crumrine upon certain property alleged to belong to the said heirs, and to the end, also, that said incumbrances be declared void. Restraining orders were issued pending the suit. Separate demurrers were filed to the petition, and overruled, and the rulings severally excepted to. Separate answers were thereafter filed, which were met by replies, and trial was had before the court without the intervention of a jury. The court found the facts specially, and these, with the conclusions of law, were entered upon the journal as part of the judgments or decree. The evidence is not before us. The findings, decision, judgment, and decree were severally excepted to by the defendants in the court below. Motions for new trial seem to have been filed, presented, and overruled, and time allowed for reducing exceptions to writing. No bill of exceptions

is in the record. The petition alleged that one Frederick Bath died intestate at Laramie City, Wyo., October 24, 1881, leaving surviving him, as sole heirs of his estate, his wife, Johanna Bath, and his two infant children, Paul F. H. Bath and Josephine D. S. Bath; that on November 2, 1881, the widow was appointed administratrix of said estate, and thereupon duly qualified and entered upon the discharge of the duties thereof; that the estate was duly appraised at \$11,818.12, and the total indebtedness did not exceed \$1,600, but that the said estate was then worth more than \$10,000 net, one-half of which belonged to the said infant heirs. It is further alleged in the petition that on November 2, 1882, Johanna Bath made a report, as administratrix, showing that after the payment of the debts of the estate, and all expenses of administration, there remained in her hands \$3,324.24; that none of the real estate of said estate had been disposed of, and a part only of the personal property had been converted into money. It is also alleged that the real estate consisted in part of the Laramie Brewery, situated on parts of sections 20 and 21, in township 16 N., of range 73 W., in Albany county, Wyo., and parts of lots 20, 21, and 22 in block 192 in the town of Laramie City, said brewery consisting of a stone ice house, stone malt house, a frame brewery building, and frame stable; that Frederick Bath, in his lifetime, made a pre-emption filing upon certain described lands, and made settlement thereon with his family; that after his death his widow, on July 21, 1882, made a cash entry of said land, and paid therefor with moneys of the estate, and a patent from the government was issued to her therefor; that it being discovered that the brewery was erected on lands, title to which was not in Frederick Bath, the administratrix purchased the same,—a part from the Union Pacific Railway Company, and a part, presumably, from some other person,—paying for the same with moneys of the estate; that the deeds to said land were made to Johanna Burman, she being said widow, and having in the meantime remarried. It is charged that these lands, and the titles thereto, were and are held by her in trust for the heirs of said estate; that said Johanna Burman caused said Laramie Brewery to be rebuilt (it having been destroyed by fire, as it later appears), expending thereon about \$8,000 of the moneys of the estate, and it is charged this was unlawful. Further, that she contracted with said Seibel for machinery for said brewery, and with said Berner for work, labor, and materials in the construction and repair thereof, and that each of them claims a balance due them for such material and labor (to Seibel, \$2,236.32, and to Berner, \$4,738.40), for which balance each of them has filed a mechanic's lien, and has brought an action in the district court to enforce and foreclose said liens upon the brewery and the lands upon which it stands,

to the extent of one acre. It is also stated: That E. Crumrine holds two several mortgages, for \$6,000 and \$4,000, respectively, covering the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and lots 3 and 4 of section 28 in township 16 N., of range 73 W.; also the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 21, township 16 N., of range 73 W., and a portion of section 20, containing $\frac{9}{10}$ acres; also lots 11, 12, and 13 in block 164, and parts of lots 20, 21, and 22 in block 192, in Laramie City; said mortgages having been executed by said Johanna Burman; that Crumrine claims them as subsisting liens, and has appeared in the suit brought by Seibel and Berner, and set up his liens, asking that they be declared prior to the said mechanics' liens. It is charged that the property thus mortgaged was the property of the said estate. The mortgages were given in May and July, 1890, respectively. It is further alleged that the district court in April, 1891 (which, upon the admission of the state, assumed probate jurisdiction), had cited said administratrix to render an account and settlement of the estate, and that she was, at the time of filing the petition in this suit, preparing her statement of account. The answers filed by the several defendants denied that any of the property belonged to the estate; admitted the purchase of the lands by the widow in her own name, but denied that she did so as administratrix, or with moneys of the estate, or that she took the lands in trust, as alleged in the petition; denied that the brewery was rebuilt or repaired with any of the moneys of the estate, or without authority of law. As a second defense, each answering defendant set up want of knowledge or notice of the trust, actual or constructive.

As the errors charged are predicated upon the conclusion of law reached by the court, and judgment or decree rendered upon the facts as found by it, it has been necessary to thus rather explicitly review the allegations of the pleadings; the evidence not being before us, and the findings of fact not being opposed by the plaintiffs in error, the sole contention being that upon the findings of fact a different judgment should have been rendered. The court found the death of Frederick Bath, as alleged and admitted, and that he left surviving him his widow and two infant children already named; the appointment of Mrs. Bath as administratrix; that she was remarried to one John A. Burman on the 1st day of December, 1885, and that her letters of administration had not been revoked, but that she continued to act as administratrix until after the bringing of said action, and during all that time retained possession of the property of the estate; that the property of the estate, at the time of the death of the deceased, "consisted in part of certain buildings situated upon a portion of sections twenty (20) and twenty-one (21) in township number sixteen (16) north, of range number seventy-three (73) west, and known as the 'Laramie Brewery,' the title to said

lands in said section number twenty (20) then being in some person other than said Frederick Bath, deceased, and title to said lands in said section twenty-one (21) being then in the Union Pacific Railroad Company; and that the property of said estate consisted further of parts of lots numbered twenty (20), twenty-one (21), and twenty-two (22) in block numbered one hundred ninety-two (192) in town of Laramie City, in said county and state, title to which said property was in said Frederick Bath, deceased." The court then further finds that in 1882, after the death of Frederick Bath, said Johanna Bath purchased the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 21 from the Union Pacific Railroad Company, and took a conveyance therefor in her own name and in her personal capacity, and has ever since then held the legal title thereto in her own name; that in 1890, as Johanna Burman, she purchased from the owner the said lands in section 20, and took a conveyance therefor in her own name, and in her personal capacity, and ever since has held the legal title thereto in her own name; that at the time of the death of Frederick Bath he was living with his family upon certain described lands in section 28, and had filed a pre-emption declaratory statement therefor, but had not obtained title thereto, and that after his death, and in the year 1882, said Johanna Bath filed a declaratory statement for said lands in her own name, and thereafter made final proof, and entered said lands in her own name, and obtained a patent from the United States therefor, and ever since then has had the legal title to said lands in her own name, and in her personal capacity; that the moneys used in obtaining title to the lands in section 21, and the lands upon which she filed her declaratory statement in section 28, were in part her personal moneys, and in part the moneys of the estate, and that it is impossible to determine the amount or proportion of each; that after the death of Frederick Bath the brewery buildings were in part destroyed by fire, but that the foundations, cellars, and other portions remaining were worth \$2,892, and that \$3,684 was received by Johanna Bath as proceeds of the insurance on buildings so destroyed, and by her reinvested in the new buildings constituting the said Laramie Brewery. As to notice, the court finds that neither of the defendants below, at the time that their several liens accrued to them, had any notice or knowledge of the claims of said infant heirs to the property in controversy, nor that any of said property constituted, or was claimed to be the property of, the estate of Frederick Bath, deceased, nor that the said estate was still in process of administration, nor that Johanna Bath was administratrix thereof, nor that any of the moneys of said estate were used to obtain title to said lands, or any portion thereof, but that, on the contrary, each of the defendants contracted his obligations and claims, and that the same accrued to them, re-

spectively, in good faith, and for valuable considerations. As a mixed question, perhaps, of law and fact, the court finds that the undivided one-half of the buildings remaining after the fire, and one-half of the insurance moneys, were the property of the plaintiffs, said infant heirs. The court found them entitled to a first lien upon the brewery building, as then constituted, but not upon the lands upon which the same is situate, for the sum of \$3,288.36, in preference to the claims of the defendants, or any of them, and that they were entitled to an undivided one-half of part of lots 20, 21, and 22 in block 192, as heirs of the said estate. It was thereupon ordered and decreed that the injunctions be dissolved and vacated, and that the said lienors and mortgagee be at liberty to enforce in any and all lawful ways their claims and liens against said lands and other property, subject to a first lien upon said building for said sum of \$3,288.36, without interest, in favor of the said infant heirs, and subject also to the undivided one-half interest of said heirs in said lots in said block 192.

After the filing of the petition in error, plaintiffs in error, having discovered that Josephine D. S. Bath was deceased, filed a motion to substitute in her stead, as defendants in error, her heirs, Paul F. H. Bath, already a party, and Ralph Burman and Lena Burman, minor children, which was assented to by counsel for defendants in error, and the order was made as requested; and plaintiffs in error, also with the consent of counsel for defendants in error, moved the appointment of Charles Kuster as guardian ad litem for said Ralph and Lena Burman. The order may be entered as prayed for.

The petition in error was filed in this court on December 7, 1894. On the 23d day of March, 1895, the defendants in error filed a motion to dismiss the proceedings in error on several grounds, which resolve themselves into two: (1) That there is no error presented by the petition in error which can be reviewed by this court, for the reason that there is no bill of exceptions in the record, and no motion for new trial presented by bill of exceptions; the statute of limitations of two years having expired, as alleged, as to the ruling on the demurrers. (2) That there is a defect of parties, in this: that one of the defendants in the court below (Eli Crumrine) is not joined as plaintiff in error, and has not been served with summons in error, or in any manner notified of the pending proceedings in error. After the filing of this motion to dismiss, and before hearing, the plaintiffs in error filed a motion to make said Crumrine a plaintiff in error, producing his consent in writing thereto. The two motions were submitted together, and the whole case was also submitted at the same time,—the merits of the motions, and the points involved in the case itself, being fully discussed in and covered by the briefs of the respective parties. If the motion to dismiss is well found-

ed, we need go no further. The petition in error charges error in overruling the demurrers to the original petition, and error in the judgment, in that the same is not sustained by the findings of fact, and that the same is contrary to law. In addition, error is charged in overruling the motions for new trial. In so far as it is attempted to obtain a review of the order of the district court in overruling the motions for new trial, the record is insufficient to properly present such error, if any exists. Under our practice, and a long line of decisions in this court, a motion for new trial is not a part of the record, unless incorporated in a bill of exceptions properly prepared, allowed, and signed. Not only have the rules of the supreme court required this, but the decisions thereof have been uniform in this respect, and have formed a rule for practice in error proceedings much too long established to be now abandoned. The present rule of the court, which is given the authority of statute law, provides that "nothing which could have been properly assigned as a ground for a new trial in the court below will be considered in this court, unless it shall appear that the same was properly presented to the court below by a motion for a new trial, and that such motion was overruled and exception was at the time reserved to such ruling; all of which shall be embraced in the bill of exceptions." This may not, in terms, be as restrictive as the former rule, but we apprehend the latter went no further, and did not attempt to require such a motion, unless the same was proper under the statute. A new trial, under our laws, is "a re-examination, in the same court of an issue of fact, after a verdict by a jury, a report of a referee or master, or a decision by the court." Rev. St. 1887, § 2652. In so far as error is predicated upon the judgment or decree as not being sustained by the findings of fact, and as contrary to law based upon such findings, no motion for a new trial was necessary. No re-examination of an issue of fact is required. The plaintiffs in error accept the findings of fact. They do not controvert them. The findings are entered upon the journal, and are a part of the record. The petition, demurrers, answers, and replies are also parts of the record proper. To enable this court to consider an assignment of error that the judgment or decree is not sustained by the special findings, and, as based thereon, is contrary to law, neither a motion for new trial nor bill of exceptions is necessary. *Froman v. Patterson* (Mont.) 24 Pac. 692; *Curtis v. Walling* (Idaho) 18 Pac. 54; *Roberts v. Eldred* (Cal.) 15 Pac. 16. See *Perkins v. McDowell*, 8 Wyo. 328, 23 Pac. 71. We could not, however, review the findings of fact without a bill of exceptions, and a motion for new trial, to the overruling of which an exception had been reserved, and duly embraced in the bill.

But it is urged that there is a defect of parties. It is extremely doubtful if there is any

such defect of parties in the petition in error, as originally filed. The defendants Seibel, Berner, and Crumrine had no joint interests in the suit below. Their liens were several, and perhaps antagonistic, although not opposed to each other in the present case. A review of the decree upon the application of one of them could not, in any sense, it seems to us, injuriously affect the others. However that may be, the plaintiffs in error, within the statutory period of two years for bringing error proceedings in this court from a final judgment, move to join Mr. Crumrine as plaintiff in error; and he consents thereto, not only, but joins in the request. We perceive no reasonable objection to the granting of this motion. The addition of new parties in the appellate court is not a novel proceeding. In Ohio, whose Civil Code is the pattern for our own, it is frequently allowed. They have gone so far in that state as practically to overrule an earlier case (*Smetters v. Rainey*, 14 Ohio St. 237) wherein it was held that where omitted parties were necessary they cannot be permitted to be brought in after the period of limitation for prosecuting error had expired. *Secor v. Witter*, 39 Ohio St. 218; *Bradford v. Andrews*, 20 Ohio St. 208; *Bank v. Green*, 40 Ohio St. 431; *Wangerien v. Aspell*, 47 Ohio St. 250, 24 N. E. 405. See, also, *Smetters v. Railway Co.*, 13 Ohio St. 503. In Kansas, where objection was made on the ground that several plaintiffs in error were improperly joined, the court stated that even if they considered the petition defective, as contended for, they would in such a case, where the question was doubtful, have granted permission to each to file separate petitions in error, rather than sustain the motion to dismiss. *Jordan v. McNeil*, 25 Kan. 459. If these parties are improperly joined, no objection on that ground is made. The counsel for defendants in error insisting that Crumrine should have been brought in either as plaintiff or defendant in error, and his written consent and request to be joined as plaintiff in error being filed, the other plaintiffs in error moving therefor, all within the period within which error could have been prosecuted, we think he may be joined. See *O'Keefe v. Foster* (decided at the present term of this court) 40 Pac. 525. The motion to dismiss is therefore denied. The motion to make Eli Crumrine an additional plaintiff in error is granted, and the plaintiffs in error may have leave to amend their petition in error by joining said Crumrine as a plaintiff in error.

Plaintiffs in error insist that the judgment and decree of the district court postponing their liens to a lien of the plaintiff heirs in the brewery building for one-half the value of the ruins of the old buildings, and one-half of the insurance moneys invested by their mother, Johanna Burman, in the construction and repair thereof, is error, and unsupported by the findings of fact. As against this claim, counsel for the heirs contends that

we must assume, in the absence of evidence to the contrary, that the court had evidence before it to sustain the conclusion of law and its judgment. In case the finding of fact had been a general one, this might be true, but the court finds as facts all that is essential to show the ownership of the various parties, including the interests of the heirs in the buildings and lands. We can hardly assume that upon the evidence the court found other facts inconsistent with those entered in its findings as its conclusion upon all the facts.

It is further insisted that the court took the view that the intestate, being the owner of the buildings, the children, the heirs to one-half his estate, became and remained the absolute owners thereof, and, further, that the proceedings in the probate court constituted *lis pendens*, and the plaintiffs in error could not acquire, pending the administration of the estate, any interest in or lien upon the buildings, as against the heirs other than Mrs. Burman. It seems that Frederick Bath, at the time of his death, was the owner of the brewery buildings, but did not own the land, or any portion thereof, upon which they were built. The railway company owned a part thereof, and some one, whose name is not disclosed, held the title to the remainder. If he owned the buildings only, so far as his ownership went, the property must have been personal in character, as distinguished from real. Ewell, *Fixt*, pp. 66, 67. There could not have been two owners of the real estate. Under certain conditions he might have owned the buildings, notwithstanding the other ownership of the land, and have had the right to retain them where they were, or remove them. Whether these conditions existed or not does not appear, further than by the finding that the buildings were the property of the estate. Without pursuing this inquiry further, however, it may be said, in passing, if the buildings were personal property they vested in the administratrix, the same as all other personal estate, pending administration. We are inclined to think that this is the proper view to take of this matter, and that such was the legal status of the property. Afterwards Mrs. Bath, who was the administratrix, purchased in her own name, and in her personal capacity, all the lands upon which the buildings were situated,—the purchase of a portion not being made until the year 1890,—taking the deeds of conveyance in her own name. As to part of this land she used in the purchase, indiscriminately, moneys of her own and of the estate, but in what proportion it is not possible to determine. She thereby obtained title to the realty in her personal capacity. She was also in possession. It is probable that, as against the other heirs, she held the buildings, and the land as well, into which the estate money had gone, in trust for them, to the extent of their interest; but the buildings, as against any one dealing with her without

notice, actual or constructive, have become a part of the realty, if they were not so before that time, and they could not have been so before, unless they belonged to the owner of the soil. She, then, has taken the legal title to some property of the estate. She also invested in these buildings upon land to which she held the legal title some insurance moneys belonging to the estate, thus again taking to herself title to property of the estate. It is a similar case, in both instances, to a trustee using trust property or funds with which to buy property in his own name, and, to all appearances, in his individual capacity. In such cases, what is the result? The trustee has the legal title, it is true, but he holds such title in trust for the beneficiary. As against any other person, however, without notice of the trust, or the equitable interests of the cestui que trust, who purchases the same from the trustee, or obtains a lien thereon by mortgage or by operation of law, such as a mechanic's lien, dealing with the trustee, in good faith, for valuable consideration, he is, to all intents and purposes, the full owner, and such third person takes it discharged of the trust. 2 Pom. Eq. Jur. §§ 591, 1049, 1051, and note 1, with cases cited; *Patterson v. Booth*, 103 Mo. 402, 15 S. W. 543; *Bomar v. Gist*, 25 S. C. 340; *Bowman v. Anderson*, 82 Iowa, 210, 47 N. W. 1087. We say "without notice," and include therein notice actual or constructive, as well as such notice as is presumed under the doctrine of *lis pendens*. In the case at bar the record title was never in the intestate. The lienors and mortgagees had no notice or knowledge that the buildings were the property of the estate, or of any claim or interest of the heirs, or even that the holder of the legal title was the administratrix. It may be that all persons must be conclusively charged with notice of the appointment of the administratrix, but that, in itself, would not cause a presumption of notice of all the property, personal and otherwise, which belonged to the estate. The findings of fact not only do not show that they had notice of such facts as should have put them upon inquiry, but go so far as to establish the contrary. Thus, they had neither notice, actual nor constructive, unless the proceedings of the probate court are to be considered as *lis pendens*. *Lis pendens* is a harsh rule in all cases, and especially so under our statute, which does not require a filing or recording in the office of the register of deeds, and a court will not extend its provisions beyond that absolutely required by the strict necessities of the case. It has never been applied, so far as our investigation goes, except where property, generally real estate, has been in actual litigation, and the pleadings disclose the identical property which is the subject thereof. The statute of this state (Rev. St. § 2442), which is a part of the Code of Civil Procedure, provides that "when the summons has been served, or publication made, the action is pending, so

as to charge third persons with notice of its pendency; and while pending no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title." This section clearly contemplates an action, brought by some person in some court, wherein the title or right to property is directly involved; and under the general rule, as aforesaid, the property must be described or identified in the pleadings with sufficient particularity to have put one upon his inquiry, should they have been brought to his attention. Surely nothing more than is reasonably disclosed by the pleadings can bind any one under such a doctrine. It would, indeed, be a harsh rule if that were so. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351. In California it has been directly held in two cases that such probate proceedings do not constitute constructive notice. *Ni-dever v. Ayers* (Cal.) 23 Pac. 192; *Association v. Chalmers* (Cal.) 3 Pac. 101. The latter case involved an order of probate setting apart a homestead, the record title not being in the intestate; and the former was a case where an administrator held the legal title to property belonging to the heir, and an order of distribution had actually been made, but before it was recorded the administrator holding the legal title sold it to another for a valuable consideration, who had no notice of the secret trust. It was held that the probate proceedings did not impart constructive notice. It seems to me it would be a dangerous precedent to establish that would conclusively bind every one who should deal with the holder of the legal title to personal or real estate, by proceedings in a court of probate, in the matter of some estate wherein, perhaps, by the inventory or otherwise, it might appear that the heirs had some equity in that property, where there is no actual notice or notice of any fact which would put a reasonably prudent man upon inquiry, and there is no element of bad faith in the transaction. We are of opinion that, under the facts as found by the district court, no notice, either constructive, or under the rule of *lis pendens*, can be imputed to the plaintiffs in error by reason of the probate proceedings.

Upon the finding of facts, the district court erred in awarding a first lien to the defendants in error upon the buildings. Whatever their rights are as against Johanna Burman, who is not a party to this suit, their equity is subordinate to the liens of the defendants, except as to their interest in lots 20, 21, and 22 in block 192, which stood in the name of Frederick Bath. The judgment and decree must be reversed and vacated, and the district court is directed to enter a judgment and decree upon the findings in favor of Seibel and Berner, respectively, and to dissolve the injunctions as to them, without subjecting their claims to any lien or claim of the said heirs, and to render a judgment and decree in favor of Crumrine, except as to the undivided one-half of that part of lots 20, 21, and

22 in block 192 in Laramie City, which stood in the name of Frederick Bath, as stated in the findings, which undivided one-half interest belongs to said heirs other than Johanna Burman; to dissolve the injunctions as to Crumrine, without subjecting his claims to any lien or claim of the heirs, except as to said interest in said lots in block 192; and to enjoin him from enforcing or foreclosing his mortgages, or either of them, upon that interest in said last-described lots held as aforesaid by Paul F. H. Bath, Ralph Burman, and Lena Burman.

GROESBECK, C. J., and CONAWAY, J., concur.

(5 Wyo. 427)

RUBEL et al. v. WILLEY, Sheriff.

(Supreme Court of Wyoming. June 25, 1895.)

REVIEW ON APPEAL—RECORD.

Errors assigned as ground for a new trial will not be reviewed unless the motion for a new trial is embraced in the bill of exceptions.

Error to district court, Sheridan county; W. S. Metz, Judge.

Action by Rubel Bros. & Co. (a copartnership), Daniel J. Bowman, and Charles R. Larimer against Dennis H. Willey, sheriff, to recover property seized by defendant under writ of attachment issued at the suit of the Sheridan Brewing Company, substituted defendant herein. From a judgment for defendants, plaintiffs bring error. Affirmed.

A. M. Appleget, John P. Arnott, and Burke & Fowler, for plaintiffs in error. E. E. Lona-baugh, for defendants in error.

CONAWAY, J. The property in controversy in this action was seized as the property of James A. Jones by Dennis H. Willey, sheriff of Sheridan county, and the original defendant herein, by virtue of a writ of attachment issued at suit of the Sheridan Brewing Company, substituted defendant herein, against the property of the said Jones. It is part of a quantity of property conveyed to plaintiffs in error by John J. Dolan, as agent for Jones, in payment of antecedent indebtedness of Jones to plaintiffs in error, amounting, as found by the trial court, to \$265. The trial court fixes the value of the property so conveyed at \$600, and a special interest of defendant in error therein at \$291, for which last-mentioned amount, with interest at 12 per cent. per annum from September 26, 1893, and costs, judgment is given in favor of defendant in error.

The assignments of error are based partly upon the insufficiency of the evidence to sustain the findings and judgment, and partly upon errors of law occurring at the trial. These are grounds for a motion for a new trial, and no motion for a new trial is authenticated to this court by appearing in the bill of exceptions. The rules of this court, by express legislative enactment, have the force of statutes. Rule 13 (26 Pac. xli.) provides as fol-

lows: "Nothing which could properly have been assigned as a ground for a new trial in the court below will be considered in this court unless it shall appear that the same was properly presented in the court below by a motion for a new trial, and that the motion was overruled and exception was at the time reserved to such ruling; all of which shall be embraced in the bill of exceptions." It is established by a long line of concurring decisions that such errors as may be presented by a motion for a new trial will not be reviewed in an appellate court unless the motion for a new trial is embraced in the bill of exceptions. See *Seibel v. Bath* (decided at this session) 40 Pac. 756. This is not done in this cause. A court sometimes suspends the operation of its own rules to avoid an inequitable result. We have looked through the record in this case, and do not find it to be a case of that character. The finding of the trial court that the sale of the attached property before the levy of the writ of attachment was unauthorized, and for an inadequate consideration, and void as to attaching creditors, is sustained by the evidence. The judgment of the district court is therefore affirmed.

GROESBECK, C. J., and POTTER, J., concur.

(16 Mont. 297)

THOMAS et al. v. FRANK.

(Supreme Court of Montana. June 10, 1895.)

INTEREST IN LAND — CONSIDERATION NAMED IN DEED—GRANTOR'S RIGHT OF RECOVERY.

Plaintiffs had, in order to defend a suit against them and others, for land, by persons claiming under a quartz location, located the land for themselves and the other defendants in such suit, and agreed that if the plaintiffs therein were unsuccessful they would convey to each defendant who contributed his pro rata share of the expenses of the suit so much of the land as he was entitled to. Plaintiffs and the other defendants in such suit were successful, but, through the default of several owners of lots involved therein in payment of their share of expenses, plaintiffs were compelled to pay a deficiency of \$500. One of these defaulting owners, whose pro rata share of expenses was \$41, conveyed to defendant, who, after learning what title and interest plaintiffs claimed in the lot, had a notary make a deed to himself, without stating the consideration, and take it to plaintiffs, who named \$200 as the consideration, and told the notary to ask defendant if that was satisfactory. The notary, after consulting defendant, told plaintiffs that defendant wanted the deed, and did not care what consideration was inserted, and plaintiffs executed the deed, with \$200 named as the consideration. *Held*, that plaintiffs could recover that amount, it having been evidently named by them in order to secure a reimbursement for their expenditures.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by J. D. Thomas and others against Henry L. Frank to recover the consideration expressed in a deed. From a judgment for plaintiffs, defendant appeals. Modified.

Suit by plaintiffs against defendant, in the justice's court, to recover the sum of \$200,

alleged to be due for the price of the surface ground of certain lots conveyed by plaintiffs to defendant, and which, it is alleged, was the price agreed upon for such conveyance. The defendant denied any promise to pay plaintiffs \$200, or any other sum, for the property, but alleged the facts to be that plaintiffs and one Archer agreed with all the occupants of the Destroying Angel lode claim, in Butte, whereby plaintiffs and Archer were to convey to all the occupants of said lode claim the several lots owned by such occupants on the said claim, and a pro rata interest in the surface ground of said claim, if said occupants would contribute to the defense of a lawsuit then pending in the courts of Silver Bow county, wherein Lee Mantle and others were plaintiffs, and plaintiffs herein and others were defendants; that defendant contributed and paid to plaintiffs his proportion of such expense, to wit, \$41.25, which amount represented defendant's pro rata interest in said litigation, and plaintiffs accepted the same as full consideration for the conveyance to defendant of the lots described in the complaint, and in consideration thereof, and of the release of his pro rata interest in the additional surface ground of the Destroying Angel lode claim by defendant, plaintiffs executed to defendant the deed mentioned in the complaint, which said amount defendant has fully paid, and has also released to plaintiffs his claim to the pro rata surface ground of said lode claim; that the consideration of \$200 recited in the deed was not the real consideration, but that the same was as heretofore stated. The case was tried to a jury. Verdict for plaintiffs for \$200. Defendant appealed to the district court. The case was there tried to a jury. Again the plaintiffs secured a verdict for \$200. Motion for new trial was made and overruled. Defendant appeals.

Forbis & Forbis, for appellant. Thompson Campbell, for respondents.

HUNT, J. (after stating the facts). The only error relied upon by the appellant is the insufficiency of the evidence to sustain the verdict of the jury. About 1883, Lee Mantle and others sued the occupants of certain portions of the town site of Butte, claiming the ground under a quartz location called the "Diadem Lode." To resist this litigation the occupants organized as the "Destroying Angel Pool," and the ground involved in the litigation was located by these plaintiffs and Archer as the "Destroying Angel Lode Claim." This location was made for the benefit of the occupants on the ground under the town-site patent, as appears from the agreement offered in evidence on the trial. Under the terms of this agreement these plaintiffs and Archer, on January 19, 1884, agreed with a large number of persons that in view of the litigation heretofore referred to, and the contribution by them to carry the

same on, to defend the same for the benefit of the parties to the agreement; and in consideration of the premises, and of the money so paid and furnished to said first parties (plaintiffs herein), they also agreed with all defendants in said suit, "who shall come in and pay and contribute money to defend said suit, that in case said defendants in said suit shall be successful in the defense of said suit, and shall be the prevailing parties therein, and shall defeat said plaintiffs, Lee Mantle et al., in said suit, the said first parties will then deed and convey, by good and sufficient conveyance, such part or portion of the surface ground of said Destroying Angel lode as each of the said second parties, and other defendants who shall pay as aforesaid, claim and are entitled to. Said first parties further agree with said second parties that in case any part of the surface ground shall be and remain after making said conveyances aforesaid, and after taking out such part or portion thereof, as said first parties claim as town lots, that they will convey to said second parties such part or portion of said remaining portions of said surface ground of said Destroying Angel lode claim as the amount of money paid and contributed by them shall bear to the whole amount expended in defending said suit; that is to say, that after said first and second parties each get the amount of surface ground claimed by each of them as town lots, that any and all remaining parts or portions of said Destroying Angel lode claim surface ground shall be shared, and belong to said first and second parties, and others who may, as defendants, contribute to the defense of said suit as aforesaid, pro rata, according to the amount of money each may have paid towards said defense." It further appears that one Van Gundy, of Deer Lodge, prior to 1888, had been the owner of the lot out of which the present suit grew. Van Gundy neglected to pay his pro rata of the expense of the defense of the suit while the same was pending. It does not appear that Van Gundy was directly a member of the pool, but that his property was affected by the litigation is admitted. Other claimants failed to pay, and plaintiffs were obliged to pay sums largely in excess of the amounts actually collected by the pro rata assessments upon lot owners, made under the terms of the agreement hereinbefore referred to. These excesses amounted to between \$400 and \$500. The defendant Frank bought the Van Gundy lot about this time, and had some conversation with plaintiffs in regard to their right, title, and interest to the same by virtue of the Destroying Angel claim. There was, however, no definite agreement as to the price to be paid to plaintiffs for their interest. Defendant had a deed prepared, conveying the interest of these plaintiffs to himself. No consideration was expressed in the deed when it was prepared. A notary was then directed by defendant to take the deed to plaintiffs.

Plaintiffs told the notary that the consideration to be put in was \$200, and asked him to see defendant, and ascertain if that was satisfactory. The notary did consult defendant, and returned to plaintiffs, telling them, substantially, that defendant wanted the deed, and did not care what the consideration inserted was. Plaintiffs thereupon executed the deed, with a consideration of \$200 written therein, and the same was delivered to defendant by the notary. Defendant says he did not authorize the notary to make any agreement. The notary did not make any agreement, but did convey to defendant the fact that plaintiffs wanted a consideration of \$200 inserted in the deed. After this message was taken by the notary, and delivered, the notary at once returned to the plaintiffs, and took their acknowledgment to the instrument. We think that the jury were justified in believing, from all these facts, that the defendant assented to the consideration of \$200 demanded by the plaintiffs, and authorized the notary to secure their signatures, after he was told of the consideration. Any other inference, too, would be to cast a suspicion of willful deception and wrong upon the conduct of the notary himself, and would imply that he deliberately misled the plaintiffs into a false belief concerning the consideration named in the deed. Such an inference is not to be presumed, and is not warranted by the evidence. Defendant says that he did not mean to pay plaintiffs anything more than he had paid on the amount assessed to Van Gundy, which was \$41.25. Doubtless, he honestly believed he might secure the interest of Van Gundy by the payment of that sum. But when it is remembered that Van Gundy had not paid his assessment when he ought to have paid it, and that these plaintiffs had to pay out some \$400 to \$500 more than the assessments for the litigation amounted to, it is but equitable and just that they should be reimbursed by those who were the beneficiaries of their expenditures, and it was clearly with a view to secure such reimbursement that they fixed upon the consideration of \$200 before they were willing to execute and deliver the deed to defendant. The appellants suggest that plaintiff had no right to demand this sum, but this suggestion is disposed of by answering that they did have an equitable claim to be reimbursed, and if the defendant, as the purchaser of an original owner, who had defaulted in his payment, desired to come in after such default, it does not seem at all inequitable that he should pay, as a consideration for the privilege, a share of the deficiency incurred by plaintiffs, who had expended time and money in the litigation affecting the property.

The facts present a case where the jury were warranted in finding as they did, and when we consider that two juries and a judge have reviewed the testimony, and reached the same conclusion, we do not feel

at liberty to disturb it. We are of opinion, however, that, inasmuch as the plaintiffs evidently disregarded the check of defendant for the amount of the Van Gundy assessment in the negotiations, the defendant's check for that sum, delivered to Beck, treasurer, should be returned to defendant, or, if the same has been presented and paid, the amount thereof, with legal interest thereon since date of actual payment, should be credited to defendant on the amount of this judgment. Let the judgment therefore be modified to conform to these views, and, as so modified, let it be affirmed.

PEMBERTON, C. J., and DE WITT, J.,
concur.

(12 Utah, 1)

BRIGHAM YOUNG TRUST CO. v. WAGNER.

(Supreme Court of Utah. June 14, 1895.)

ESTOPPEL—OF LANDLORD—ENFORCEMENT OF LEASE.

1. In an action for rent, defendant alleged that the lease provided that the lessor should have the right to take possession of the premises on default in payment of rent; that defendant tendered the amount due for rent to a certain date, but the lessor refused to accept the same, and declared that the lease had been forfeited; and that defendant had been about to build on the premises, which were vacant, but thereafter considered that he had lost all right in said premises; and that he had not since been in possession thereof. *Held*, that the facts pleaded did not estop plaintiff from enforcing the lease.

2. To constitute equitable estoppel, the facts must be such as to make a cause of action for deceit in favor of the party pleading the estoppel.

3. To constitute equitable estoppel, it is necessary that there should have been—First, a false representation of a material fact; second, such representation must have been knowingly made; third, the party pleading the estoppel must have been ignorant of the facts; fourth, the representation must have been made with the intention that it should be acted upon; fifth, the other party must have been misled to his injury.

Appeal from district court, Third district; before Justice S. A. Merritt.

Action by the Brigham Young Trust Company against Henry Wagner for rent. From a judgment for plaintiff, and from an order overruling his motion for a new trial, defendant appeals. Affirmed.

J. A. Williams, for appellant. Barlow Ferguson and Richard W. Young, for respondent.

SMITH, J. This was an action to recover rent. The defendant held under a written lease. There was a verdict for plaintiff, and, defendant having moved for a new trial, his motion was overruled, and he appeals. Some 17 assignments of error are made in this court. It is not necessary to pass upon these serialim. The complaint alleged the making of a written lease of certain premises in Salt Lake City to Wilcken and Turnbow. The

lease itself was made an exhibit. The rental was \$60 per month. It then alleged that defendant had become the assignee of the lease at some time prior to October, 1891. It then alleged the rent to be due and in arrears from October 1, 1891, to November 1, 1892, and prayed judgment therefor, the amount being \$780. The lease was for 15 years from April, 1890. The defendant answered; admitted plaintiff's title to the leased premises; also admitted the making and assignment of the lease; admitted he had not paid the rent for the period stated in the complaint, but denied that defendant had been in possession of the premises since September 30, 1891. The answer then alleges that on or about the 1st day of May, 1892, he tendered the plaintiff \$480, being the rent up to June 1, 1892, but that plaintiff refused to accept the same, and informed defendant that the lease had been forfeited, and that plaintiff had taken possession of the demised premises; and it is further alleged that plaintiff had in fact taken possession. The defendant set up, by way of further answer, that the premises were vacant land, and that defendant intended to erect thereon certain buildings, but that, after plaintiff informed him that his lease was forfeited, he considered he had lost all right in said premises, and took no further steps to build thereon. The answer then alleged that the plaintiff had the right to declare a forfeiture of said lease and to take possession of the premises without process of law, and that the plaintiff, by declaring a forfeiture and refusing to accept the rent tendered in May, thereby estopped itself from claiming rent from the defendant. The lease contained the following provisions: "It is hereby agreed that if any rent shall remain due and unpaid for a period of ten days, or if default shall be made by the party of the second part in any of the covenants herein contained, then said party of the first part is hereby guarantied * * * the right and privilege, without notice of any sort or any process of law, and without any opposition, * * * to enter either by himself or otherwise, * * * and take full, complete, and unmolested possession." The rent was payable monthly in advance. The court instructed the jury, in effect, that defendant was liable for rent until the plaintiff did in fact re-enter. A re-entry was pleaded, as we have seen, but there was no evidence to support the plea of such re-entry prior to November 1, 1892. The defendant, in this court, expressly waives this defense, and admits there was no eviction in fact, but relies upon the matters of estoppel pleaded. It is not necessary to recite the evidence in the case; it is sufficient to say that it tended substantially to prove the facts alleged in the answer as an estoppel.

The court having disregarded the plea of estoppel in its charge to the jury, and exceptions to the charge and refusals to charge as requested by defendant on this subject having been properly saved, the question is

squarely presented whether the facts pleaded constitute an equitable estoppel against the plaintiff. As we understand the rule, matters pleaded by way of equitable estoppel must be of such character, and sufficient, as pleaded, to make a cause of action for deceit on the part of the defendant. The rule is stated in language of infinite variety in the many cases that have arisen in the courts. In *Branson v. Wirth*, 17 Wall. 32, the supreme court of the United States say: "If one person is induced to do an act prejudicial to himself in consequence of the acts or declarations of another on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations." In *Dickerson v. Colgrove*, 100 U. S. 578, upon the same subject the supreme court say: "He who by his language leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." It is not necessary to quote from other authorities; the rule is easily deducible from these. It is this: In order to create an estoppel of this character, it is necessary that the plaintiff, either by language or conduct, should have—First, falsely represented or concealed a material fact; second, the false representation or concealment must have been knowingly made; third, the party pleading the estoppel must have been ignorant of the facts; fourth, the representation must have been made with the intention that it should be acted upon; fifth, the party pleading it must have been misled thereby to his injury in some substantial particular. Tested by this rule, does the matter pleaded as an estoppel in the case at bar fulfill the requirement? We think it is clear that it does not.

It may be admitted, for the purpose of this case, that the representation of the plaintiff that it had re-entered and had forfeited the lease was false, and intentionally made to deceive the defendant. There is nowhere a hint in the answer that defendant was ignorant of the real facts. This is a vital matter in any plea of equitable estoppel or complaint for deceit. If the plaintiff knew the truth, he had no right to rely upon a falsehood; and in a plea of this kind it is imperative that he should show his want of knowledge. Then, again, this plea fails to disclose any substantial injury. The only matter of which defendant complained in this regard is that he forbore to construct a building which he contemplated erecting. Whether it would have been to the advantage of the plaintiff or not if he had been permitted to erect the building is left wholly to conjecture. There is nothing in the answer that even intimates that it would have been profitable to defendant to have constructed such building. It may have been greatly to his advantage that he did not build. Suppose the defendant were suing the plaintiff for deceit, and were to allege the making of the lease in this case, and his

default in the rent, and then allege that the plaintiff here had represented to him that it would not declare any forfeiture of the lease, and that it had not re-entered; that he considered his lease to be in full effect, and therefore contemplated erecting a building on the premises; but that plaintiff in fact had re-entered and forfeited the lease. Would it be claimed for a moment that the complaint stated a cause of action? We think not. The plea in this case must be tested by the same rule.

The only defense well-pleaded was eviction in May, 1892. This defense was not proved, and, as we have said, was expressly waived in this court. But for this defense, the plaintiff would have been entitled to judgment on the pleadings. We are therefore of opinion that the judgment of the court below should be, and it is, affirmed.

BARTCH and KING, JJ., concur.

(12 Utah, 13)

OGDEN STATE BANK v. BARKER et al.
(Supreme Court of Utah, June 3, 1895.)

CREDITORS' BILL — TO SET ASIDE FRAUDULENT CONVEYANCE—RECITAL OF CONSIDERATION—EFFECT—KNOWLEDGE OF GRANTEE.

1. The recital in a debtor's deed to his children that it was made for a nominal consideration is conclusive against him in an action by creditors to set aside the deed for fraud.

2. In an action by creditors to set aside a deed, evidence that it was made by a debtor to his children for services rendered by them is not admissible to contradict a recital that it was made for a nominal consideration, especially where the debtor was legally entitled to such services.

3. A deed made to children for a nominal consideration, whereby the grantor is rendered unable to meet existing debts, is void.

4. A voluntary conveyance of land by a debtor, who is thereby rendered insolvent, is constructively fraudulent as to existing creditors, without proof of actual fraud, though the grantee had no knowledge of the fraud.

5. Where it may be inferred from the whole bill in a suit to set aside a conveyance for fraud that defendant was insolvent at the time of the conveyance, an express allegation to that effect is unnecessary.

6. Under Comp. Laws 1888, § 2838, providing that every conveyance made with the intent to delay, hinder, or defraud creditors shall be void, an allegation, in a creditors' bill to set aside a conveyance that the grantor was insolvent at the time of the conveyance, is unnecessary.

7. Where evidence was taken by a master, and reported to the court, it will be presumed that incompetent evidence offered by either party was not considered by the court in rendering its decision on the evidence reported.

8. Evidence which throws any light upon an alleged fraudulent conveyance is admissible in a suit to set it aside.

Appeal from district court, Fourth district; before Justice J. A. Miner.

Action by the Ogden State Bank against William Barker and others to set aside a certain deed. From a judgment for plaintiff, and from an order overruling their motion for a new trial, defendants appeal. Affirmed.

Richards Macmillan, for appellants. W. A. Lee and H. H. Henderson, for respondent.

BARTCH, J. This is an action in the nature of a creditors' bill, brought by the plaintiff, who is a judgment creditor of William Barker, one of the defendants, to set aside and declare null and void a certain deed by which William Barker and his wife Mary Ann Barker, conveyed certain lands to their sons, the defendants Franklin J. Barker and Leroy Barker, on the ground that said conveyance was fraudulently made for the purpose of hindering and delaying the plaintiff in collecting his judgment. The case was referred to a master in chancery to take and report the testimony. A return of the evidence having been made, the court, after considering the same and hearing arguments of counsel, entered judgment thereon setting aside and canceling the deed, and ordered the property thereby conveyed to be sold to satisfy the judgment of the plaintiff. A motion for a new trial was made and overruled, and thereupon the defendants appealed both from the judgment and order overruling the motion for a new trial, assigning various errors.

It is alleged in the complaint, substantially, that on September 17, 1892, the plaintiff obtained a judgment in the district court of the Fourth judicial district against the defendant William Barker and one James Iverson for the sum of \$4,003.40, in a foreclosure suit; that on October 10, 1892, the mortgaged premises were sold to satisfy said judgment, and \$1,700 realized thereon, and on October 12, 1892, a deficiency judgment was docketed, in the sum of \$2,375.55; that thereafter, on February 10, 1893, a writ of execution was issued against the property of said Barker and Iverson, which was returned nulla bona; that on April 20, 1892, and after he had contracted the debt upon which the judgment was recovered, William Barker and his wife conveyed the premises described in the deed to their sons; that they so conveyed the same without consideration, for the purpose of hindering, delaying, and obstructing the plaintiff in collecting his judgment, all parties knowing that the deed was fraudulent; that said William Barker, after the conveyance, remained in possession of the land; that said Barker and Iverson are insolvent, and plaintiff is without remedy at law; and that the premises, unincumbered, are worth about \$3,000, but, if sold with said clouds thereon, would not satisfy the judgment. The defendants, in substance, deny that the grantors remained in possession since the conveyance, or that there was no consideration for the deed, or that the conveyance was made to cheat, defraud, hinder, or delay plaintiff or other creditors, or that the premises are worth more than \$1,250, or that William Barker and James Iverson are, or either of them is, insolvent, or that plaintiff is without a remedy at law. It will be observed that neither the corporate existence of the plaintiff, nor his

judgment against the defendant William Barker, valid and unsatisfied, is denied. Nor is the issuance of the execution against the property of Barker and Iverson, or the return nulla bona, denied. Nor is it denied that defendants William Barker and wife were the owners in fee of the land, or that the conveyance to their sons was made after the debt, which was merged in the judgment, was contracted. All the facts not denied are admitted to be true, and upon the trial the court found all the issues raised in the pleadings, in favor of the plaintiff, as appears from the findings of fact. Under the pleadings and facts thus shown by the record, counsel for the appellants insist that the deed in question was made in good faith, and for a valuable consideration, to pay an honest obligation between parents and children, which, they contend, arose under a contract entered into between the parents and children long before any debt to this plaintiff was contracted or assumed by William Barker.

The first question to be considered is whether the conveyance was made for a valuable consideration, in good faith, and not merely to defraud, hinder, or delay the creditors of William Barker. The effect of the consideration expressed in a deed is to estop the grantor from denying that the deed was executed without a consideration, and to prevent its operation as a resulting trust in the grantor. When a consideration, though merely nominal, is expressed, whether founded thereon or not, the deed may be valid and operative, as between the parties; but, when assailed by the creditors of the grantor, it may be void as to them, because not founded on a valuable consideration. Such would be the effect in a case where the demands of the creditors were in existence at the time when the deed was executed, if the operation of the deed would put it beyond the power of the grantor to meet his liabilities; and in such case, if the creditors of the grantor attack the conveyance as fraudulent and made to hinder or delay them in the collection of their claims, the burden of proof is upon the grantee, or those claiming under him, to show such a consideration as will release the conveyance from such imputation, and for such purpose the fact that a consideration is recited in the conveyance is not evidence as against creditors whose claims accrued prior to its execution, for such recital is the mere declaration of the grantor. The consideration clause in a deed does not prove that the deed was founded on a valuable consideration, or on any consideration. Hence, where the consideration expressed is one dollar, it may be shown that a larger sum was actually paid. So, where a larger sum is expressed, it may be shown that a less sum was actually paid. But an entirely different consideration from that expressed cannot be shown by parol evidence, when the deed is assailed by creditors, be-

cause this would be to vary the terms of a contract, the stipulations of which were reduced to writing by the parties. In the absence of mistake or fraud, the written instrument speaks for itself, and, when attacked by creditors, its stipulations are conclusive as to the grantor and grantee; and the instrument cannot be supported by falsifying its recitals, because they must be presumed to have been made and accepted deliberately, and to express the intention of the parties thereto. The law presumes that every man intends the necessary and natural consequences of his own acts, and where the proximate and natural results of a debtor's acts are to hinder, delay, or defraud creditors, it will be presumed that he intended his acts to produce such results. *Snyder v. Free* (Mo. Sup.) 21 S. W. 847; *Belden v. Seymour*, 8 Conn. 304; *Houston v. Blackman*, 66 Ala. 559; 8 Am. & Eng. Enc. Law, p. 753; *Goodspeed v. Fuller*, 46 Me. 141; *Lawson v. Funk*, 108 Ill. 502; *Maigley v. Hauer*, 7 Johns. 341; *Grout v. Townsend*, 2 Hill, 554; *Coleman v. Burr*, 93 N. Y. 17. In the case at bar the consideration expressed in the deed is one dollar, and there is no other consideration mentioned or referred to in the consideration clause. The deed having been assailed by a creditor of the grantor on the ground that it was fraudulent and made to hinder and delay such creditor in collecting his claims, its recitals were conclusive, and at the trial neither the grantor nor the grantee was entitled to show any other consideration than that contained in the instrument. *Potter v. Gracie*, 58 Ala. 303. The fact that the grantor was permitted on the trial to introduce evidence tending to show that the conveyance was made by Barker to his sons because they had remained at home with him, and had rendered value in work to him, and had agreed to stay with him, cannot change the effect and operation of the consideration expressed in the deed. Such evidence cannot be considered. Nor could it be regarded under the issues raised in the pleadings, or under the facts disclosed by the record. Even if such a promise or agreement was made, it is clear that it was made at a time when the grantor was legally entitled to their services, without compensation, and therefore such services would not constitute a valuable consideration which would avail the grantees as against creditors. The deed was therefore made for a nominal consideration. Such a deed is a mere voluntary conveyance, without consideration, and void as to creditors whose claims existed at the time of its execution, and who would, because of such conveyance, be defrauded of their rights, or hindered or delayed in the collection of their claims. Labor performed by children, during their minority, for their parents, will not entitle such children to compensation, so as to establish the relation of debtor and creditor between them, or to enable the parents

to lawfully prefer them to creditors, and to convey their property to them, and place it out of the reach of creditors whose claims were in existence at the time of such conveyance. Nor does the fact, if such be a fact, that the grantees did not participate in any fraud against the creditors, or that they accepted the deed in good faith, without intent to defraud them, if they so accepted it, relieve them from the effect and operation of a voluntary conveyance. Where there is no valuable consideration for a deed, one of the material questions is the intent of the grantor, and it is immaterial how innocent the grantees are. They are bound by his acts, and, if he was heavily indebted at the time of making the conveyance, the inference is that the instrument was fraudulently made for the purpose of hindering and delaying his creditors. A voluntary conveyance of land, made by a debtor while he is under embarrassed circumstances, is constructively fraudulent, and will be held void, as to existing creditors, without proof of actual fraud. And this is so although the grantee has no knowledge of a fraudulent intent on the part of the grantor. So even where the debtor has not been shown to be absolutely insolvent, but when the effect of the conveyance is to hinder or delay or defraud the creditors. *Bump, Fraud. Conv.* pp. 282, 287, 288; *Bohannon v. Combs*, 79 Mo. 305; *Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286; *Shaw v. Tracy*, 83 Mo. 224; *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Matson v. Melchor*, 42 Mich. 477, 4 N. W. 200.

Counsel for the appellants insist that there is no allegation in the complaint in this case that the debtor was insolvent at the time the conveyance was made, and that, therefore, the respondent cannot prevail. This position is not tenable, for it is alleged in the complaint that an execution was issued, and returned nulla bona, and that both the defendant debtor and his cojudgment debtor "are insolvent." While the allegation as to insolvency is in the present tense, and does not refer directly to the time of the execution of the deed, still the complaint, considered as a whole, is sufficiently certain to admit evidence of insolvency. But even the omission of an allegation of insolvency at the time of the conveyance would not be fatal to the bill, because such insolvency is not a fact of jurisdictional consequence, and is not a condition of relief per se. The legislature has pointed out the facts on which jurisdiction rests, where creditors are concerned, and on which relief must be founded, and insolvency is not mentioned among these facts. Every conveyance made with the intent to delay, hinder, or defraud creditors shall be void as to them. *Comp. Laws Utah 1888, § 2838.* That the facts mentioned in the statute, on which the relief is sought, are sufficiently set out in the bill, there is no question. The case at bar is different from one in which injunctive relief is sought; for there insolvency becomes

one of the ultimate facts to be proved, and must be properly alleged. This is not so when resort is had by bill in equity to set aside a conveyance in aid of execution on a judgment. In such case the bill must show that the conveyance was made to delay, hinder, or defraud the creditors of the grantor. "It is not necessary, however, that insolvency should either be proved or presumed, in order to render a voluntary conveyance void. If the indebtedness is so large that the effect of the transfer is to defraud creditors, the conveyance is void. If insolvency, therefore, takes place shortly after the making of the conveyance, that is enough." *Bump, Fraud. Conv.* pp. 282, 283. While in this case it was not necessary to base the relief demanded on the fact of the insolvency of the grantor at the time of the execution of the deed, still it is apparent from the record that, had the conveyance been valid, such fact would have existed; for it is shown by the evidence that shortly after the making of the deed an execution was issued by the judgment creditor against the property of William Barker, and returned nulla bona, except as to the property in controversy. The judgment and fruitless execution were evidence that such creditor's legal remedies had been exhausted, and conclusive evidence of the debtor's insolvency. It was so held by this court in *Enright v. Grant*, 5 Utah, 334, 15 Pac. 268; *Hager v. Shindler*, 29 Cal. 48; *Case v. Beauregard*, 101 U. S. 688. Nor is there anything in the record which indicated that he had any other property at the time he made the deed.

While a father may lawfully convey property to his minor children in consideration of love and affection, or for services performed or to be performed, when it does not interfere with the rights of creditors, and while it is commendable for him to make suitable provision for his family when he is solvent and able to pay his debts, still he may not make such conveyance or provision at a time when the effect and operation of the same would be to defraud or cheat his creditors, or to hinder or delay them in the collection of their just claims. Conveyances of this character, being voluntary, and not made for a valuable consideration, must be held to have been executed, delivered, and accepted subject to the rights of the creditors existing at the time they were made. *Dowell v. Applegate*, 15 Fed. 419; *Irish v. Bradford*, 64 Iowa, 303, 20 N. W. 447; *Rynearson v. Turner*, 52 Mich. 7, 17 N. W. 219; *Gardner's Adm'r v. Schooley*, 25 N. J. Eq. 150. In the case at bar the instrument in question was a voluntary conveyance, having been made without a valuable consideration. The complainant was a judgment creditor. As to him, the conveyance is void, because his claim is paramount to that of the debtor's sons. That a person must be just before he is generous is an invariable rule of law. The claims, under a

voluntary conveyance, of those who are bound by the ties of natural affection and duty, must yield to the superior rights of creditors. A settlement of property by a father upon his child, when the father is insolvent or largely indebted, and when he has not sufficient property remaining to satisfy his debts, cannot be sustained. *Bump, Fraud. Conv.* p. 280; *Crawford v. Logan*, 97 Ill. 396; *Potter v. Gracie*, *supra*.

Counsel for the appellants also complain that at the trial certain evidence was improperly admitted. It is not deemed necessary to refer particularly to the evidence complained of, because it was taken by a special master in chancery, and reported to the court. In such case, in the absence of any ruling on such evidence by the court sitting as a court of chancery, it will be presumed that incompetent evidence offered by either party to the suit was excluded, and not considered by the court in rendering its decision on the evidence reported. It may be observed, however, that in questions of fraud a wide range is allowed in the admission of evidence. Fraud is a creature of secrecy. It assumes many disguises and subterfuges, and, in general, can only be detected by the consideration of circumstances and facts, and these are frequently disconnected, remote, and trivial. Their meaning is often difficult of interpretation, and for this reason the evidence is allowed to assume a wide latitude, and it is sometimes difficult to determine what circumstances should be admitted and what excluded. The true test seems to be whether the testimony offered throws light upon the transaction, or whether it is wholly irrelevant. Applying this test to the evidence in question, which consists of the declarations and acts of the grantor, it is clear that it tends to show the intent with which the conveyance was made, and was therefore admissible, because the intent of the grantor at the time of making the deed is one of the material elements in this case. Such declarations and acts of the grantor, made before and contemporaneous with the transfer, are admissible, at the suit of creditors, against the grantee, as well as in his favor. *Bump, Fraud. Conv.* pp. 579-581, 588, 589.

There are other errors specified in the record, and, while they have not escaped our notice, still we do not deem a discussion of them necessary to the decision of this case. The record presents no reversible error. We are of opinion that the deed in question is fraudulent and void as to the complainant, and was properly canceled and set aside by the court. The order directing the property to be sold in satisfaction of the debt was also proper. The judgment is affirmed.

MERRITT, C. J., and SMITH and KING, JJ., concur.

(12 Utah, 27)

OGDEN STATE BANK v. BARKER et al.
(Supreme Court of Utah. June 3, 1895.)

FRAUDULENT CONVEYANCES.

Plaintiff was a creditor of one who conveyed land to his sons. After the debt had been put into judgment the debtor and his sons joined in a mortgage to defendant to secure the payment of certain notes of the debtor and his son, which defendant held for collection. Both the owner of the notes and defendant acted in good faith, and neither knew of the mortgage until after its execution. *Held*, that the evidence was insufficient to set aside the mortgage as being in fraud of appellant.

Appeal from district court, Fourth district; before Justice J. A. Miner.

Action by Ogden State Bank against William Barker and others to set aside a deed and a mortgage. From a judgment refusing to set aside the mortgage, plaintiff appeals. Affirmed.

W. A. Lee and H. H. Henderson, for appellant. Evans & Rogers, for respondents.

BARTCH, J. The question to be determined on this appeal was raised in the creditors' bill in the case of Ogden State Bank v. Barker (decided at this term) 40 Pac. 765. It appears from the record that the appellant was a judgment creditor of William Barker, that Barker conveyed his land to his sons, and that then all the Barkers joined in a mortgage to the respondent Brough. The appellant sought to have both the deed and mortgage set aside on the ground that they were fraudulent and void, claiming that they were made without consideration, and to hinder and delay the creditors of William Barker. The court canceled the deed, and declared it void, but refused to cancel and set aside the mortgage, and dismissed the action as to Brough.

Counsel for the appellant insist that the mortgage was given to Brough without consideration, in a secret trust, and therefore should be canceled and set aside. This position does not appear to be sustained by the record. It is shown by the evidence, substantially, that Brough was the acting cashier of the Citizens' Bank; that certain notes came into his possession for collection by reason of his position in the bank; that he placed them in the hands of attorneys, and demanded that suit be brought to enforce payment, unless security be given; that the mortgage was given to secure the payment of the notes; that Brough was made trustee in the mortgage without his knowledge; and that neither he nor the owner of the notes knew anything of its execution until after it was made. Each note, on its face, represents a valuable consideration, and there is evidence tending to show such consideration in fact. There is nothing in the record to warrant an assumption that there was no valuable consideration given for these notes. Nor is such the contention of counsel for the appellant, for their contention is that the mort-

gage, not the notes, was given without a valuable consideration. Nor is there anything to show that the notes were not executed in good faith. If, then, the notes were made for a valuable consideration, upon what theory of law can it be contended that the mortgage given to secure them was void for want of a valuable consideration? The notes, having been given for value, and evidencing the indebtedness of the mortgagor to the real owner of them, constituted a valuable consideration for the mortgage. The mere fact that the mortgagee was not the real owner of the notes, but was simply a trustee or agent for the owner, does not affect the validity of the mortgage. Nor does the fact that the mortgage was executed by all the Barkers, and at a time when the debt which was merged in the judgment of the appellant was in existence, affect its validity. Neither is the validity of the mortgage affected because, among the notes which it secures, there is one which was made by Franklin J. Barker, and for which William Barker was not liable. It is apparent from the record that the notes for which William Barker was liable constituted bona fide existing claims against him. These he had a right to secure, even though the debt which he owed the appellant was in existence at the time of the execution of the mortgage, because he had a right to prefer as a creditor the owner of the notes. Even if such preference were made with a fraudulent design, or with the intent to hinder and delay the appellant in the collection of his judgment, still, if neither the trustee nor the owner of the notes participated in the fraud, or had any knowledge of it, the validity of the mortgage would not be affected. *Pettit v. Parsons*, 9 Utah, 223, 33 Pac. 1038. There is no contention that there was any such participation or knowledge on the part of the trustee or mortgagee or owner. Nor does it appear from the evidence that it was a secret trust. It is shown that the trustee was not present at the time the mortgage was made, and knew nothing of it until after its execution. We are of the opinion that the cancellation of the mortgage was properly denied, and the action properly dismissed as to the respondent Brough. The judgment is affirmed.

MERRITT, C. J., and SMITH and KING, JJ., concur.

(21 Colo. 275)

CHAPPELL v. McKEOUGH.

(Supreme Court of Colorado. June 3, 1895.)

NEGOTIABLE NOTE—PAYMENT BY SURETY—WHAT IS.

1. Where a surety on a note pays part thereof at maturity, and then procures a stranger to take it up by giving their joint note to the holder, the intention being to keep the note alive, such transaction constitutes a purchase, and not a payment of the note; so that, in an action by the purchaser against the other surety to recover the balance due on the note, defenses

which would have been available against the cosurety in an action for contribution are not available against the purchaser.

2. An action against a cosurety for contribution is not on the instrument itself, but on the implied promise.

3. Where a note is paid after maturity by a stranger it will generally be held to be a purchase thereof, and not a payment.

Appeal from district court, Las Animas county.

Action by James McKeough, Jr., against Delos A. Chappell and others on a note. From a judgment for plaintiff, defendant Chappell appeals. **Affirmed.**

This is an action brought by James McKeough, Jr., as the assignee of a certain promissory note, against W. A. Burnett, James M. John, and Delos A. Chappell, to recover a balance alleged to be due thereon. Burnett and John made default. Chappell interposed several defenses: First, denial of the assignment of the note to McKeough, or that he was the owner of the note; second, payment; third, that John, and not McKeough, was the real party in interest. The further defenses aver that John and Chappell signed the note as cosureties for Burnett, and allege matters that, if true, would defeat an action brought by John for contribution. On motion of appellee these latter defenses were stricken out. The cause was tried to the court on the issues presented by the first three defenses, and judgment rendered in favor of appellee for \$6,701.68. Chappell appeals from this judgment.

Yeaman & Parsons, for appellant. James M. John, for appellee.

GODDARD, J. It appears from the evidence that on November 12, 1888, W. A. Burnett, James M. John, and Delos A. Chappell executed to the First National Bank of Pueblo their promissory note for \$10,000 (the note in suit), payable one year after date, with interest; Chappell and John executing the note as sureties for Burnett. About the time of its maturity the note was sent by the First National Bank of Pueblo to the First National Bank of Trinidad, indorsed, "Collect for account, and credit First National Bank of Pueblo." On April 2, 1890, the Trinidad bank paid the Pueblo bank the full amount of the note, principal and interest, and it became the property of the Trinidad bank. On July 5, 1890, John paid the Trinidad bank one-half the principal, \$5,000, and accrued interest. At the time of such payment, and frequently thereafter, he urged the Trinidad bank to bring suit to collect the balance due on the note from appellant, Chappell. This the bank refused to do, because Chappell was one of its officers. Thereupon John procured the appellee, McKeough, to take up the note, which he did by giving his note, signed by John, for the balance then due thereon, had the note assigned to him, and on the next day instituted this action. The controlling question in the case is wheth-

er, upon this state of facts, the transaction through which McKeough obtained the note from the Trinidad bank constitutes a payment or a purchase of the note. It is strenuously insisted on the part of appellant that it is, in effect, a payment of the note by John, and that he is the real party in interest; that McKeough is therefore not entitled to maintain the action, and, if permitted to do so, the appellant should have been allowed to avail himself of any defense that he could have made in an action brought by John for contribution. On the other hand, appellee insists that he purchased the note, and became thereby subrogated to the rights of the holder of the note, from whom he purchased; and can maintain the action in his own name, unaffected by any of these matters. The law applicable to these respective contentions is well settled. The difficulty arises in determining which of them is established by the evidence. If a surety pays a note, he is entitled to contribution against his cosurety. By the payment the note is extinguished, and his action against his cosurety is not on the note itself, but on an implied assumption. "An indorsement or assignment of the note cannot serve to keep the note itself alive so as to be made the basis of a suit." *Fitch v. Hammer*, 17 Colo. 591, 31 Pac. 336; *Swem v. Newell*, 19 Colo. 397, 35 Pac. 734. If, on the other hand, a note is paid, after its maturity, by a stranger, it will, in general, be held to be a purchase, and not a payment. This is especially so if it is the intention of the party paying not to satisfy the note. *Dodge v. Trust Co.*, 93 U. S. 379; *Barney v. Clark*, 46 N. H. 514; *Harbeck v. Vanderbilt*, 20 N. Y. 395. It is evident that the appellee procured the note and instituted the action at the instance and upon the request of John; and it is also equally evident that it was the intention of the parties to the transaction to preserve the life of the note by a purchase by and assignment to McKeough. For this purpose, and in consideration thereof, he gave his note, and thereby incurred a liability to the bank accepting it. Does the fact that John signed this note constitute the transaction a payment by him of the balance of the note in question? We think this must be answered in the negative, upon the authority of *Harbeck v. Vanderbilt*, supra. This was a case very similar in its facts to the one at bar. Decker and Brown recovered a judgment upon a joint contract against Jacob H. Vanderbilt and others. An execution having been issued to a county in which Jacob Vanderbilt had abundant property to satisfy it, he, through his attorney, paid his aliquot share—one-seventh of the judgment—in cash, and for the remainder he delivered to the plaintiffs in the judgment his promissory note, payable four months after date, to the order of and indorsed by Cornelius Vanderbilt. The attorney simultaneously took to himself an assignment of the judgment, to be held by him as an indemnity to Cornelius

Vanderbilt against his liability as indorser of the note. Before the note became due, Vanderbilt's attorney caused a fresh execution to be issued to collect the balance of the judgment against Harbeck and others, who were judgment debtors. In an action by Harbeck and others to enjoin the levy and collection of this execution, upon the ground that the judgment had been satisfied by Jacob Vanderbilt the opinion of the court was rendered by Gray and Selden, JJ., and it was held that the judgment was not satisfied, and could be enforced by Cornelius Vanderbilt as an indemnity against his contingent liability as indorser. After discussing the general principles upon which the case depended, Selden, J., used the following language: "Cornelius Vanderbilt did not actually pay any portion of the judgment; but he became contingently liable to pay it, and an assignment of the judgment to protect him against this liability was just as legitimate and proper as it would have been to indemnify him for money paid. Here, then, is an assignment made, evincing an evident intention not to satisfy the judgment, but to keep it in force for the benefit of somebody. It was perfectly equitable and just, as well as legal, that it should be kept in force as to the defendants, who had paid nothing upon it, for the benefit of one who had made himself liable in a certain contingency to pay it." The facts before us present a much stronger case in favor of appellee. The reasoning in that case clearly sustains his contention that the facts in evidence show a purchase, and not a payment, of the note in suit. We think, therefore, that the court below correctly held that the note sued on was a subsisting obligation, and that appellee was the owner thereof, and entitled to recover the balance due thereon. The judgment of the district court is accordingly affirmed. Affirmed.

(21 Colo. 329)

GRANT et al. v. VARNEY.¹

(Supreme Court of Colorado. March 4, 1895.)

MASTER AND SERVANT—DUTY OF MASTER TO FURNISH A SAFE PLACE FOR EMPLOYEES—ERRONEOUS INSTRUCTION—EFFECT OF SUBSEQUENT PROPER INSTRUCTION—INJURY TO MINER—CONSTRUCTION OF MINE—EXPERT TESTIMONY—INSTRUCTIONS TO EMPLOYEES—FELLOW SERVANT.

1. In an action against a mine owner for the death of an employé through the falling of a roof of a drift in which deceased was working, it was error to charge that, if defendant failed to furnish a safe place for deceased to work in, he was guilty of negligence.

2. Such error was not cured by a subsequent instruction that defendant was only required to furnish a reasonably and ordinarily safe place for his employés to work in.

3. In an action against a mine owner for the death of an employé through the falling of the roof of a drift in which he was working, it was proper to allow experienced miners to testify to the proper method of timbering a drift such as the one in which deceased was killed.

4. Evidence of instructions given to individ-

ual workmen to timber a drift when necessary for their safety was properly excluded, where it was not shown that such instructions were brought to the knowledge of deceased.

5. An instruction which informs the jury that though they might find, on a hypothetical case based on the evidence, and stated in the instruction, that plaintiff was guilty of contributory negligence, yet they must not find for defendant unless they also believed from the evidence that deceased did not exercise reasonable care, is misleading and confusing.

6. A person employed by a mine owner to timber a drift so as to provide a safe place for the miners who were running the drift to work in is not a fellow servant of the miners.

Appeal from district court, Pitkin county.

Action by Florence L. Varney against James B. Grant and others for injuries resulting in the death of plaintiff's husband. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

The plaintiff below, who is appellee here, instituted this action, as the widow and sole heir at law of Joseph N. Varney, deceased, to recover damages for the death of her husband, alleged to have been caused by the negligence of the defendants. The complaint charges that said Varney was a miner employed by the defendants to work in the St. Joe mine, and that while he was so engaged in his employment, in running a drift therein, the roof thereof caved in, and fell upon and instantly killed him. The caving and falling in of the roof were in consequence of the wrongful and negligent failure of the defendants properly to timber said drift, or cause the same to be timbered. The answer denies the negligence of the defendants, and contains three separate and distinct defenses, the first of which sets up the contributory negligence of Varney as the proximate cause of the injury; second, that, if the death of said Varney was caused by the negligence of any one other than that of himself, it was the result of the negligence of a fellow servant; third, that said deceased had equal means of knowledge with the defendants of the alleged unsafeness of defendants' mine, and thereafter continued in the service. Trial was had upon the issues thus joined, and a verdict and judgment for \$5,000 was rendered against the defendants, from which judgment the defendants come here by appeal. The evidence of plaintiff tended to show that on the night when Varney was killed he and his companion, Steel, were engaged in running a drift in the mine, in ground which, though breaking well, required blasting. These two men were doing the work of drilling and blasting. The defendants had employed a man named Moore to timber the drift so as to provide and keep a safe place in which Varney was to carry on his work. For a day or two previous, Moore had absented himself from the mine, and been in Aspen, occupying himself with politics in the town, instead of confining his attention to the work for which he was employed at the mine. In consequence of this inattention by Moore to his duty, and possibly from an in-

¹ Rehearing denied July 1, 1895.

sufficient force of men expeditiously to do the work, the protection of the drift was neglected, so that at the time of the accident the last of the timbering was at a distance of from 16 to 18 feet from the breast of the drift where the men were engaged in pushing forward the work of extension. While so prosecuting their work, with the roof of the drift back of them without any support for a space of about 17 feet, the roof suddenly caved in, and a huge bowlder fell upon and instantly killed both Varney and Steel. None but these two men were in the mine when the accident occurred, and it is from witnesses who were employed in and about the mine, and who found these unfortunate men soon after their death, that the evidence for the plaintiff was elicited. Testimony was also brought out, both in the cross-examination of plaintiff's witnesses, and in the direct evidence of defendants', tending to show that Varney knew, equally with defendants, of the danger that would probably result from working in a place where the timbering was so far behind the breast of the drift, and that he had, only a short time before he lost his life, been warned by one of the witnesses that there was danger in remaining in the drift, and that he (Varney) replied that, although there was danger, yet, by keeping close to the breast of the drift, he thought he might safely keep on with his work. There was evidence that before this Varney had complained to a fellow servant of his in the mine that the timbering was not keeping pace with the work of extension, and requested that complaint thereof should be made to Bush, the superintendent of the mine, which was done, with the result that no additional steps were taken to make the place safe, and no promise was made to do so. Bush is reported to have said that he wanted to push the running of the drift as rapidly as possible, so as to make for his employers that month as good a showing as possible, and thought that there was no necessity to hasten the timbering. In spite of this remonstrance and reply, Varney continued his work in this dangerous place. Evidence was also introduced tending, to show, by experienced miners, that good mining required that a drift made in such ground and under such circumstances as this should be kept timbered all the time up to within three or four feet, or the length of one set of timbers, of the breast of the drift. The evidence of the defendants had for its object to establish affirmatively that defendants were not negligent; that Varney knew, equally with the defendants, of the unsafeness of the place where he was working, and thereby was guilty of contributory negligence which would defeat a recovery by the plaintiff; that the injury was caused, if by anything other than the negligence of Varney himself, by the negligence of Moore, who was a fellow servant of his. There was also evidence to the effect that defendants had used reasonable care in providing a proper

place for Varney to work, and an attempt is claimed to have been made by the defendants to show that they had issued general rules and provided instructions for the miners to do for themselves the work of timbering the drift whenever, in their judgment, their own safety demanded it, but that Varney disregarded the rules thus prescribed, and, by violating them, brought upon himself his own destruction. From this summary of the evidence it will be observed that plaintiff's cause of action, and all the defenses interposed by the defendants, unless it be that of the negligence of a fellow servant, have some evidence which the parties had the right to have the court submit to the jury by appropriate instructions.

C. S. Thomas, Bryant & Lee, and C. H. Pierce, for appellants. Joseph W. Taylor, for appellee.

CAMPBELL, J. (after stating the facts). 1. The first instruction given by the court of its own motion is as follows: "If the jury believe from the evidence in this case that the defendant E. W. Bush was superintendent of the defendants, and had full charge and control of the property, and of the men employed therein, then it was his duty to see that the drift in which deceased was at work was properly and securely timbered, and his failure to do so would be negligence, and his negligence would be the negligence of the other defendants whom he represented; and he could not delegate this duty to an employé, and shift the responsibility for negligence in not properly timbering such drift on to such employé, so that the defendants could claim that the injury occurred by reason of the negligence of a coemployé. *The duty to furnish a safe place for said Varney to work in was the duty of the defendants. If they failed in that, they were guilty of negligence.*" The defendants assign for error the giving of the foregoing instruction, especially the portion which we have italicized. This instruction is not the law. It virtually declares that the duty of the master is to furnish to the servant an absolutely safe place in which to work. In other words, it makes the former an insurer of the safety of the latter. The failure to provide a safe place for the employé to work in is not negligence of his employer, but the jury were, by this instruction, told that it was. The contention of counsel for appellee that the vice in this instruction is not fatal to the judgment, because in other and subsequent instructions the jury are practically told that the employer's duty requires that he should furnish a reasonably or ordinarily safe place for his employé to work in, is plausible, rather than sound. True it is that where the court gives an instruction which contains only a partial, though, so far as it goes, correct, legal proposition, and in another instruction completes and perfects the statement of the correct rule, prejudicial

error may not be assigned. But where, in the same charge to the jury, are found one instruction embodying a correct legal principle, and another instruction containing a contradictory statement upon the same proposition, which is not the law, there is error. For this court to attempt to speculate or determine which instruction the jury in such a case selected as stating the correct rule, and which they rejected as incorrect, would lead us upon an uncertain voyage, and would be to credit the jury with powers of legal discrimination superior to those possessed by the court which submitted for their guidance rules so essentially antagonistic. To say that a rule which makes a master the insurer of the safety of his servant is, in effect, the same rule which requires that he shall provide only a reasonably safe place for the latter to work in, would be to abolish all rational and recognized legal distinctions. *Wells v. Coe*, 9 Colo. 168, 11 Pac. 50; *Clare v. People*, 9 Colo. 122, 10 Pac. 799, and cases cited; *Holman v. Security Co.*, 20 Colo. —, 36 Pac. 797.

2. This ruling upon the foregoing assignment of error necessitates a reversal of this case, and renders unnecessary a determination of the numerous other errors discussed. In view, however, of the contingency of another trial, and to save possible error in the court below, we feel constrained to add some suggestions that may be of some assistance to the court and counsel. In a case involving issues such as are raised by the pleadings and evidence in this case, it would seem that so many of the questions, fully discussed by counsel in their briefs, have been settled by repeated decisions of this court that an examination of these cases ought certainly to furnish a satisfactory and safe guide to court and counsel in drawing instructions.

(a) Witnesses for the plaintiff were permitted, over defendants' objection, to state, in substance, what was the proper method of timbering a drift run in such ground as the evidence shows this one penetrated. Counsel for defendants now say that such questions permitted the witnesses to state what the jury were, as a matter of fact, to find from the evidence, and that the opinions of the witnesses were not admissible. The witnesses were not allowed to state whether or not this drift, with the timbers 15 or 16 feet from the breast, was safe. They spoke only as to the proper way to timber it. We think there was no error in this. These witnesses qualified as experienced miners. The questions related to matters of skill in a department of labor that requires special training, and to which only those skilled in such work were competent to give intelligent answers. The fact, if it be a fact, that the court did not explain to the jury this class of evidence, and throw about it the proper safeguards, does not go to the admissibility of the evidence, but only to the alleged error of the court in other particulars.

(b) The court below struck out certain evidence given by one of the witnesses for the

defendants, and refused to admit other evidence offered by the defendants, tending to show that defendants had issued general rules and instructions to its workmen, which provided, in substance, that the workmen who were engaged in running the drift should do timbering whenever they considered it necessary and essential for their safety. Such evidence was, of course, pertinent, and an offer to prove such rules by competent testimony should have been allowed. An examination of the record shows that such attempt was only to establish that such instructions had been given to individual workmen, and no offer was made to show that any general rules or instructions had been issued by defendants or their superintendent, or that knowledge of such directions to individual employes had ever been brought home to the deceased. In this ruling by the court there was no error.

(c) In instructions Nos. 11, 13, and 14, as asked by the defendants, the court stated to the jury a hypothetical case, based upon the evidence, which, if the jury found to be true, they were told, would prevent a recovery by the plaintiff. The assumed case was one that was intended to constitute contributory negligence on the part of Varney. To each one of these instructions the court added a proviso which, in its logical effect, must have conveyed to the minds of the jury—if it conveyed any intelligent meaning—that notwithstanding they might, in accordance with the first part of the instructions, or the instructions as asked, find that Varney was guilty of contributory negligence, yet they must not find for the defendants unless they also believed from the evidence that Varney was not exercising reasonable care and prudence. It is unnecessary to determine whether or not these instructions, as asked by the defendants, were the law. It is sufficient to say that, as modified and given, they must have confused and misled the jury, as they would almost any legal mind. It is true that if a master is guilty of negligence which was the proximate cause of the injury complained of, and there is nothing else in the case that calls for the application of some recognized exception to the general rule, the servant may recover, if he was at the time using reasonable care. If the proviso added to these instructions merely states this general rule, and if the instruction, as asked, stated a contributory rule, the former should have been given by itself, and the latter refused altogether. If, however, the instructions, as asked, did state what in law constitutes a case of contributory negligence, they should have been given. But if it be contended that both these instructions and the provisos are but different forms of the same legal proposition, still it was confusing to the minds of the jury thus to combine them; for the adding of the provisos would naturally lead the jury to conclude that the instructions, as asked, were themselves incorrect, and that the court thereby intended the jury to understand that the

provisos added by the court were necessary to make the instructions good. If, on the other hand, the instructions and provisos constitute inconsistent propositions of law, then in one instruction we have two incorrect and contradictory rules, and such combination, of course, would be prejudicial error.

(d) We think that Moore was not a fellow servant of Varney. The duty of the master is to furnish and maintain a reasonably safe place for the servant to work in. If the master delegates to an agent the performance of this duty, the latter is considered as the representative of the former; and if such agent is negligent in furnishing or maintaining such a safe place, and if, in working therein, and without his fault, an injury occurs to another employé, such negligence is the negligence of the master, for which the injured workman may recover. It is the same as where the master is bound to furnish for his workmen reasonably safe and proper machinery, and employs an agent to purchase it, or where he employs a servant to maintain the same in good repair. If such agent is negligent, and selects unsuitable or unsafe machinery, or the servant neglects to keep in good repair said machinery, in using which another servant receives an injury without any fault on his part, the negligence of the agent who bought the machinery, or of the servant whose duty is to keep the same reasonably safe, is the negligence of the master, for which an action will lie.

(e) If this case is to be tried again, we think there will not be a repetition of the unusual scene that marked the close of the first trial. In his closing argument to the jury, counsel for plaintiff, actuated, doubtless, by zeal for his client, and possibly carried away by the exuberance of a heated imagination, went outside of the record, and, at the close of a scathing arraignment of defendants, referred to them as "living in their mansions, and handling their millions." The record is silent as to any evidence upon the kind of houses in which defendants live, or the extent of their wealth. Objections were promptly made by counsel for defendants, and plaintiff's counsel withdrew the reference, and asked the jury to strike it from their minds, in which request the court, somewhat mildly, joined with counsel, and told the jury entirely to disregard the statement because it was improper, and inferentially referred to the counsel for plaintiff by remarking that "such statements should not be made in court to the jury, in the argument of this case." Thereupon plaintiff's counsel proceeded with his argument, employing language set out in full in the bill of exceptions,—exceedingly forceful, eloquent, and picturesque. At the close of his peroration, as we are advised by the affidavit of one of defendants' counsel, "the audience broke out into prolonged, loud, and continuous applause, thereby manifesting their approval of the statements of counsel for the plaintiff." The court said to the audi-

ence, "Gentlemen, that is entirely improper to have any such demonstrations in the court room"; and again the court cautioned the jury against allowing such things as these to influence their verdict. This rather extraordinary and dramatic closing of a trial in a court of justice calls for a few words from us. Great latitude should be allowed counsel in addressing a jury, so that he may fully and fairly present every point in his case; but he should be kept within the limits of the evidence, and not be permitted, in his argument, to testify, without having been sworn as a witness, or to interject into the case evidence that was never elicited at the trial. In *Brown v. Swineford*, 44 Wis. 282,—which decision fully comports with our ideas of professional ethics,—the forcible remarks of Chief Justice Ryan we adopt as our own. The case was an action of tort, calling for exemplary damages, and evidence of the financial ability to pay was admissible, under the decisions of that court. There was no evidence at all upon this point. Defendant, however, was connected with a railroad corporation. In argument to the jury, counsel for the plaintiff endeavored to supply the defect in his proof as to the defendant's pecuniary ability to respond to a verdict by drawing for his facts upon his unaided imagination, and attributing to the defendant the possession not only of great wealth, but ascribing to him the possession of earthly goods in amount equal to that belonging to the corporation of which defendant himself was only a subordinate officer. For this the supreme court reversed the judgment of the lower court. In that case, as in this, the practice condemned arose in the case of an eminent member of the bar, whose professional reputation is well known, and "whose professional ability needs no adventitious aid, and who probably fell into this error casually and inadvertently. His professional standing shields him from personal censure, while it will give emphasis to the rule laid down." The applause of the audience probably could not have been anticipated, and for such a demonstration no one connected with this case can be held responsible. In our judgment, the court should have more pointedly rebuked counsel for his violation of professional conduct, and more clearly impressed upon the jury that they should not be influenced thereby. A spontaneous outburst of applause by the audience ought not to have been passed over as only a trivial offense, but they should have been punished in some proper way, or at least severely censured, for their reprehensible interference with the course of justice, and for their evident attempt to influence or coerce the return of a verdict for plaintiff. The jury returned with their verdict a statement that neither the transgression of counsel nor the applause of the audience influenced them in their deliberation. Possibly not. Possibly the verdict would have been the same, had there been no audience present, and had counsel altogether

valued his closing argument; but that, without any suggestion or request, so far as the record shows, the jury should have made such an unsolicited and voluntary finding awakens in our minds a fleeting suspicion that their better judgment must have told them that such conduct sometimes, with some other juries, might possibly produce such a result. The question is not, necessarily or primarily, what effect did such things as happened at the close of this trial have in this particular case, but what tendency do they and would they naturally and probably have with juries in general, in arriving at their verdicts? The most impartial minds and the most honest men find it difficult to decide correctly and fairly the complicated questions of fact that are submitted for their determination in a lawsuit, without having thrown into the balance that which naturally appeals to passion and prejudice. When such foreign influences are brought to bear upon either trained or untrained minds, it is difficult to tell just what effect they have. Whatever be the merits of his cause, every man is entitled to a fair and impartial trial in courts of justice, according to the established rule of judicial procedure. In this state he is not required to submit the issue of his life and his property rights to a verdict of a town meeting, or to an organized band of people who throng the court room to impress or coerce by their presence the jury which has been organized by law to try his cause. The foregoing considerations require that the judgment should be reversed and remanded. Reversed.

(21 Colo. 119)

RYAN v. PEOPLE.

(Supreme Court of Colorado. June 17, 1895.)

CRIMINAL PROSECUTION — RIGHT TO CONFRONT WITNESS — ADMISSIBILITY OF DEPOSITION — NOTICE — IMPEACHMENT OF WITNESS — LAYING FOUNDATION.

1. Const. U. S. Amend. 6, providing that in criminal prosecutions the accused shall have the right to be confronted with the witnesses against him, applies only to trials in the federal courts of parties charged with a violation of the constitution of the United States or of the laws of congress.

2. Const. art. 2, § 16, declaring that the accused shall have the right to meet the witnesses against him face to face, and section 17, permitting the taking of depositions to be used on the trial under certain limitations, are to be construed together, and, when so construed, sanction the taking of a deposition on the part of the prosecution, and its introduction against the accused on final trial, as provided by Acts 1889, p. 475, §§ 1-3.

3. The provisions of Acts 1889, p. 475, §§ 1-3, relative to depositions of witnesses in criminal cases, being an exception to the general rule requiring the prosecution to confront the accused on final trial with the witnesses against him, must be followed in all substantial particulars, or the deposition cannot be read to the jury.

4. Under Acts 1889, p. 475, § 2, permitting the taking of a witness' deposition by a judge of the supreme, district, or county court, to be used on a criminal trial, and providing that reasonable notice of the time and place shall be given the accused and the prosecuting attorney,

it is the duty of the judge to fix such time and place, and give the notice, and, when this is done by the district attorney instead, the accused need not appear, and such deposition cannot be used against him at the trial.

5. Defects in the manner of issuing or serving notice of the taking of a deposition to be used on a criminal trial, as provided by Acts 1889, p. 475, § 2, are waived, when the attorney for the accused appears, and subjects the witness to a searching cross-examination, though the accused himself elects to stay away.

6. A witness cannot be impeached by showing that he has made statements inconsistent with his testimony, unless he be given an opportunity to explain or deny the statements claimed to be contradictory; and it is immaterial that his testimony was taken by deposition, and that some of the alleged statements were made after his examination, when it was too late to lay the foundation for their introduction, while others, though made before he gave his deposition, were not known to counsel till afterwards.

Error to district court, Arapahoe county.

Michael Ryan was convicted of larceny, and brings error. Affirmed.

Plaintiff in error was tried in the district court of Arapahoe county upon an indictment for the larceny of a check of the value of \$5,000 from one Adam Hjorth. In a second count he was charged with larceny as bailee. He was convicted of the crime of larceny, and sentenced accordingly. To review the judgment, he brings the case here upon writ of error. The following provisions of the bill of rights of the state of Colorado and of the statutes are referred to in the opinion.

Const. art. 2:

"Sec. 16. That in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

"Sec. 17. That no person shall be imprisoned for the purpose of securing his testimony in any case longer than may be necessary in order to take his deposition. If he can give security he shall be discharged; if he cannot give security, his deposition shall be taken by some judge of the supreme, district or county court, at the earliest time he can attend, at some convenient place by him appointed for that purpose, of which time and place the accused and the attorney prosecuting for the people, shall have reasonable notice. The accused shall have the right to appear in person and by counsel. If he have no counsel, the judge shall assign him one in that behalf only. On the completion of such examination the witness shall be discharged on his own recognizance, entered into before said judge, but such deposition shall not be used, if, in the opinion of the court, the personal attendance of the witness might be procured by the prosecution, or is procured by the accused. No exception shall be taken to such deposition as to matters of form."

Acts 1889, p. 475:

"An act to secure the attendance of witnesses in criminal cases, and to provide for the taking of bonds in that behalf, or for taking the depositions of such witnesses.

"Section 1. Whenever, in the opinion of the district attorney or the defendant, it is necessary or advisable that the testimony of witnesses on behalf of the state or defendant shall be secured upon the examination of any criminal accusation or indictment, the district attorney or defendant may give notice to the clerk of the district or county court, who may issue an order to bring before him any such witness, who shall give bond for his appearance as a witness at such trial in the sum of five hundred dollars. If the person so ordered neglects or refuses to appear, or to give bond in the manner required, such magistrate or coroner may issue a warrant of commitment against him, and he shall be confined in the county jail thereunder until his depositions can be taken, as provided by law.

"Sec. 2. In case any person shall be committed to jail under the provisions of the foregoing section, his deposition shall be taken by some judge of the supreme, district or county court within five days, at some convenient place by him appointed for that purpose, of which time and place the accused and the attorney prosecuting for the people shall have reasonable notice. The accused shall have the right to appear in person and by counsel. If he has no counsel, the judge shall assign him one in that behalf only. On the completion of such examination, the witness shall be discharged on his own recognizance, entered into before said judge.

"Sec. 3. Any deposition taken in pursuance of the provision of this act may be offered and read in evidence upon any trial of the accused upon a criminal charge, wherein the facts testified to in such deposition are relevant or material, and no exception shall be allowed to such deposition as to matters of form: provided, that such deposition shall not be used if, in the opinion of the court, the personal attendance of the witness might be procured by the prosecution or is procured by the accused."

E. B. Cronkhite, O. S. Barton, W. H. Davis, and Morgan Edgar, for plaintiff in error. Eugene Engley, Atty. Gen., Byron L. Carr, H. T. Sale, F. P. Secor, and Thomas Ward, for the People.

HAYT, C. J. (after stating the facts). Some months prior to the trial in the district court, but after the indictment was presented in this case, the deposition of one A. S. Dulin was taken at the instance of the prosecution, and allowed to be introduced in evidence, over the defendant's objections, upon the final trial. Error is assigned upon the ruling of the district court admitting this deposition, and this raises the principal question in the case. It is claimed by counsel for plaintiff in error that the admission of this deposition

was in violation of the sixth amendment to the constitution of the United States, and of the sixteenth section of the bill of rights of the state of Colorado, and that it was taken without reasonable notice to the accused. In so far as the objection to the use of the deposition is based upon the right secured to an accused in criminal prosecutions by the sixth amendment to the constitution of the United States, it is sufficient to say that this clause, as interpreted by the federal courts, is limited in its application to trials in the federal courts of parties charged with a violation of the constitution of the United States or of the laws of congress. *Barron v. Baltimore*, 7 Pet. 243; *Withers v. Buckley*, 20 How. 84; *U. S. v. Cruikshank*, 92 U. S. 542; *Walker v. Sauvinet*, Id. 90; *People v. Fish*, 125 N. Y. 136, 26 N. E. 319. The question may therefore be considered without reference to the constitution of the United States. Coming, then, to the bill of rights of the state of Colorado, we find that the section granting to an accused the right to meet the witnesses against him face to face is immediately followed by a provision permitting the taking of depositions to be used upon the trial, under certain defined limitations. These provisions, being a part of the same instrument, must be construed in *pari materia*; and, when so construed, no doubt can be entertained that in this state, at least, there is constitutional sanction for the taking of a deposition on the part of the prosecution, and the introduction of the same against the accused upon final trial, under some circumstances. In order to give effect to this constitutional provision, the legislature of 1889 passed an act entitled "An act to secure the attendance of witnesses in criminal cases, and to provide for the taking of bonds in that behalf, or for taking the depositions of such witnesses." This statute, which will be found in the statement preceding this opinion, provides, in the first section, that, whenever the district attorney or the defendant deems it necessary or advisable that the testimony of a witness shall be secured, notice may be given to the clerk of the district or county court, who may issue an order to bring before him any such witness. The clerk is also authorized to require the witness to give bond in the sum of \$500, and, upon his refusal to do so, the magistrate may issue a warrant of commitment against him, and the witness shall be confined in the county jail thereunder, until his deposition can be taken. Section 2 follows closely the language of section 17 of the bill of rights. It provides that, in case any person shall be committed to jail under the provisions of the foregoing section, his deposition shall be taken by some judge of the supreme, district, or county court within five days, at some convenient place by him appointed for that purpose, of which time and place the accused and the attorney prosecuting for the people shall have reasonable notice.

It requires no argument to show that provisions of this character, being an exception to the general rule of evidence in criminal cases requiring the prosecution to confront the accused upon final trial with the witnesses against him, deal with one of the most sacred rights of the individual, and must be followed in all substantial particulars, or the deposition will not be permitted to be read to the jury. 3 Rice, Ev. c. 33; *People v. Morine*, 54 Cal 575; *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862. It will be noticed that section 1 of the act requires a notice to be given to the clerk by the district attorney or defendant desiring a deposition to be taken, while section 2 prescribes a notice of the time and place to be served upon the accused and the attorney prosecuting for the people, which notice shall be reasonable. We think it is clearly the intention of these provisions that the time and place should be designated by the magistrate, and that the notice of taking the depositions should emanate from that officer. Certainly, the time is to be appointed by the magistrate, and the reasonable character of the notice is to be determined by him; and the fact that both the accused and the attorney prosecuting for the people are to be notified of such time and place shows, when read in connection with the context, that the notice must originate with the magistrate. The district attorney, and not the court, fixed both the time and place for taking the deposition, while the only notice served emanated from the district attorney, and was signed by him. It was received by the defendant some time during the 23rd, and by it he was advised that the deposition of Dulin would be taken at 10 o'clock the next morning, at the district court room in the courthouse of Arapahoe county. The time allowed was very short, and, as we have shown, the district attorney, in fixing the time and place, was acting without authority of law, and the accused was under no obligation to respond to the notice, and, if he or his counsel had not appeared, Dulin's testimony could not have been used against the defendant at the trial.

When the case was originally presented to us, it was made to appear that the defendant's attorney had entered a special appearance for the purpose of protesting against the taking of the deposition, and counsel for the state, as well as the court, overlooked the fact that, although notice was given that counsel desired to appear solely for the purpose of protesting against the taking of the deposition on constitutional grounds, when this protest was overruled he remained and cross-examined the witness fully upon all pertinent points brought out upon the direct examination. It is true the defendant did not appear in person, and it is equally true that the magistrate was without power to compel his attendance, but he elected to stay away and intrust his case to counsel. The counsel selected was among the ablest

at this bar, and in every way qualified to protect the interests of the defendant. He subjected the witness to a searching cross-examination, and had the benefit of that cross-examination before the jury at the final trial. In view of these circumstances, the form and manner of giving notice is immaterial, and we are now clearly of the opinion that the defendant had every benefit that could have accrued to him by the fullest notice, and that he has waived all defects in the manner of the issuance or service of notice upon him. *Elliott*, App. Proc. §§ 290, 291.

At the trial it was sought to impeach the evidence of the witness Dulin by showing that at other times, before and after his deposition was taken, he had made statements contrary to those contained in the deposition. This offer of proof on the part of the defendant was rejected by the court, for the reason that the proper foundation had not been laid for it, the attention of the witness Dulin while upon the stand not having been called to these alleged contradictory statements, and he having had no opportunity to explain or deny the same. Counsel concede the general rule to be that a witness cannot be impeached by showing that he has made statements at other times inconsistent with his testimony, unless a foundation be first laid by interrogating the witness himself as to whether or not he has made such statements. This rule is of almost universal application. It is founded upon the soundest principles, and supported by the great weight of English and American authority. The reasons given for the rule are that justice requires that the attention of the witness should be first called to the subject, in order that he may explain or deny the alleged contradictory statements, and be given an opportunity, upon "a re-examination, to explain the nature, circumstances, meaning, and design of what he is proved elsewhere to have said." 1 Greenl. Ev. (14th Ed.) § 462.

This case is urged, however, as falling without the rule, for the reason that the statements claimed to have been made by the witness were made, some of them, after the deposition had been taken, and at a time when it was too late to lay the foundation for their introduction, while others, although made before, were not known to counsel until after the witness had been examined. Similar claims have been advanced from time to time in other jurisdictions, but the courts have with great unanimity declared against them. The few cases in which a contrary doctrine has been held cannot be considered as sufficient authority to destroy the rule or weaken the force of the principles upon which it is based. "The fact that one party has lost the power of contradicting his adversary's witness is really no greater hardship to him than the fact that his adversary has lost the opportunity of recalling his witness and explaining his testimony would be

to him. There is quite as much danger of doing injustice to one party by admitting such testimony as to the other by excluding it. The respective advantages and disadvantages of a relaxation of the rule are so problematical that courts have with great uniformity refused to recognize the exception." *Mattox v. U. S.*, 156 U. S. 237, 15 Sup. Ct. 337; *Stacy v. Graham*, 14 N. Y. 492; *Unis v. Charlton's Adm'r*, 12 Grat. 484. The opinion in *Mattox v. U. S.*, supra, contains an able and exhaustive review of the authorities upon the question. The exception there and here claimed was held to have been rightfully denied in that case, although the defendant was upon trial for a capital offense, which trial resulted in his conviction and sentence. We fully concur with the reasoning of the majority of the court in that case, and hold in this case that the evidence of the witnesses Coryell and Masterson, sought to be introduced for the purpose of showing that the witness Dulin had made statements out of court contradicting or differing from his deposition, was properly rejected, as no foundation had been laid for the introduction of such evidence.

Upon a careful review of the record, we are satisfied that the defendant has had a fair and impartial trial. The verdict is fully warranted by the evidence. The jury were fully and fairly instructed upon the law applicable thereto, and no sufficient reason has been shown why the judgment of the district court should not be carried out. It will therefore be affirmed, and the prisoner remanded to the custody of the warden of the state penitentiary, in order that he may serve out the unexpired term of his sentence. Judgment affirmed.

(6 Colo. App. 429)

DENVER & R. G. R. CO. v. WATSON.
(Court of Appeals of Colorado. June 10, 1895.)

EVIDENCE—STATEMENTS AT FORMER TRIAL.

In an action against a railroad company for injuries to a horse by its train, it was error to allow plaintiff to introduce evidence of statements of the engineer of the train, while testifying on a former trial, as to the rate at which the train was running when the accident occurred.

Appeal from district court, Pitkin county.

Action by Samuel Watson against the Denver & Rio Grande Railroad Company for damages for injuries to a horse. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Wolcott & Valle and William W. Field, for appellant.

BISSELL, J. Samuel Watson was the owner of a stallion, which was injured about the 17th of September, 1892, on the line of the railroad operated by the Rio Grande Company in Pitkin county. One of its legs was cut off, and the horse was of necessity

ultimately killed. Satisfactory evidence was produced to show the accident occurred on the line of road, and that the animal must have been hurt by one of the trains run by the company. The locus of the accident was very clearly established by the blood and other marks on the ties and rails, and the horse was found but a short distance from the point where it had evidently been struck by the train. The necessity to establish the negligence of the company is conceded, and Watson offered evidence tending to prove it. Some testimony was offered to show the passage of a train along the line of the road in the night or early in the morning, and the failure on the part of the employees operating it to blow a whistle or ring a bell before it reached the crossing which is near the point of the accident. Since the thing happened in the night, the evidence on the subject was neither very direct nor persuasive, but was probably sufficient to go to the jury as tending to establish negligence, if otherwise the case was sufficient in this particular. The plaintiff did not prove this train to be the only one running over the line on that night, and of course did not establish with certainty that the train which failed to whistle or ring its bell killed the horse. Omitting any further reference to this matter, the plaintiff attempted to prove negligence on the part of the company by offering evidence which tended to show a running of the train at an unusual and dangerous rate of speed. This was not done, however, by the production of any other testimony than the declaration of the engineer who is said to have been in charge of the engine pulling the train. The statements of the engineer were not made at the time the accident happened, nor immediately afterwards. Just when they were made is not disclosed. It appears from the record a trial of this case was originally had in the county court, and from thence came to the district court for trial on appeal. When the first trial was had, the abstract does not show. At all events, the evidence on this point was given by the witness Hardenburgh, who stated the engineer testified in the county court that his engine was running about 30 miles an hour when a horse was struck. The company promptly objected to its introduction, on the ground that there was nothing in the case to show the declaration to have been made so concurrently with the happening of the event as to constitute a part of the *res gestae*, and therefore to be admissible as being the declaration of an agent made at the time of the accident. Manifestly the objection was well taken. *Edmunds v. Curtis*, 8 Colo. 605, 9 Pac. 793; *Mining Syndicate v. Rogers*, 11 Colo. 6, 16 Pac. 719; *Building Co. v. Klein* (Colo. App.) 38 Pac. 608. There is no doubt respecting the admissibility of the declarations of an agent made at the time he is engaged in the business of the principal, and about the time of the happening of the matter which is the sub-

ject of inquiry. To bring the declarations within the rule, and make them admissible, it must always appear that they were made at the time and under circumstances which bring them within the tolerably well-defined rule as to the necessity of the concurrence of the act and the declaration. We are referred to no case which would make the declarations of the engineer given at the time of the first trial of the case admissible on this ground. Had the engineer been produced as a witness, and had he given testimony in opposition to what he had stated on the former hearing, then this might have been introduced for the purposes of contradiction. It was not admissible as the declaration of an agent made at the time of the event. The court committed an error in admitting it, which may have largely affected the jury, and determined them in the verdict which they rendered. No other serious error occurred or requires discussion. The admission of this testimony over the objection of the company compels us to reverse the judgment, and to send the case back for another trial.

(6 Colo. A. 446)

DENVER TRAMWAY CO. v. CLOUD.

(Court of Appeals of Colorado. June 10, 1895.)

STREET-RAILWAY COMPANY — EJECTION OF PASSENGER — PETITION — EXEMPLARY DAMAGES.

1. A complaint in an action against a street-railway company, which alleges that, after plaintiff purchased his ticket, he entered defendant's car, and was ejected therefrom by defendant's servants, and prays for damages, states an action in tort, and not one for breach of contract.

2. In an action by a passenger against a street-railway company for wrongful ejection from its car, plaintiff is not entitled to exemplary damages where the conductor ejected him through a misconception of his rights, and in doing so used no more force than was necessary to accomplish the result.

Appeal from district court, Arapahoe county.

Action by Henry J. Cloud against the Denver Tramway Company for damages for the wrongful ejection of plaintiff from one of defendant's cars. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

A. M. Stevenson, for appellant. R. H. Gilmore, for appellee.

BISSELL, J. Henry J. Cloud was a passenger on the surface lines of the tramway company in February, 1892. He was ejected from the car. His loss was not great, and he was personally uninjured in the controversy, but nevertheless he has the right to maintain the suit if his rights have been infringed by the wrongful conduct of the company's servants. Cloud originally took passage on what is known as the Agate Avenue Electric Line, which connects at the loop with a line belonging to the same company, which

runs on Fifteenth street and Colfax avenue. At this time it was a cable line, and the passengers from one to the other were given a continuous ride or passage on the payment of one fare and the procurement of a transfer check. Cloud reached the loop at about 9 in the morning. He had paid his fare on the Agate avenue branch, and received from the conductor a transfer check, purporting to give him the right to continue his journey on the cable line to its end. The check was in the ordinary form used by the tramway company, was punched for the month of February, and as of its 1st day, and of the hour of 9, whereby Cloud secured the right to continue his journey between the hours of 9 and 10 from the loop onward. When he entered the cable car, he presented his transfer check, but the conductor refused to receive it. The reason is not very clear. The conductor was not produced, and the company offered no evidence by way of explanation or against plaintiff's case. According to the plaintiff's story, the conductor said the transfer was regular, so far as concerned its date and its hour and the time of presentation, but he insisted there had been a change in the form of the transfers issued by the company on that day, and, whether the Agate line conductor had or had not made a mistake, the transfer check gave Cloud no right to pursue his journey without the payment of a fare, which the conductor demanded. Cloud refused to pay it, insisted he had received the transfer from the conductor, and, if there was any mistake, it was the company's mistake, and not his; and he would neither submit to the inconvenience of recovering his fare from the company, nor would he offer any other thing in exchange for his ride than the transfer, whereupon the conductor said he must either pay or get off. Cloud refused to do either. The conductor called the gripman and the conductor of a passing car to his assistance, and ejected the passenger. There was no contest, conflict, or scuffle about it. Cloud simply refused to go, and the only resistance which he offered was the resistance of his inert weight. The employes of the company used no more force or exertion than was necessary to accomplish their object. Whereupon he brought this action.

The case calls for neither comment nor sympathy. The suit is simply one which has been brought by a passenger to recover for a wrongful act, and to compel the transportation company to observe and protect a passenger's rights from any infringement or abuse on the part of the employes. Many questions were raised on the motion to set aside the verdict, which are preserved in the assignment of errors, but in the argument of counsel for the appellant none are presented save those which relate to the character of the action and to the instruction of the court on the subject of exemplary damages. This narrows the inquiry, and permits us to dis-

pose of the appeal with a brief consideration of these two matters. The first proposition is based on the character of the complaint, and what is alleged to be the form of the suit. The pleader has stated the purchase of a ticket, and the payment of his fare, and then detailed the circumstances of his ride and ejection, concluding with a prayer for damages. Appellant's counsel insist that this, of necessity, makes the case an action for breach of contract, which will only entitle the plaintiff to recover whatever pecuniary loss he may be able to prove. The theory is coincident with the common-law rule which permitted the injured party in a case of this description to declare in either case or assumpsit. The only way to determine the character of the action was to consider and analyze the declaration. If the declaration alleged a promise, a consideration, and a breach, the action would be taken to be in assumpsit, and the plaintiff held to have waived the tort. *Smith v. Seward*, 3 Pa. St. 342; *Porter v. Hildebrand*, 14 Pa. St. 129; *Railway Co. v. Chappell*, 21 Fla. 175. We do not agree with counsel as to the proper interpretation of the pleading, even though we were bound to follow the common-law rule. No promise was alleged. The only thing deducible in the nature of a promise is an implied one which the law raises against a railroad company when the passenger alleges a proper entry into the car, and the payment of his fare. This, however, is not the allegation of a specific promise, which, under the authorities, must concur with the payment of a consideration to make such an action one in assumpsit. We are not willing, however, to concede the existence of the rule. Under our system of pleading we have but one form of action, and when the pleader has stated the facts out of which his cause of action arises, and supports that cause by proper proof, he may recover for the tort, even though he has stated facts which at the common law would, of necessity, make his action one in assumpsit, and not in case. In other words, we are not willing to admit the existence of those technical distinctions which at the common law determined what action was brought, and what relief the plaintiff might have. Undoubtedly the pleader might so frame his complaint as to disentitle himself to any other judgment than one for the breach of a contract, with such damages as the breach proved might warrant. Even though, in this case, the plaintiff had alleged the payment of his fare, and a promise by the company to carry him, yet, when he proceeded to state the tort and claim the damages therefor, he cannot, because he has alleged both a promise and a consideration, be limited to a recovery as for a breach of contract. No further discussion of the subject is necessary, nor are we called upon to imagine and state a case to which the common-law rule might be properly applied. It is enough to say the present pleading is not

brought by its terms, nor by any reasonable construction, within its limits.

The other question respects the damages which the plaintiff may recover. It is impossible to determine from the record or from the verdict how far the jury were controlled or influenced by the court's instructions on the subject of exemplary or punitive damages. They were quite elaborately instructed about it, and rendered what may be regarded as a substantial verdict. The plaintiff made a case which entitled him to recover damages, and the amount of them of necessity rested somewhat largely with the jury. But he made no case which entitled him to exemplary damages. We are not compelled to enter the debatable territory filled with learned discussions as to the classes of causes and the sort of wrongs which may be redressed by the infliction of certain penalties. For many years, in this state, exemplary damages could not be recovered in any form of a civil action. The law remained in this condition until it was changed by an act of the legislature in 1889. Since that time punitive damages are recoverable in civil actions whenever the plaintiff, by proper pleading and proof, brings himself within the purview of the statute. There is probably no trouble respecting the plaintiff's complaint. Whether it would have been open to a general demurrer, or whether, on objections to the introduction of proof tending to bring the case within the statute, an amendment would have been necessary, we need not consider. It has been adjudged in this state that a party must bring himself within the statute by both pleading and proof to entitle himself to either offer the testimony or to obtain a judgment which shall include damages of this description. Conceding the sufficiency of the complaint, the plaintiff did not make the necessary proof. The statute has been construed by the supreme court, and it is very clear the evidence must disclose some wrong motive in the doing of the thing complained of, or else the circumstances of the act must show a reckless disregard of the injured person's rights. Malice cannot be implied. There was nothing whatever in the circumstances of the ejection of Cloud which permits the inference of a bad motive on the part of the conductor. He made a mistake, he committed a wrong, and the company should be compelled to respond. The duty of the company with reference to the care of its passengers and the conduct which must be observed by their employees with reference to those who are being transported is very clear. It is likewise true that every transportation company, whether what is known as the "surface companies" in cities or the "general transportation lines" of the country, has the right to adopt reasonable regulations for the management of its business, which must be observed by the passenger, and which may be enforced by the employees. The company runs this risk, and they may be called

upon to answer if their servants fall in the method of the discharge of their duties, or mistake the occasion for the enforcement of the regulations. Notwithstanding these considerations, we are not at liberty to infer bad motives because the employé has made a mistake. There must be some proof tending to show the existence of those motives, if the right to recover such damages rests upon its existence. If, on the other hand, the right is based on a disregard of the passenger's rights, exhibited by the employé, it is equally necessary to prove facts establishing this disregard, and its reckless character. There is nothing in the present case to show either. The employé mistook his right, and enforced a regulation which, so far as the record goes, he had no business to carry out. He enforced the regulation without the exhibition of any more force than was necessary to accomplish the result, and with a decent regard for all of the plaintiff's rights, except his right to ride on the car on this transfer. If the case demonstrated the right of the conductor to eject the passenger, there was nothing whatever in the act which would give rise to a cause of action. This must spring, if at all, from the fact that the conductor had no right to expel him; and, while the expulsion will sustain the suit, it will not uphold the recovery of exemplary damages. *French v. Deane*, 19 Colo. 504, 36 Pac. 609; *Publishing Co. v. Conroy* (Colo. App.) 38 Pac. 423.

It would not be useful to state, either exactly or in substance, the court's instructions. The court told the jury the plaintiff could recover exemplary damages for the wrong, and in no way stated what facts must be established to permit the recovery. On the case as made, the plaintiff was entitled to no instruction on this subject. If the subsequent trial alters the proof, any instruction about it should be limited and qualified by a careful statement of the facts which the jury must find in order to entitle them to include such damages in their general verdict. For the error committed by the trial court, the case must be reversed and remanded. Reversed.

(6 Colo. App. 383)

GIBBS v. GIBBS.

(Court of Appeals of Colorado. June 10, 1895.)

DEPOSITIONS—SET-OFF — LIMITATIONS—VERIFICATION OF COMPLAINT.

1. Though depositions were suppressed on account of a mistake of the clerk in the designation of the person to whom the authority ran to take the testimony, they cannot be retaken without a strict compliance with the statute as was originally required.

2. Defendant agreed to purchase certain notes, upon which plaintiff was liable. The notes were deposited in a bank, and, upon payment of the amount agreed upon, they were to be delivered to defendant. Held that, where such payment was not made before the commencement of plaintiff's action, defendant could not set off the notes in such action.

3. Plaintiff executed a note, and afterwards paid money to a bank, to the credit of the payee, pursuant to a prior agreement. The payee did not discover until some years later that the money had been paid to the bank, and thereupon indorsed the amount so paid on the note. Held, assuming that such payment revived the note, limitations were to be computed from the time of actual payment, not from the time of the indorsement.

4. The considerations which led a party to verify a second complaint on a note, alleging a title thereto totally different from the one originally averred, cannot be shown by plaintiff's conversation with his counsel at the time of the verification.

Appeal from district court, Rio Grande county.

Action by Dennis J. Gibbs against Maria B. Gibbs on a note. From a judgment for plaintiff, defendant appeals. Reversed.

E. F. Richardson, for appellant. Ira J. Bloomfield, for appellee.

BISSELL, J. Dennis Gibbs sued Maria Gibbs on a promissory note for \$500, dated in July, 1892, and payable to Andrew Gibbs. He alleged a transfer to Wilber Gibbs, and an indorsement to himself. The labor of stating the whole case may be avoided, and yet enough remain to make the decision plain. To this very simple cause of action the defendant pleaded many and divers defenses. She denied the transfer for a valuable consideration to Wilber, or the assignment by him to the plaintiff, and averred the title still to be in Andrew. There were then set out in this plea two other notes, said to have been given by Andrew, and purchased by the defendant, and on this title to the latter paper she pleaded a set-off. In addition to her various defenses, she filed a cross complaint wherein she set up the execution by Dennis Gibbs of a promissory note in 1882 for \$789.50, with the usual allegations of nonpayment. In a like manner, she pleaded, by way of cross action, sundry other promissory notes, and interest coupons. The pleading contained 18 different cross actions. It will be observed, these several notes were dated in 1882, and had matured many years prior to the bringing of the present suit. The plaintiff replied, and pleaded the statute of limitations. The bar appeared on the face of the complaint, but there was an averment of a part payment on the 5th of November, 1887. The evidence tended to show negotiations between the defendant and M. H. Cheney looking to the purchase of the two notes which were pleaded as a set-off. Cheney was the agent of the owner of the notes, but whether he had power to sell and convey, or make terms, is not satisfactorily settled. At all events, the negotiations culminated in an offer to purchase the notes for a given sum. Cheney stated they could be purchased for this amount, and promised to communicate with the owner, in the East, and procure the notes. They were to be paid for when delivered. The arrangement was to put the

notes into the bank, where the purchaser could get them on the payment of the money. There was no definite or specific agreement for the transfer of the title at the time of the negotiations in August, nor was any contract or writing entered into between the parties whereby it can be legally said the title passed as a result of the deal. With reference to the cross complaints, this only need be said: The notes were barred by the statute of limitations, and there was nothing to remove the bar, unless the indorsements of payment on the back of the several notes operated as a new promise, under the well-recognized rule. The circumstances of these indorsements, and what are claimed to be payments, are somewhat peculiar. George Gibbs, the husband of Maria, the defendant, had been engaged in mercantile business in the San Luis valley. He became embarrassed, and turned the goods over to Dennis, to close the business out, and settle with the banking concern to which George was indebted. We need not go any further into the details of this transaction. To arrange the affairs in a business like way, and possibly for George's protection, Dennis executed to George divers promissory notes, in the total amount of the supposed value of the goods. The goods were to be sold, and the proceeds turned over to the bank. Dennis, who had become a debtor to the bank, in some way, in this transaction, was to have a credit when the goods were sold. It need not be determined whether, as between Dennis and George, there was an actual purchase and sale, and therefore a liability on this paper, for the whole matter turns on a different consideration. The stock was sold during the years 1883 and 1884, and the money turned over to the bank. Dennis got a credit in the bank for the amount which the goods brought, which was in the neighborhood of a couple of thousand dollars. George seems to have had some difficulty in ascertaining what was realized from the sale, and the date of the credit. At all events, he did not learn till 1887 what credit the bankers had given Dennis. Accordingly, in November, 1887, he computed the proportion which the total credit bore to each individual piece of paper, and indorsed on each note the proportionate sum which was the credit each note was entitled to. This indorsement, under these circumstances, he claims, constitutes a payment which removes the bar, and makes a new promise, on which the action will lie. While the suit was pending the plaintiff sued out a *dedimus* to take the depositions of divers witnesses in Wyoming. The writ was irregular, but under it the testimony of the witnesses was taken, and the depositions returned. No cross interrogatories were filed. It is conceded, the notice was regular, and in apt time, and, but for a mistake of the clerk in the designation of the person to whom the authority ran to take the testimony, the depositions would have been useful as evidence. On their return the de-

fendant filed a motion to suppress for this irregularity. The motion was sustained. The court, however, made a somewhat extraordinary order,—“that the plaintiff be, and is hereby, permitted to withdraw the depositions, etc., to which objections have been filed, and that the clerk may issue a new commission, correcting the technical omission in the former commission, it not designating the person named by any official title.” Whereupon the plaintiff sued out another *dedimus*, without notice, and proceeded to retake the depositions. Whether the old depositions were simply reformed, does not appear. When they were refiled a motion was made to suppress, and the question was preserved by apt objections. These were overruled, and the depositions were received in evidence. They contained important testimony, and may have had great bearing upon the decision of the suit. Judgment was entered for the plaintiff, and the defendant has appealed.

But for the error committed by the court in permitting the depositions to be used, the judgment would be affirmed. We have been referred to no statute, and have discovered none, which authorized the court to permit a party to take depositions without a strict compliance with the statute. There is no known way by which depositions of witnesses living out of the state can be taken, except on due observance of the statutory course. Any deviation from the provisions of the chapter on this subject has, in this state, been held fatal, and the use of depositions erroneously taken to constitute an error for which a cause must be reversed. *Mining Co. v. Molson*, 12 Colo. 405, 21 Pac. 190. A Texas case was cited which seems to recognize the practice as entirely regular. We are unadvised as to what the Texas statute may be, but, in any event, it cannot control the construction of our own act on this subject. Without some statutory authority, the court is powerless to abridge the time of the notice which must be given to the opposite party, or the service of the interrogatories, which are conditions precedent to the exercise of the right to take foreign depositions. The defendant was under no obligations to ask for time to file cross interrogatories, but might rely on the failure of the plaintiff to pursue the required statutory course. The depositions were not properly received, and were inadmissible on the trial.

As this case must go back for another trial, we are under some obligation to dispose of two questions which have been discussed by counsel, and which are legitimately presented by the record. To relieve the parties of the expense and trouble of a retrial of issues which are in no way sustained by the testimony, and which must be eliminated from the consideration of the jury unless the case is varied by subsequent proof, we will dispose of them. It is exceedingly clear to us that the right of set-off did not inure to the defendant, as to the two notes which were purchased of Stilman through his agent, Che-

ney. Appellant's counsel properly conceded the lack of right on the part of the defendant to buy claims after the commencement of the action, and set them up as defenses in the suit. A set-off cannot be thus acquired. The only question, then, is, when was the defendant's purchase made, and what are her rights thereunder? It cannot be successfully maintained, under the testimony as it now stands, that the transaction between George and Cheney amounted to a purchase, whereby the title to the two notes vested in the defendant, and gave her the right to set them off against the plaintiff's claim. To render these notes available, the title must have vested before the institution of the suit. The proof showed an agreement to pay the money and receive the notes. The two acts were to be concurrent, and there was no arrangement for the transfer of the title until the money should be paid. Under these circumstances, there was no right of set-off as to the two notes procured from Stilman.

There is a like trouble with the several cross complaints. Undoubtedly, the notes and coupons were all barred, unless the indorsement stopped the running of the statute. The circumstances surrounding the indorsement, and which in reality constituted the payment, remove all possible question concerning this matter. The notes were given in 1883. The indorsement was the result of an application by George of sundry credits which the bank gave to Dennis on an obligation which Dennis, jointly with George, apparently owed the bank. Whatever may have been the agreement between Dennis and George respecting the notes which George held, and respecting their satisfaction, in whole or pro tanto, from the proceeds of the sale of the goods, it was undoubtedly agreed between them that the money was to be turned over to the bank, and applied in satisfaction of the bank's claim. Since this was true, the money which Dennis paid into the bank, even though, as between Dennis and George, the amount of it ought to be treated as a payment on the notes, the payment, if any, was made at the time the funds were turned over, which was some time in 1884. Lack of information as to the time or the amount of those credits did not preserve his right to make an indorsement as of the date when he acquired the information, and not as of the date when in fact the payment was made. Under these circumstances, George's indorsement on November 5, 1887, did not operate to revive the promise, nor was the statute thereby stopped, and a right of action preserved. It is exceedingly doubtful whether the transaction would amount to a payment by Dennis, with a right of application by his creditor. This position need neither be analyzed nor justified, for the matters first referred to wholly dispose of the contention.

The appellant complains of the examination of the plaintiff respecting a conversation had between him and his counsel at the time of

his verification of the second complaint. With respect to the allegation of a transfer to Wilber and an indorsement to himself, this varied from the allegations in the original pleading. Whether the case would be reversed for this error, we need not determine. Undoubtedly, the plaintiff could be inquired of respecting the circumstances of the verification, and the considerations which led him to verify a complaint showing a title totally different in its origin from the one originally averred. He could give his explanation, state his reasons, and it would be left for the jury to determine their value and their force. It was not proper for counsel to interrogate him specifically as to the conversation between counsel and client on the subject. Doubtless, the subject-matter was proper enough, but the form of the inquiry was open to criticism. The record presents no other matters which need be adverted to, and for the error committed by the court with respect to the depositions the judgment must be reversed, and the case remanded for a new trial. Reversed.

(6 Colo. App. 393)

ADAMS v. TUCKER.

(Court of Appeals of Colorado. June 10, 1895.)

LIMITATIONS—PLEADING—NONSUIT—APPLICATION OF PAYMENTS.

1. Where, in an action on a note, the bar of limitation did not appear from the complaint, and the replication simply traversed the recitals in the answer, incidental recitals in the answer "that an agreement for the settlement of said note had been made between the parties after the statute of limitations had run against it"; that an indorsement of payment had been "made for the purpose of attempting to take the note out of the statute,"—are insufficient to raise that issue.

2. Where the plea admits some indebtedness, a nonsuit should not be granted.

3. The giving of a note, the proceeds of which are to be applied to the payment of a debt barred by limitation, renews the entire debt.

4. Where a person is a maker on a note, and a joint maker on another note, an inappropriate payment by him should be applied to the individual note.

Appeal from district court, Pitkin county.

Action by Ledyard Tucker against Matthew Adams on two notes. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 23d day of February, 1893, appellee brought suit against appellant on the following promissory notes: "\$2,500. February 20, 1883. On or before October 30, 1883, after date, I promise to pay to the order of L. R. Tucker, twenty-five hundred dollars, at Colorado National Bank. Value received, with interest at 12 per cent. per annum. [Signed] M. Adams." On which were indorsements as follows: "Received on within note the sum of two hundred dollars, legal services rendered in case of the People vs. Mrs. E. J. Harding, in supreme court of Colorado, October 19, 1889. L. R. Tucker." "May 23, 1890. Received on the within note the sum of one hundred dollars. L. R. Tucker." "April 25, 1891. Received on within note the sum of six hun-

cred dollars. L. R. Tucker." The second: "\$1,474. Ashcroft, Colo., May 24, 1882. Ninety days after date we promise to pay to the order of L. R. Tucker the sum of one thousand four hundred and seventy-four (\$1,474) dollars, with interest at ten per cent. per annum, until paid. Value received. W. F. Freeman. Matthew Adams. John Calvin." On which was the following indorsement: "Received on within note the sum of six hundred dollars this 24th day of May, 1890. L. R. Tucker." On the 25th of April, 1893, defendant filed his answer, admitting the execution of the note of February 20, 1883, and alleging that the indorsement on the note made October 19, 1889, was incorrect, unauthorized, and fictitious; that, after the note had been barred by the statute of limitations, an agreement was made between the parties for the settlement of the note, and that \$1,300, in all, had been paid under the agreement, as a payment on the first demand, and was so accepted by the plaintiff. Admits the making of the promissory note set forth in the complaint as the second cause of action, but alleges that the indorsement of May 24, 1890, upon the note was incorrect, unauthorized, and fictitious,—made for the purpose of attempting to take the note out of the statute of limitations,—and that the payment of \$600, indorsed upon the note, was made as a payment on the first demand. And, for a further defense to the second cause of action, alleged that the plaintiff, John Calvin, W. F. Freeman, and the defendant, previous to the date, entered into a copartnership agreement, and that the note was given simply as a memorandum of the amount advanced by the plaintiff to the partnership; that the partnership was entered into with the distinct understanding that the note should be paid out of the first net profits of the business, if there should be such, otherwise the note was not to be paid at all; and that the partnership, subsequently, proved a failure. The replication specifically traversed every allegation of the answer, and set up other notes made by the defendant. A demurrer was filed to the alleged new causes of action and sustained by the court. A trial was had to a jury, resulting in a verdict for the plaintiff for \$1,623.25, and a motion for a new trial overruled. Judgment upon the verdict, and an appeal prosecuted to this court.

Robert W. Bonynge, for appellant. Perry & Bliss, for appellee.

REED, P. J. (after stating the facts). Counsel for appellant bases his claim for the reversal of the judgment entirely upon the refusal of the trial judge to grant a nonsuit. The determination of the correctness of the ruling involves and renders necessary an examination of all the questions presented, growing out of the statute of limitations, as the defense of appellant was based entirely upon that statute.

1. Counsel takes it for granted that the bar of the statute was pleaded, and issue taken

upon it. I have very grave doubts in regard to the matter, and whether any question of the statute was so raised as to justify this court in entertaining the question or making any decision upon any supposed issue involving the statute. The plea of the statute is a special, personal plea; it may be pleaded or waived at the option of the defendant. "If the defendant intends to insist upon the statute, he should plead it to prevent surprise, and, if he do not do so, it is presumed he intends to waive it." Ang. Lim. 312; *Hodsden v. Harridge*, 2 Wms. Saund. 63b, and note; *Pearsall v. Dwight*, 2 Mass. 87. The plea is in confession and avoidance, it admits the original indebtedness, but interposes the statute as a bar to recovery. "Another general rule of great practical importance is that the bar of the statute must be interposed by the diligence of the debtor, and as early as possible, and usually, unless otherwise provided by statute, on the pleadings, previously to the hearing, and that it will not be raised by the court unsolicited, and also that protection afforded by the statute may be waived by the debtor, the best possible proof of such waiver being payment." Wood, Lim. 25. To be available, the statute must be pleaded. Such is the English rule. See *Puckle v. Moor*, 1 Vent. 191; *Gould v. Johnson*, 2 Ld. Raym. 838; *Kirkman v. Siboni*, 4 Mees. & W. 339. Such has been, invariably, the ruling of the United States courts, and nearly all of the states have held, where the bar appears upon the face of the complaint, the defendant might avail himself of it by special demurrer, a general demurrer is insufficient, and, even in those states, that unless the bar appears from the declaration the statute must be pleaded. *Davenport v. Short*, 17 Minn. 24 (Gil. 8); *Frosh v. Swett*, 2 Tex. 485; *Sturges v. Burton*, 8 Ohio St. 215; *Lewis v. Alexander*, 51 Tex. 578. In this case it need only be said that the bar did not appear upon the complaint, as the indorsements *prima facie* made the balance a valid, existing claim, recognized by the debtor, but, however this may be, no demurrer was interposed, and the bar could only be made available by special plea. *Storm v. U. S.*, 94 U. S. 76; *Upton v. McLaughlin*, 105 U. S. 640; *Capen v. Woodrow*, 51 Vt. 106. That the rule is the same under the Code, see *Sands v. St. John*, 36 Barb. 628; *Bihin v. Bihin*, 17 Abb. Prac. 19; *Cotton v. Mauer*, 3 Hun, 552. It is said that no rule of practice is more firmly settled than that, to render the statute of limitations available as a defense, it must be set up and relied on in the pleadings. *Boyce v. Christy*, 47 Mo. 70; *Parker v. Irvin*, 47 Ga. 405; *Mansfield v. Doherty*, 21 La. Ann. 395; *Green v. Railroad*, 73 N. C. 524; *Merryman v. State*, 5 Har. & J. 425; *Robbins v. Harvey*, 5 Conn. 335. The plea in this class of cases is the well-known one of "non accrevit infra sex annos," etc. It is called a "strict plea."

I can find nothing in the answer of a plea of the kind, or even analogous, no attempt at pleading affirmatively the bar of the statute, no plea tendering an issue. In regard to the first note it is said "that an agreement for the settlement of said note had been made between the parties hereto after the statute of limitations had run against the note." In regard to the second note it is said that the indorsement was incorrect and fictitious,—“made for the purpose of attempting to take the note out of the statute.” These incidental recitals cannot take the place of a plea; the replication simply traversed the recitals in the answer. There was therefore no issue in regard to the bar of the statute of limitations. This alone was sufficient to warrant the court in refusing a nonsuit; in fact was sufficient to warrant the court to reject and disregard all matters in pleading in evidence in regard to the statutory bar. The court and counsel for both parties seem to have labored under the supposition that the question of the statute was involved properly, and the adjudication proceeded upon that theory. How far this assumption should control this court in reviewing the case is a puzzling question, and it may be as well to briefly review the points made as to the questions presented on the other issues.

2. In regard to the alleged settlement for the payment of \$2,500, to be in full for the individual indebtedness, as alleged by the defendant and denied by the plaintiff, the evidence was very contradictory, and the jury returned a general verdict, from which it is impossible to determine the basis of its finding. In regard to the other note, the joint note,—in regard to its character,—while appellant asserted that appellee was a member of the firm, was to, and did, advance the money for the firm use, and was to lose it if the venture was unsuccessful, both are positively denied by the plaintiff, and each testified in direct opposition to the other, consequently the contention of plaintiff was not established by the evidence. One pertinent fact should not be overlooked. Although the appellant testified that the contract, made in advance of the undertaking, was: “Mr. Tucker was to put up the money, and if it was lost he was to lose it, and we were to lose our time, and any expenses we might have been to outside,”—the business in Ashcroft, as shown by the dates, was commenced February, 1882, the note bore date May 24, 1882, and was made after the collapse and close of business. Appellant, on cross-examination, testified Tucker had the benefit of all the goods that were returned, upon the basis of some discount, when the business was abandoned. “The \$1,474 note was given to secure Mr. Tucker for the amount of money he had advanced; it was given at the time we concluded that the town was going off on wheels, and we would soon have to settle it.” The statement is hardly compatible with the fact

that, if the money was lost, it was to be the loss of appellee. If such were the fact, why should the parties have made the note for advances after the collapse, and after it had been lost? The jury would have been justified in finding that issue against the defendant.

3. The only remaining question is whether the payments made and indorsed, under the facts proved, prevented the claims from being barred by the statute. It is conceded that payments were made. The recognition of an existing indebtedness, after the statutory bar had become operative, was clear and unequivocal. That the payments were made upon such indebtedness was established by the evidence of both parties. For the purposes of this discussion it is unimportant whether there had been, as claimed by the defendant, an agreement to take less, in discharge of the whole. There is no new consideration. The payments were upon the original consideration. The only effect such contract could have, if established, would be to fix the amount that would discharge appellant from the original indebtedness. Taking the plea as true, it admits an agreement to pay \$2,500. The proof shows it to have been only half paid. Consequently, by plea and the testimony of appellant, to that extent the original debt had been taken out of the bar of the statute, and the balance unpaid was an existing debt. As before stated, we have no data upon which to predicate the basis upon which the verdict was found. The new agreement was stated to have been made in May, 1890; the payments made, \$1,300. Without definite calculation, the verdict appears to be but a trifle, if any, more than a balance and interest. The plea and evidence of appellant warranted a verdict and judgment, regardless of the question made by the payments. With that plea upon file, the court could not legally grant a nonsuit. It was an admission of some indebtedness, and of a promise to pay it. By the amount of the verdict, it is evident that it resulted from the adoption of the agreement, as pleaded, or some compromise. Taking the \$2,500 note alone, if allowed, the sum must have been doubled, including the interest, leaving the joint note entirely out of consideration. It was originally held in the courts of Great Britain, and in early decisions of our courts, that nothing less than an express promise would revive a debt barred by the statute. See Ang. Lim. § 209; *Dickson v. Thomson*, 2 Show. 126; *Williams v. Gun*, Fortes, 177; *Bland v. Haselrig*, 2 Vent. 152. Afterwards, the decisions swung clear over to the other extreme, and it was held that the slightest acknowledgment would take a demand out of the statute. *Trueman v. Fenton*, Cowp. 548; *Bryan v. Horseman*, 4 East, 599; *Quantock v. England*, 5 Burrows, 2628. But for many years, in England, and since the leading case of *Bell v. Morrison* (1829) 1 Pet. 351, that law has been well settled and declared

to be—First, that a debt barred by the statute of limitations may be revived by a new promise; second, that such new promise may either be an express promise or an implied one; third, that the latter is created by a clear and unqualified acknowledgment of the debt. See Ang. Lim. § 231. No rule of law is better settled than that a partial payment made on the debt for which the action is brought will be sufficient to renew the entire debt. *U. S. v. Wilder*, 13 Wall. 254. And is sufficient to warrant a jury in finding a promise to pay the balance. *White v. Jordan*, 27 Me. 370; *Whipple v. Stevens*, 22 N. H. 219; *Ilsey v. Jewett*, 2 Metc. (Mass.) 168; *Pond v. Williams*, 1 Gray, 630; *Sanderson v. Stage Co.*, 18 Vt. 107; *Carroll v. Forsyth*, 69 Ill. 127; *Ayer v. Hawkins*, 19 Vt. 28; *Van Keuren v. Parmelee*, 2 N. Y. 523; *Harper v. Fairley*, 53 N. Y. 442. In *Barclay's Appeal*, 64 Pa. St. 69, the court said: "There can be no more unequivocal acknowledgment of a present existing debt than a payment on account of it." See, also, *Cleave v. Jones*, 6 Exch. 573; *Bamfield v. Tupper*, 7 Exch. 27; *Maber v. Maber*, L. R. 2 Exch. 153; *Hart v. Nash*, 2 Crompt. M. & R. 337; *Hooper v. Stephens*, 4 Adol. & E. 71. As in this case, the giving of a note to be used and the proceeds applied in payment is equally significant and efficient. *Turney v. Dodwell*, 3 El. & Bl. 136; *Irving v. Veitch*, 3 Mees. & W. 90; *Gowan v. Forster*, 3 Barn. & Adol. 507; *Smith v. Ryan*, 66 N. Y. 352.

4. Under the evidence, the indorsement of the payment of \$600 upon the joint note of Freeman, Adams & Calvin was unwarranted, and would not operate to relieve the bar of the statute, had it been properly pleaded. The note being joint, and there being an individual indebtedness of appellant, and no order of designation of it as a payment upon that note having been made, the payment, being a personal or individual one, must have been credited to the individual indebtedness, but, under the finding of the jury in this case, cannot affect the result.

It appears from the record that an appeal was prayed and allowed by both parties, and cross error filed by the appellee; but they are not insisted upon, nor is the cross appeal prosecuted. Under the law of the case, if appellee is content with the judgment, it seems that appellant should be. The judgment will be affirmed. Affirmed.

(16 Mont. 351)

NELSON v. SPEARS.

(Supreme Court of Montana. July 8, 1895.)

RECEPTION OF EVIDENCE—PREJUDICIAL ERROR—INSTRUCTIONS.

1. A new trial should be granted where parol evidence was admitted to vary a written contract, when the verdict was influenced by such evidence, though the court properly instructed the jury to disregard it.

2. An agreement of dissolution of partnership was made between plaintiff and defendant.

Plaintiff, in his replication to defendant's counterclaim, alleged that after the partnership was dissolved he employed defendant as a herder at \$40 per month. *Held*, that an instruction that plaintiff in his replication alleged that under the agreement of dissolution defendant was to receive \$40 per month was misleading and reversible error.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by H. H. Nelson against More Spears. Verdict for defendant. From an order denying a motion for a new trial, plaintiff appeals. Reversed.

A. J. Shores, for appellant. Leslie & Downing, for respondent.

PEMBERTON, C. J. Plaintiff sued the defendant in the district court to recover the sum of \$900, claimed to be due for hay and other personal property sold by him to defendant. The answer denies the indebtedness, and sets up a counterclaim. From the pleadings and evidence it appears that on the 21st of October, 1891, plaintiff and defendant, by written contract, entered into copartnership in the sheep business. At the date of this contract the plaintiff owned a large number of sheep, corrals, and lands, near Glasgow, in this state. This property was turned into the copartnership business, and became the property of the copartnership, by the terms of the articles of copartnership, the defendant giving his notes to plaintiff for a one-fourth interest therein. This copartnership continued to do business until the 22d day of September, 1892, when it was dissolved by the following written contract of the parties: "This agreement, made this 22d day of September, 1892, by and between H. H. Nelson, of Cascade, in Cascade county, Montana, party of the first part, and More Spears, of Glasgow, state of Montana, party of the second part, witnesseth: That it is hereby mutually agreed that the partnership heretofore existing between said parties, in the sheep business, is dissolved by consent of both parties; that all contracts and agreements heretofore made by said parties, including notes and accounts, are hereby declared of no effect and void; that all sheep, horses, implements, sheds, buildings, corrals, fences, and hay, and all other personal property of whatsoever description, having belonged or used in connection with the aforesaid business, and all parcels and pieces of land held by either party prior to said date, shall revert and belong to the party of the first part; for and in consideration of which said first party agrees to cancel all claims of whatever description, now held by first party against said second party. In witness whereof said parties have hereunto affixed their hand and seal the year and day aforesaid. H. H. Nelson. M. Spears." This contract was acknowledged before a notary by the parties. The defendant, in his answer, admits the making of this contract, but says that at the time the same was made the plaintiff agreed

to pay him \$125 per month from the 21st day of October, 1891, until the 22d day of September, 1892, when the copartnership was dissolved, and as long thereafter as he should work for plaintiff. Defendant claims this was a part of the contract of dissolution of the copartnership, and in his answer says "that at the time of the making of the said new contract with plaintiff aforesaid, to wit, on the 22d September, 1892, aforesaid, the same was attempted to be reduced to writing, but by inadvertence, fraud, or mistake of the draftsman, and by mistake or inadvertence of said parties thereto, the same failed to state the terms of said contract, and did not express the intentions of said plaintiff and this defendant, in failing to show that plaintiff was to pay this defendant \$125 per month, from the — day of July, 1891, aforesaid, and thereafter, so long as defendant would work for plaintiff under said contract." Defendant, as part of his counterclaim, alleges that plaintiff is indebted to him in the sum of \$650 for taking care of other sheep belonging to plaintiff, at the rate of \$50 per month. Plaintiff's replication denies the indebtedness contained in defendant's counterclaim, but says when the copartnership was dissolved on the 22d day of September, 1892, he employed defendant as a herder, for which services he agreed to pay him \$40 per month, and paid him \$100 in advance, and that defendant worked for him under said contract until about the 10th of October, 1892. The case was tried to a jury, who returned a verdict for the defendant in the sum of \$600. The plaintiff moved for a new trial, which was denied. From the order refusing a new trial this appeal is prosecuted.

The appellant assigns as error the action of the court in submitting to the jury the question of the indebtedness of the plaintiff to defendant for services prior to September 22, 1892, claiming that under the pleadings and evidence the jury should have been instructed to disregard the defendant's claim for such services. The evidence did not show any mistake, fraud, or inadvertence, as claimed by defendant, in making the contract of September 22, 1892. The court took this view of the matter, and instructed the jury that the evidence on the part of the defendant did not show that by inadvertence, fraud, or mistake anything had been omitted from said contract, and that defendant was not entitled to relief on that account. But evidence of the fact that plaintiff had agreed to pay the defendant \$125 per month, and that this was part of said contract, and was omitted therefrom, as claimed by defendant, had gone to the jury. This evidence tended plainly to contradict and change the terms of the written contract. It was error to admit it. *Fisher v. Briscoe*, 10 Mont. 124, 25 Pac. 30; *Comp. St. First Div. § 628*. Its consideration should have been excluded from the jury. The court no doubt endeavored to do so by an instruction, but when it appeared that the jury did

consider it, notwithstanding the instruction of the court, a new trial should have been granted. The counsel for the respondent certainly understood that the jury considered this evidence, for in their brief they say: "The jury, after considering the case, taking their verdict as a guide, allowed the plaintiff his claim, in full, of \$900, and also adopted the view of defendant that plaintiff contracted to allow him the \$125 per month, and allowed defendant \$1,587, less \$100 as a credit, with interest."

The appellant also assigns as error the giving of the following instruction: "Defendant further alleges an agreement in settlement of the affairs of the parties, and a new agreement whereby the partnership was dissolved, and an agreement made that defendant was to receive \$125 from July, 1891. This is denied, and the reply alleges that under the agreement defendant was to receive \$40 per month." In giving this instruction the court evidently misconstrued the allegations of plaintiff's replication. The replication alleges an agreement to pay defendant \$40 per month, as a herder, from and after September 22, 1892. There is no agreement contained in the replication* to pay defendant \$40 per month from July, 1891. From this instruction it is fairly inferable that the replication alleged such an agreement. The instruction was calculated to mislead the jury, and was therefore prejudicial to the plaintiff. It is difficult to determine upon what theory the jury arrived at their verdict in this case. It is fair to presume that the verdict was not arrived at without considering evidence that was not admissible, and which tended to prejudice the plaintiff. Nor do we think that it may not be safely said that the jury were probably misled by the instruction complained of and treated above.

Under all the circumstances of the case, we think the motion of appellant for a new trial should have been granted. The order appealed from is reversed, and the cause remanded for new trial.

DE WITT and HUNT, JJ., concur.

(16 Mont. 349)

HEFFERLIN v. CHAMBERS et al., Board of Commissioners.

(Supreme Court of Montana. July 8, 1895.)

CONTRACTS OF COUNTIES—INJUNCTION.

A board of county commissioners paid out, for plans, specifications, and grounds upon which to build a courthouse, a sum which, together with the subsequent contract price to erect the building, exceeded the sum of \$10,000. The proposition to build a courthouse had not been submitted to the electors. *Held*, that the proceedings were in conflict with Const. art. 13, § 5, prohibiting a county from incurring an indebtedness or liability for any single purpose to an amount exceeding \$10,000 without the approval of the electors.

Appeal from district court, Park county; Frank Henry, Judge.

Action by Charles S. Hefferlin against George T. Chambers and others, constituting the board of commissioners of Park county, to enjoin said board from carrying out a contract with H. J. Wolcott. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was brought by the respondent, a taxpayer of Park county, to restrain the defendants, the board of county commissioners of Park county, and H. J. Wolcott, from carrying out a contract entered into between the commissioners and said Wolcott, for the erection by the latter of a courthouse. The case was tried upon an agreed statement of facts. The judgment of the court perpetually enjoined the defendants from carrying out said contract, or paying any moneys to defendant Wolcott upon the same. The ground for injunction relied upon by plaintiff was as follows: The contract with Wolcott was to erect the courthouse for \$9,680. The constitution of the state provides, in section 5 of article 13, that "no county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars (\$10,000) without the approval of the majority of the electors thereof, voting at an election to be provided by law." Before the letting of the contract the commissioners had paid out \$3,200 for ground upon which to build the courthouse, and \$700 for plans and specifications for the same, and further agreed to pay \$250 to an architect for supervising the construction. The sum of these items is \$13,830. The plaintiff contends that the acts of the commissioners incurred an indebtedness for more than \$10,000, to wit, \$13,830, and that such indebtedness was proposed to be incurred without submitting the question to a vote of the electors. It appears by the statement of facts that the proposition had never been submitted to a vote. The district court adopted the views of the plaintiff, and rendered judgment as above noted, from which the defendants now appeal.

W. H. Poorman and H. J. Haskell, for appellants. Campbell & Stark, for respondent.

DE WITT, J. (after stating the facts). There is no question, in our mind, but the district court was right in its judgment. In fact, the proposition seems to be so simple that little remains to be said, beyond its statement. The constitution prohibits the incurring of an indebtedness or liability exceeding \$10,000, for a single purpose, without obtaining the approval of the electors at an election held for that purpose. It cannot be questioned but the commissioners in this case are undertaking to incur an indebtedness exceeding \$10,000 without the approval of the electors. The only suggestion made against this view is that the indebtedness of \$3,200 and \$700 had been heretofore incurred, and that the indebtedness now proposed is only \$9,680, which, it is claimed, is within the limit, and therefore within the power of the

commissioners. But such construction of the constitution would fritter away its plain intent. The constitution intended to limit the powers of the commissioners, as to an expenditure for a single purpose, to a certain figure, unless they obtained the approval of the people for such expenditure. If we were to sustain the proposition of appellants in this case, it would be to allow county commissioners to expend more than \$10,000, or incur an indebtedness or liability exceeding that sum, if they simply resorted to the evasion of dividing the total amount into several sums, each less than \$10,000, and expending each of said several sums, or incurring each of said several liabilities, at different times. Under such construction they could expend \$9,990 in each of several successive years, and the total of said amounts all for one purpose. If they could do this in each of several successive years, why not in each of several successive months or days? It is clear that such conduct would be a gross violation of the constitutional provision, and that it was just such a violation as was contemplated by these appellants, and restrained by the district court. The judgment of the district court is affirmed. Remittitur forthwith.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 342)

SELL v. GRAVES.

(Supreme Court of Montana. June 24, 1895.)

TITLE TO MAINTAIN TRESPASS.

One who, after selling land to a town-site company, remained in possession thereof with its consent, had sufficient possession to maintain trespass against a naked trespasser, without claim or color of title, though the land had been laid out as a town site and the survey properly made and filed.

Appeal from district court, Flathead county; Dudley DuBose, Judge.

Trespass *quare clausum* by John Snell against John H. Graves. From a judgment for plaintiff, defendant appeals. Affirmed.

McIntire & Clinton, for appellant. Sanford & Grubb and Walsh & Newman, for appellee.

PER CURIAM. This action was brought to recover damages for the trespass of defendant in entering land in possession of plaintiff, and cutting the grass thereupon. There was a judgment in favor of plaintiff for \$35. Defendant appeals from the judgment and the order denying the motion for new trial. It appears that the plaintiff, in February, 1891, had sold the land upon which the hay was cut, to the Kalispell Town-Site Company. At the time of the sale it was agreed that the plaintiff should remain in possession of the premises until he could cut the grass which should grow upon the land that year. This agreement was not inserted in

the deed as a reservation, but it appears by the testimony that this agreement was also made after the deed, and that the town-site company left the plaintiff in possession of the land, and protected him in such possession by all means within its power. The plaintiff was residing upon the land, and had a fence around the whole of the same, except for a short distance on one side, and at that place he kept a herder to keep stock out. Under these circumstances, the defendant entered and cut the grass. The appellant's defense was that there was not sufficient possession of plaintiff to maintain trespass, and that he (appellant) had cut the grass upon the streets and alleys of the town site of Kalispell. It is true that the land had been laid out as a town site, and the survey properly made and filed. We are of opinion that the facts showed a sufficient possession in the plaintiff to maintain this action against an absolutely naked trespasser, without right or title, or claim or color of same. We have examined the record and the instructions, and are of opinion that the case was fairly presented to the jury, and that there was no substantial error upon the trial which would justify us in disturbing the result. The judgment and order are affirmed.

(16 Mont. 333)

BURNS v. PAULSEN et al.

(Supreme Court of Montana. June 24, 1895.)

COSTS ON FRIVOLOUS APPEAL.

When it is apparent that the only object of an appeal was the delay and vexation of plaintiff, the judgment of the lower court should be affirmed, and a penalty added for frivolous appeal.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

Action by F. C. Burns against John C. Paulsen and another. From a judgment for plaintiff, defendants appeal. Affirmed.

McConnell, Clayberg & Gunn and O. W. McConnell, for respondent.

PER CURIAM. This action was brought by plaintiff to obtain judgment for \$546, balance of an account owing him by defendants for personal services, also for \$92.95, money advanced by him to defendants, and also for \$100 on an account assigned to plaintiff by the Boyce National Bank. The case was tried to the court without a jury, and judgment rendered for plaintiff for the whole of the several sums. The court also gave judgment for interest, by reason of unreasonable and vexatious delay. Defendants appeal from the judgment. No motion for new trial was made, and the evidence is not before us. It is presumed that the evidence sustained the judgment. The only point raised upon the appeal is that judgment should not have been rendered for interest. In the absence of the evidence, we must presume that it was sufficient to sustain the finding of unreasonable

and vexatious delay. We are also of opinion that the complaint in this respect is sufficient. It alleges that the defendants have not paid any part of the sums demanded; that they have been often requested so to do, but have wholly refused to pay the same, to the unreasonable and vexatious delay of the plaintiff. *Jefferson Co. Com'rs v. Lineberger*, 3 Mont. 248; *Maddox v. Rader*, 9 Mont. 138, 22 Pac. 386. The judgment is affirmed, with costs.

This appeal was absolutely frivolous. There is not even a contention that the judgment for the amount claimed was not proper. While a brief was filed on the part of the appellants, contesting the allowance of interest, counsel did not appear to argue the case, and the suggestion that the pleading is not sufficient to sustain the judgment for interest is equally frivolous. It is perfectly apparent that the only object of the appeal is delay, and the vexation of the plaintiff. In order to discourage such appeals, it is ordered that a penalty of \$75 be imposed upon the defendants for a frivolous appeal, and that the judgment of the district court, as affirmed, be increased in said amount. *Clark v. Nichols*, 3 Mont. 372; *Wykoff v. Loeber*, 5 Mont. 535, 6 Pac. 363; *Ramsey v. Cattle Co.*, 6 Mont. 498, 13 Pac. 247; *Bank v. Kleinschmidt*, 7 Mont. 146, 14 Pac. 667.

(12 Wash. 157)

BEAL et al. v. NICHOLS et al.

(Supreme Court of Washington. June 22, 1895.)

LOGGER'S LIEN—TIME FOR FILING.

Where a logger releases his lien on the specific logs cut during the last period of a continuous employment, the time for filing his lien for logs cut during the first period begins to run from the end of such period.

Appeal from superior court, King county; W. T. Scott, Judge pro tem.

Action by George Beal and others against H. B. Nichols and others to foreclose loggers' liens. From a judgment for defendants, plaintiffs appeal. Affirmed.

P. P. Carroll, for appellants. F. S. Griffith, for respondent Fremont Milling Co.

SCOTT, J. This was an action to foreclose loggers' liens. Judgment was rendered against the plaintiffs, and they have appealed. The facts on which the respective claims are founded are practically conceded. The appellants began work at various times in February and March, 1893, for H. B. Nichols & Co., and no work was performed by any of them after the 16th day of June, following. Some of them had quit prior to said last date. The testimony shows that on the last day of May the plaintiffs refused to continue work longer for said H. B. Nichols & Co. under the arrangements then existing between them, whereupon the following instrument was executed: "Seattle, Wash., June 3, 1893. To the Fremont Milling Company, Seattle,

Washington: We hereby appoint W. H. Thayer as our agent, for the period of 13 days from date, in the matter of selling all logs upon which we shall perform hereafter labor under said H. B. Nichols & Co., and upon which we might and could claim a lien under the laws of the state of Washington, and we also authorize you to pay to said W. H. Thayer the purchase price thereof." This was signed by all of the plaintiffs, who thereafter continued work, and subsequently the following receipt was given: "Seattle, Wash., June 17, 1893. Received of Fremont Milling Company acceptance 60 days after date for one hundred fifty-nine and $\frac{26}{100}$ dollars, in payment labor on logs furnished from June 1 to June 13, 1893, same to be applied as follows: George Beal, \$18.40; H. E. Egert, \$11.50; G. Blomberg, \$13.60; J. Morris, \$13.50; A. Beckman, \$13.60; A. Peterson, \$9.25; L. Clem, \$10.40; A. Berg, \$8.50; Jno. Ordish, \$30.00; W. Daniels, \$9.75; G. Comp-ton, \$21.25. Total, \$159.25. [Signed] George Beal." It is conceded that said Beal was authorized to represent the plaintiffs in this transaction. After this time the plaintiffs filed the liens which they now seek to enforce, against all logs cut by them during the time that they worked as aforesaid, including the logs cut in June, and one of the points in controversy is as to whether said liens were filed in time. This depends on whether the work performed by them in June can be relied upon to save the claims. The lower court held that it could not be, and we are of the opinion that this holding must be sustained, under the ruling in *Campbell v. Vincent*, 8 Wash. 650, 36 Pac. 685. The instrument first executed, authorizing a sale of the logs, and a payment of the purchase price to Thayer, was in effect a release of any right to claim a lien upon the logs cut within the time therein specified, for labor performed thereon. Even though all the work performed by the plaintiffs is regarded to have been done under a continuous contract of employment, we think the lien claims cannot be sustained. In order to bring the filing of such claims within the statutory time, it was necessary that they should have performed some labor upon some of the logs against which they sought to enforce liens within 30 days of the time that the claims were filed, or that they should not have relinquished their right thereto. They clearly would have no right, after having received pay for the logs cut in June, upon the sale thereof as aforesaid, to claim a lien against those same logs for labor performed upon other logs prior thereto. The fact that the same parties purchased the prior logs could make no difference as to this. If they could have such a right at all, they would have it as well if the prior logs had been sold to other and different parties. Affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

(12 Wash. 121)

SCHMIDT v. CITY OF NORTH YAKIMA.
(Supreme Court of Washington. June 19, 1895.)

ACTION ON BUILDING CONTRACT—ENGINEER'S CERTIFICATE—FRAUD.

1. A contractor suing a city on a contract which makes a certificate of the city engineer accepting the work a condition of payment must produce such certificate, or show that it is withheld through fraud.

2. A contractor who deliberately furnishes inferior materials and work will be estopped by his fraud from recovering on the contract.

3. The fact that a city engineer, knowing the work and materials furnished under a contract with the city did not meet the requirements of the contract, has accepted a part thereof, will not estop the city, in an action for the price, from showing that the work and materials furnished did not meet the requirements of the contract, especially where a larger part of such illegal work and materials was fraudulently introduced, without the knowledge of the engineer.

Appeal from superior court, Yakima county; Carroll B. Graves, Judge.

Action by Richard Schmidt against the city of North Yakima on a contract for the price of work and materials. From a judgment for defendant, plaintiff appeals. Affirmed.

F. H. Rudkin, H. J. Snively, and J. T. Ronald, for appellant. Whitson & Parker and Reavis & Englehart, for respondent.

DUNBAR, J. The appellant entered into a written contract with respondent for the construction of a system of sewerage in the city of North Yakima. Contract and specifications are set forth in the pleadings. The work was to be done to the satisfaction of and under the direction of the city engineer, and to be testified by his certificate. Under the contract, in case the contractor, at any time during the progress of the work, refused or neglected to supply a sufficiency of material, workmen, or implements to complete the system within the time, the city reserved the right to provide the same, after five days' notice in writing first being given the contractor, to finish the work, and the expense to be deducted from the amount of the contract price. The contractor was to provide, at his own costs and charges, all manner of material, labor, and implements of every description for the due performance of the contract. It was further provided that, should any dispute arise respecting the construction or meaning of the drawings or specifications, the same should be decided by the city engineer of the party of the first part, which decision should be final and conclusive. The contract was to be completed according to the specifications on or before the 1st day of June, 1892. The specifications required that the pipe should be of the best quality of vitrified ironstone, salt-glazed; that it should have a true circular bore, should be straight, and free from warps or other imperfections; also, that the material used around the pipe for not less than 12 inches above the pipe should be

free from stone or other hard, coarse substance; that, where the excavation was through coal or gravel, the material used around the pipe should be screened through a sieve, and such as the engineer might approve of, each joint to be well and thoroughly cemented with best Portland cement one part, and two parts clean, sharp sand. They provide that the cement should be put in the joints by the hands, and not by trowels or sticks; that great care should be taken not to force the cement through the joints to the inside of the pipe. The specifications were lengthy and definite. During the fore part of the month of June, the city council of the city of North Yakima passed an ordinance provided for in the contract, that they would take charge of the work, and did take charge of the same, and finish the same; whereupon the contractor (the appellant herein) brought an action against the city for damages, alleging the making, execution, and delivery of the contract; that, under the contract, he entered upon the construction of the said sewerage system, and provided necessary, suitable, and sufficient material for the construction of the same, and was proceeding to complete the same, until he was interfered with and stopped by the respondent; that, in undertaking to carry out the contract, he incurred a large expenditure, to wit, the sum of \$30,372; that he would have fully completed said system in accordance with said contract, plans, specifications, and drawings at a further expenditure of not more than \$4,000; but that the defendant, by its officers and servants, hindered, delayed, and prevented the complete performance of said contract by sundry wrongful acts, setting them forth specifically.

Among the facts which were necessary to the determination of the questions involved in this cause, the most pertinent ones were that the defendant, by its city engineer and others, wrongfully rejected large quantities of the pipe furnished by the plaintiff, and refused to permit the plaintiff to lay or use the same, notwithstanding all such pipe fully complied with the contract and specifications; that the defendant, by its officers, on sundry occasions capriciously refused to allow the use by the plaintiff of suitable materials, and, after causing said delay, allowed the same materials to be used, and approved the same, and capriciously interfered with the plaintiff's labors on said work; that on or about the 16th day of June, 1892, the defendant, by its officers, wrongfully and forcibly prohibited and prevented the plaintiff from further working on said contract; that plaintiff has fully performed all the conditions of said contract, except in so far as he has been prevented by the wrongful acts on the part of the defendant; and that, by such reason, he is damaged in the sum of \$10,000, and alleges damages for extra work, etc., which swell the amount claimed to \$29,918.33, for which sum he asks judgment.

The defendant, by its answer, admits the making of the contract, payment mentioned by the plaintiff in his complaint, and admits extra work done by the plaintiff to the amount of \$824, and admits the presentation to and the disallowance of the plaintiff's claim by the city council, but denies each and every other allegation of the complaint; and for an affirmative defense, and by way of counterclaim, alleges that plaintiff failed and refused to comply with the terms of the contract to complete such work according to the plans and specifications in many particulars, among which were that he did not properly cement the joints of the pipe, that they were laid in a defective manner, so that they leaked, and rendered the sewer system liable to generate gas, which was liable to cause explosions, etc., by which the defendant claimed to be damaged in the sum of \$2,000; alleges that the plaintiff did not furnish the quality of pipe provided for by the specifications; that the same was not the best quality, not properly vitrified, not salt-glazed, and was not of true circular bore and free from warps, but was wholly unfit for the work, and that, by reason of such failure on the part of the plaintiff, defendant was damaged in the sum of \$10,000; alleges that the plaintiff failed and refused to employ skilled mechanics to lay such pipe, to the damage of defendant in the sum of \$500, and, among other failures on the part of the plaintiff to comply with the terms of the contract as alleged, that, during all the time that plaintiff was carrying on said work, he was fraudulently contriving to and did put in defective pipe, which had been rejected by the city engineer, which was unfit for said work, and not according to the plans and specifications, and that he refused to supply skilled mechanics for laying said pipe, refused to lay the same according to the plans and specifications, and neglected and refused to construct said system in accordance with the contract, plans, and specifications; alleges that a large number of defective joints of pipe were laid by the plaintiff, which defendant was compelled to and did excavate, and discover such defective joints, and repair the same; that, at the time defendant took charge of said work, the plaintiff was unlawfully and wrongfully, by violence and force, using pipes for said sewer which had been rejected by the city engineer, and which were unfit for use in said sewer, the same being defective, and not conforming to the contract, plans, and specifications, which was well known to the plaintiff. On the trial of the cause, the jury rendered a verdict for the defendant. Judgment was rendered upon the verdict, and from said judgment an appeal is taken to this court.

We have with great care and much labor examined the record in this case, which comprises nearly 1,000 pages of testimony. The case was tried with great ability, both by counsel for the appellant and the respondent, and many days were consumed by the court

in the trial. Many errors are alleged and stoutly contended for by the appellant, but there are a few plain propositions, which are suggested by the respondent, which we think are decisive of this case.

In the first place, the payment to the contractor was made conditional upon a certificate by the city engineer. This certificate was never obtained, and, in order to escape the responsibility from this portion of the contract, the burden is upon the appellant to show that it was withheld through the fraud or capriciousness of the engineer. In the case of *Craig v. Geddis*, 4 Wash. 390, 30 Pac. 396, this court, in passing upon this question, said: "What is the proper rule as to the necessity and force of the architect's certificate under contracts of this kind? That the provision of the contract requiring such certificate should be given force is too clear for argument, and is not denied, as we understand it, by the respondents. If, however, the law of such cases justifies the instruction given by the court in this case [the court instructed the jury that if they found that the contract had been substantially complied with by the respondents, and that a certificate of due performance had been demanded, these facts of themselves would authorize them to find that the architect had wrongfully withheld the certificate, and that, under such circumstances, recovery could be had without it], we are unable to see that any substantial benefit to either party can be derived from requiring such certificate. Without such provision, the respondents, to have recovered upon the contract, would have been required to show a substantial compliance therewith on their part, or some acts on the part of the appellant excusing them from such performance; and as, under the instruction of the court, as above stated, that was all they were required to show, with such provision in the contract, it follows that said instruction deprived appellant of any and all benefit from such provision." And so in this case, if the appellant could recover upon showing a substantial compliance with his contract, in the absence of the certificate required by the contract, the effect would be to annul and render useless to the respondent that portion of the contract which required the certificate of the engineer.

We do not think that the testimony in this case will warrant the conclusion that the refusal of the engineer to furnish the certificate required was prompted by fraud, malice, or capriciousness. The testimony shows that during the entire work there were many disputes between the engineer and the contractor on questions of judgment, and as, under the agreement, the work was to be done according to the judgment of the engineer, there was nothing for the contractor to do but to submit his judgment to that of the engineer. This submission of his judgment was one of the things that he contracted to do, and it was probably as impor-

tant a thing in the minds of the city council as any other thing embraced in the contract. In *Hanley v. Walker* (Mich.) 45 N. W. 57, it was held that where a contract by plaintiffs for plastering provides that, before payment can be demanded, plaintiffs must obtain the certificate of approval of specified architects, their failure to obtain such certificate is a defense to an action on the contract, in the absence of fraud or collusion on the part of the architects and defendant; and it was also held that defendant's taking possession of the premises after plaintiffs quit work was not a waiver of the condition requiring plaintiffs to obtain the architect's certificate before they were entitled to payment. The city had a right to demand a strict compliance with the specifications. The plaintiff agreed to do the work strictly in accordance with the plans and specifications for the sum accepted. The testimony in this case plainly shows that the contractor insisted frequently upon supplying material different from that which was contracted for, and upon doing the work in a manner different from that which was specified in the contract. It is not sufficient for him to say that the material substituted is as good as that which was specified. The question of quality was determined by the contract. It must be presumed that all these questions had been in the minds of the contracting parties, had been discussed by them, and that the kind of material which they concluded was best for the purpose was the kind which was specified. They had a right to have all such questions as that settled and determined before the contract was entered into. They were settled and determined by the contract, and the contractor has no right now to have the question of the relative worth of material litigated. It was for the very purpose of preventing litigation on this question, and of preventing the subjection of their judgment to the judgment of a jury, that these specifications were made; and in this case, outside of any certificate of the engineer, the city would have the right to the kind of material for which they contracted, and to have the material placed in the sewer in the manner in which they contracted. But here they have a special right to have the question of the kind of materials, and the manner in which the material is used, submitted to the judgment of the agent whom they appointed for that purpose; and, if the contention of appellant is to prevail, the result would be that, instead of these matters being submitted to the opinion of their agent, they are to be submitted to the opinion of the jury,—the very thing which they sought to obviate by their contract.

But there is another proposition which precludes the appellant from recovering in this case at all. It was determined in *Dermott v. Jones*, 2 Wall. 1, that, where a contractor has been guilty of fraud, he cannot recover in any form of action. The evidence in this

case is overwhelming that the contract was not substantially complied with. The specifications required that the pipe should be of the best quality of vitrified ironstone, salt-glazed pipe; that it should have a true circular bore, and should be straight and free from warps and other imperfections. The process of vitrification and the results flowing from it were described with a great deal of technical learning, both by witnesses and counsel, in the trial of the cause; and it seemed to be conceded that the vitrification of the pipe was necessary, outside of the fact that such quality of pipe was called for by the contract. That this pipe was not thoroughly vitrified is plainly evident from the testimony, not only of the engineer, but many witnesses who show themselves competent experts. It is true that there was some conflict of testimony on this subject; but we think that the great weight of testimony, both as to number and experience, was to the effect that the pipe was not thoroughly vitrified, or, at least, that a great deal of it was not; and the jury were perfectly justified in coming to the conclusion, which they no doubt did, that the pipe did not meet the requirements of the contract in this particular. The contract also provided that the gravel placed upon the pipe for a foot above the same should be screened; also, that, where the screen was used, it should be one part of cement and two of sand. It plainly appears from the testimony, and overwhelmingly appears, that these provisions of the contract were disregarded, and that the contractor instructed his men to use five or six shovels of sand to one of cement; that he refused to screen the gravel that was thrown upon the pipe; and that in many instances he himself hurled down large stones, as large as a man's head, upon the pipes, injuring them, and sometimes cracking them; that, when he was expostulated with by the engineer or by the inspectors, he would curse and damn them; that when the engineer called his attention on one occasion to the fact that he should screen the gravel, and that the contract provided for it, his answer was: "To hell with the contract. I will do this work as I please. Damn you." In fact, the record is full of these and many more profane and vulgar expressions on the part of this contractor when his attention was called to the violation of the contract in any particular. Many of the witnesses testified to these expressions,—witnesses who were seemingly disinterested, some of whom were working for the contractor, and some of whom were working for the city; so that the conclusion cannot be escaped from the whole testimony in this case that the contractor not only failed to substantially comply with the contract, but that he deliberately planned to escape the responsibilities of the contract, by furnishing inferior materials and inferior workmen to place the materials in the ground.

It is claimed on the part of the appellant that the city is estopped from raising these questions for the reason that their engineer accepted a portion of this contract, and allowed the contractor to proceed in the manner in which it is alleged that he did. It, doubtless, would have been better if the work had been stopped before it was; but the engineer was evidently attempting to get along with the contractor as well as he could, yielding in many instances to prevent trouble. This yielding disposition on the part of the engineer, it seems to us, from the testimony, encouraged the contractor to still further disregard the rights of the city, until he became so absolutely disregarding of the specifications that the engineer could no longer submit to his actions. Besides, it appears that much of this illegal work and illegal material was placed in the system clandestinely. The testimony shows that during the month of January the pipe was tolerably good; that in February it was not quite so good; that in March it was still a little worse; that in April it was getting still worse; and that in May it was still worse. This was the testimony of Mr. Stewart, who was the foreman of the contractor during this work; and the foreman testifies that the rejections by the engineer were increasing all the time during these months. He also states that Mr. Schmidt, the contractor, told him to "work in" these rejected pipes whenever he could, and that, in obedience to said command, he did work them in. He testified that it was a pretty hard matter frequently to run them in, because the inspectors were watching them so closely. The following excerpt from his testimony will show somewhat the condition of things. In speaking of the rejected pipe, the answer was: "A. Well, there was some of them put down on this side by Captain Thomas. Q. How much would you think? A. Oh, I didn't count them. It was a pretty hard matter to run them, because they were watching us pretty close. McCafferty was sitting right there over the pipe, and I had not much chance. Q. Then, as you got along, you run them occasionally? A. Yes, sir. Q. How many pipe do you think you did that way? A. Oh, some days I would run in one or two. Of course, I was working for Schmidt's interests, and I run them whenever I could. Q. These were his orders, I believe you said? A. Yes, sir." These rejected pipe were marked "Rejected" by the engineer with red chalk; so that there was no question about the workmen knowing what pipe were rejected, and what were not. The witness, continuing, says: "We went on until the pipe got to coming so bad that they could not use them any more. They were sending such pipe to put in here that it was no use to try to put them in any more. Q. Now, did you have any conversation with Mr. Schmidt about the quality of the pipe that was coming? A. I asked him

once what was the reason that he did not stop it, and try to get some good pipe; that there was no use in trying to get in some that we had there then. Q. What did he say? A. He told me to keep still, and not say anything about it." The same witness testified that the cementing was not done according to specifications, and that Schmidt directed the men, in mixing the sand and cement, to put in all the sand that they could get, and, in answer to the question, "How much sand was put in?" the witness says: "Oh, it run from 2 to 3 and 4 or 5 shovelfuls to one of cement; just according to how the inspectors were watching." Another witness testified that he saw Schmidt taking pipe that was rejected from one part of the work, rubbing off the rejected mark, and hauling it to another part of the work, to be used in the sewer. Another witness (who was an inspector) testified that he would have to have a dozen pair of eyes to keep the workmen from using rejected pipe, or from using too much sand, or from improperly using the cement on the joints. In fact, without further particularizing, there were so many unimpeached witnesses who testified to the manner in which this work was done, and the manner in which the contractor treated the inspectors, frequently threatening to throw them out of the ditches or to break their necks if they interfered with his work, and in some instances intimidating them to such an extent that they would not continue work, that the jury were justified in concluding, and no doubt did conclude, that the contractor (the appellant here) had been guilty of gross fraud in the attempted performance of his contract, and that the city was justified under the contract in removing him from the work, and that much of the damage which was done was not ascertainable until after his removal, when it was found that it would become necessary to remove the rejected pipe which he had clandestinely inserted, and to do over a portion of the work which he had done. The engineer, in answer to the question why he did not furnish the certificate, said: "Well, because sometimes it was impossible to tell whether the cementing of the joints had been done properly. It was impossible to tell whether it was standard weight of pipe, or whether the work was well done or not. I had no way of ascertaining until the work had been completed, and I had tested it. I was not satisfied with it. I was afraid that it was defective along the line." And investigations afterwards showed that the fears of the engineer were justified.

We think—First, that there was no substantial compliance with the contract upon which the certificate of the engineer could be rightfully demanded; and, second, that the testimony shows that the contractor had been guilty of such fraud as would prevent him from suing on the contract at all. We

have examined the instructions given by the court, and the exceptions taken to the same, and the instructions which were asked for by the appellant and refused by the court. We think the instructions were as favorable to the appellant as they should have been, and that his failure to recover before the jury was on account of the overwhelming weight of testimony against him on the facts involved in the case. The judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(12 Wash. 199.)

KOHNE et al. v. WHITE.

(Supreme Court of Washington. June 29, 1895.)

ACTION AGAINST LANDLORD—BREACH OF COVENANT TO REPAIR—MEASURE OF DAMAGES—EVIDENCE.

1. A judgment will not be disturbed because improper testimony as to the measure of damages was admitted, if there was no objection to such testimony.

2. In an action by the lessee of a lodging house for breach of a covenant to repair, it is error to admit evidence showing that furniture, worth, when placed in the building, \$2,000, was, when taken out, worth only \$200, without any regard to the natural wear and tear, and to admit in addition, evidence of the loss of the rental value of rooms in the house as furnished rooms.

3. In such a case it is error to admit evidence of the gross value of the rooms furnished by him, without showing the value of the use of the furniture, and the cost of management.

4. The admission of improper testimony on the question of damages is not cured by proper instructions on the measure of damages.

5. An instruction that the measure of damages was all the damage which plaintiff sustained to her furniture by reason of defendant's failure to repair, and the difference between the rental value of the building as it actually was and what it would have been if defendant had repaired as the lease required, is correct.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by Annie Kohne and Charles Kohne, her husband, against Jane White, for damages for breach of covenant in a lease. From a judgment for plaintiffs, defendant appeals. Reversed.

Fred H. Peterson, for appellant. Fishback & Ferry, for respondents.

DUNBAR, J. Respondents brought an action against appellant to recover damages for a breach of covenant in a written lease for the sum of \$5,000. The lease provided that the party of the first part (the appellant here) should make substantial repairs, and all repairs to be made by reason of the neglect and the ordinary use of said building should be made at the expense of the said second party, respondent Annie Kohne. The complainant alleges that the plaintiff took possession of said premises under said lease on the 1st day of September, 1889, and continued in possession until the 1st day of January, 1891: that the plaintiff kept and performed all the

conditions of said lease on her part, but on the 1st day of January, 1890, it became and was necessary to make substantial repairs on said premises; that the roof leaked badly; that the plumbing and sewerage were defective, and flooded the house with sewerage; that the defendant was notified to make said repairs, but neglected and refused so to do, and that plaintiff was deprived of the use of the premises leased by her, by reason of the failure to keep the covenants of said lease; that, in various ways stated in the complaint, she was damaged in the sum of \$5,000. A general demurrer was interposed to the complaint, and overruled by the court. Answer was filed, denying the material allegations of the complaint, except the making of the lease, which was admitted, and alleged as a counterclaim a balance of \$135 as rent remaining due and payable from the plaintiff to the defendant; alleged that all repairs had been made, as required by said lease, and that the lease was rendered untenable by the acts of third parties, without the fault of the defendant, and also that the repairs required to be made rose out of the negligent use of said building by the plaintiffs. A trial was had, which resulted in a verdict for the plaintiffs in the sum of \$2,740. Upon a motion for a new trial the court reduced the verdict to \$2,250. This amount was accepted by the plaintiffs, and the judgment rendered for that amount was appealed from by the defendant.

In passing, we will simply say that we think the complaint was sufficient, and the demurrer thereto was properly overruled. The main contention in this case is the measure of damages. Testimony was allowed, over the objection of the appellant, to go to the jury, of the amount (1) for rent paid, viz. \$735; (2) for all depreciation in the value of furniture; and (3) for all loss of rent from rooms, upon a basis of the rental value of furnished rooms. It was the contention of the respondents that the proper measure of damages would embrace all these different items, while, on the other hand, the appellant contended that the measure of damages was the difference in the rental value of the premises as fixed in said lease and as the premises actually were, by reason of nonrepair. We think the true measure of damages lies between these two propositions. It cannot be said that the stipulated price in the lease absolutely indicates the rental value of the building. The respondent may have leased this building for a less sum than it was actually worth in the market, or she may have paid more than it was worth. In the latter instance the lessor would be entitled to the benefit of her bargain, and in the first instance the lessee would be as plainly entitled to the benefit of her bargain. It may be some indication of the market value of the lease, but it cannot go any further than that. On the other hand, it will not do to allow the lessee the full value of the lease,

and then also allow her to retain the contract price, for this would be, in effect, allowing her the benefit of the lease for nothing,—placing her in a better position than her contract placed her,—and this was the practical effect of the testimony that went before the jury in this case. If the damage by reason of the loss of the rental value of the house is \$1,000 and the amount agreed to be paid for the use of the house is \$500, it is plain that the actual damage to the lessee is \$500, and not \$1,000, because the \$500 would have to be expended, under the contract, by the lessee, if she had obtained the full benefit of the lease for which she contracted. But, as this testimony was introduced without any objection being interposed thereto by the appellant, we should not be warranted in reversing the cause for this error.

Testimony was, however, allowed to go to the jury in this case, over the objections of the appellant, as to the value of the amount of the furniture placed in the buildings by the lessee, which was proven to be \$2,000, and as to the damage done to said furniture, by showing that at the time of the vacation of the house the furniture was worth only \$200, the conclusion naturally attaching in the minds of the jury that the damage to the furniture was \$1,800. The elements of natural wear and tear to the furniture were left out of this proof. But the greatest wrong that was done in this case was by the admission of testimony, in addition to the proof of loss of furniture, showing the loss of the rental value of the rooms in the house as furnished rooms, thereby again admitting a double measure of damages; for while it is competent, under the authority of *Myers v. Burns*, 35 N. Y. 269, and *Hexter v. Knox*, 63 N. Y. 561 (both leading cases on the subject of damages), to recover damages for the rental value of furnished rooms, to the extent that the plaintiffs were entitled to furnish them for the carrying on of the business which could legitimately, under the lease, be carried on in the building, they certainly could not be entitled to recover the full damage of the loss of the value of the furniture as new furniture, and at the same time make the use of the furniture one of the elements of damage in the estimate of the value of the furnished rooms. The testimony shows that the value of these rooms, viz. 20 rooms, at \$12 a month, was the gross value of the rooms furnished, without deducting anything for the use of the furniture, which very reasonably, in the minds of the jury, had been estimated in the other charge of damages, and without in any way taking into account the expenses necessarily incident to running the business of a lodging house. Lodging houses do not run themselves. They require a proprietor and assistants to take care of them, and many other incidents of expense naturally attach. This testimony which went to the jury should have been con-

fined to the net value of the furnished rooms, and, as no testimony was offered showing the net rental value of the furnished rooms, there was consequently no testimony offered which would support the proper item of damages, viz. damages for the loss of the rent of the furnished rooms, and the jury, in all probability, based their verdict on the proof offered concerning the gross rental value of the furnished rooms; and, while the court reduced the verdict of the jury, there is nothing in the record to indicate that the deduction was made for the purpose of relieving appellant from the wrong which was worked by the wrongful admission of this testimony. It is a difficult matter to lay down a specific rule for the measure of damages, but we think that the rule laid down by the court in this case is substantially unobjectionable; for, while this objectionable testimony was admitted, it was eliminated from the case, so far as it could be, by the instructions of the court. But having been admitted, and having gone to the jury, it must be presumed that the jury were prejudiced by the admission of such testimony, notwithstanding a proper instruction by the court as to the measure of damages.

A great many objections to the instructions are raised by the appellant, but we think they are unwarranted. The main instruction was as follows: "The general rule is that a party injured by a breach of a contract is entitled to recover all such damages as might be reasonably and naturally expected to flow from the breach. And such measure of damages in this case, if you find for the plaintiff, is such sum as will fully compensate her for all damages which you find that she sustained to her furniture by reason of the defendant's failure to repair, and the difference between the rental value of the building as it actually was, and what it would have been worth if the defendant had fully complied with the conditions of this lease on her part, and made the repairs as contemplated by the lease." The further charge was made that if the jury found that the defendant, after notice, failed to make substantial repairs, and plaintiff sustained actual and unavoidable damages, they would ascertain what the same were, and the difference between what they found due for rent and the amount of damages they might find would be their verdict. The court made the qualifications in the further charge that the plaintiff, in order to recover for any loss under the lease, must show that such loss was unavoidable on her part, and that she exercised due diligence to make the loss as small as possible. Exceptions were taken by appellant to most of these charges, and other instructions were asked and refused by the court, refusal of which is alleged as error here. But we think that the law was properly given by the court, and that the instructions asked for by appellant had either been given in substance by the court, or were immaterial,

under the undisputed facts in this case. It will be noticed that under the conditions of the lease the appellant especially contracted to make substantial repairs, and there can be no question, under the testimony, but that substantial repairs were necessary, and that the appellant was notified time and time again of the necessity of these repairs, and demands were made upon her to make them. The testimony is convincing, to our minds, that great damage was suffered by the respondents in this case through the breach of the covenant on the part of the appellant, and, inasmuch as the case has three times been tried by a jury, we are exceedingly loth to reverse it. But the testimony admitted, in the particulars which we have mentioned above, it seems to us, is so plainly prejudicial to the rights of the appellant that we are compelled, for that reason, to order a reversal of the cause. The judgment will therefore be reversed, and a new trial granted.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

(107 Cal. 524)

CITY OF SAN BERNARDINO v. SOUTHERN PAC. CO. (No. 19,576.)

(Supreme Court of California. June 27, 1895.)

LICENSE OF CARRIER—INTERSTATE COMMERCE.

A city situated on a branch line, and not the main line, of a foreign railway corporation engaged in business involving interstate commerce, cannot impose on the company a license tax on the privilege of engaging in the business of a common carrier within its limits.

Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by the City of San Bernardino against the Southern Pacific Company, a corporation. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Rolfe & Rolfe and H. C. Rolfe, for appellant. Bicknell & Trask (Wm. F. Herrin, of counsel), for respondent.

GAROUTTE, J. This is an action by the city of San Bernardino, a municipal corporation of the fifth class, to recover of the Southern Pacific Company, a corporation organized under the laws of the state of Kentucky, the sum of \$100 as license tax for carrying on the business of common carrier, under the provisions of a city ordinance imposing a license tax of \$5 a month on any person or company carrying on such business in said city. The answer alleges that the defendant is engaged in interstate commerce in operating a railroad for the carriage of freight and passengers and United States mail from New Orleans, in the state of Louisiana, through the state of California, to Portland, in Oregon, and as part of said system operates a line of railroad to said city of San Bernardino, and that the sum sought to be

recovered from defendant is a license tax for the privilege of engaging in interstate commerce, and its assessment and attempted enforcement and collection is a violation of article 1, § 8, pts. 3 and 7 of the constitution of the United States. The case was tried on an agreed statement of facts, and judgment went for defendant in the court below, and plaintiff appeals.

In the agreed statement of facts we find the following: "That the defendant is now, and at all the times stated in plaintiff's complaint herein was, a railroad corporation organized under the laws of the state of Kentucky, and engaged in operating, as lessee of the Southern Pacific Railroad Company, a continuous line of steam railroad, for the carriage of freight, passengers, and United States mails, for hire as common carriers, from the city of New Orleans, in the state of Louisiana, through the states of Louisiana and Texas, the territories of New Mexico and Arizona, and the states of California and Oregon, to the city of Portland, in the state of Oregon, and that as a part of its said transcontinental line of railroad, and connecting with its main line thereof, near Colton, in the county of San Bernardino, state of California, it operates a line of steam railroad to and into the city of San Bernardino, in said county and state, for the carriage of freight, passengers, and United States mails to and from points on its said main line of railroad outside the state of California; also between points in the state of California; and that it does now, and at all times mentioned in said complaint did, under contracts with the government of the United States, regularly carry over its said line of railroad the mails of the United States to and from said city of San Bernardino, and to and from points outside of the state of California, and has at all times mentioned in the complaint herein maintained an office at said city of San Bernardino for the carrying on of its said business."

A license tax, which is a tax on the privilege of doing business involving interstate commerce, is void, and cannot be enforced. This doctrine cannot be questioned. In *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, the court said: "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which solely belongs to congress." See, also, *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851.

It would appear from appellant's brief that this proposition of law is not controverted, but its application to the facts of this case is denied, upon the ground, as it is claimed, that the line of railroad operated

by the defendant in the city of San Bernardino is not its main trunk line, but is only a branch thereof. In other words, it is conceded that a similar license tax to the one here involved would not be a valid tax, and could not be collected, in any city located upon the main trunk line of road between New Orleans and Portland, Or., not even in the city of Colton, which is situated at the point of junction of the main and branch lines, and in the same county as the plaintiff itself. Under the agreed statement of facts, there is no sound foundation upon which to rest the application of a different principle of law in these two classes of cities. It is stipulated that this branch line is "a part of its said transcontinental line of railroad," and in the face of the existence of such fact we do not perceive any force in plaintiff's contention that this particular part of the railroad is no part of its main trunk line. But the stipulation of facts even goes beyond this broad statement, and declares that the line of road operating in the city of San Bernardino carries passengers, freight, and United States mails to and from points on its said main line of railroad, outside of the state of California; also between points in the state of California, and likewise conveys the United States mails to and from such points. Carrying passengers and freight from San Bernardino to a thousand places on the line of the road in other states, and likewise from those points to San Bernardino, is conducting an interstate commerce business pure and simple, and by the stipulation this is the business the defendant is carrying on in the city of San Bernardino. The question of power in the city to create such an ordinance is not to be tested by the fact as to whether or not the city is located upon any particular line of railroad, be it trunk or branch line, but rather by the character of the business in which the defendant is engaged in the city passing the ordinance. In dealing with this question, we do not concern ourselves as to the character of the franchise under which either the trunk line or the branch line of defendant is doing business. The character of defendant's business, and not the character of its franchise, points the judgment. Again, as far as plaintiff is concerned, it is the terminus of the transcontinental line; but we think the question of direct line and termini wholly immaterial.

If this question is to be determined by the character of the business done, and we are clear that by such rule the rights of defendant are to be measured, then plaintiff stands upon common ground with every other city situated in the state of California upon the main line proper, for in those cities the defendant conducts and carries on the same kind and character of business as is conducted and carried on in the city of San Bernardino. While defendant does business in the city of San Bernardino in carrying

freight and passengers to and from other points in the state of California upon the trunk line, the same conditions are present as to every other city located upon the trunk line, and such circumstance, if controlling, would give them all power to levy the tax here assailed.

There is no attempt by the ordinance here under discussion to levy this tax upon the local business of the defendant, even if the power to take such course existed, but by its terms it includes both local and interstate business. The ordinance covers its entire business as common carriers, regardless of its nature, and therefore, of necessity, operates as a burden upon interstate commerce, if its business is of that character. As a condition attached to the conduct of its business in the city of San Bernardino, it is required by this ordinance to pay a tax to the city. In that city its business is not confined within the state lines of California. It is therefore engaged in interstate commerce, and, being so engaged, no statute or municipal law can burden or handicap its business, for the regulation thereof rests solely in the hands of congress. For the foregoing reasons the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(107 Cal. 535)

HENRY v. BARTON et al., Board of Trustees.
(No. 19,477.)

(Supreme Court of California. June 27, 1895.)

LIQUOR LICENSES—DISCRIMINATION.

The trustees of a city, in the absence of express legislative authority, are vested with no discretion as to the granting of liquor licenses, but must issue a license to any one complying with the requirements.

Department 1. Appeal from superior court, San Bernardino county; George Otis, Judge.

Petition for a writ of mandamus by Charles H. Henry against H. M. Barton and others, constituting the board of trustees of the city of San Bernardino, a municipal corporation. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Rolfe & Rolfe, for appellants. E. E. Rowell, for respondent.

GAROUTTE, J. Respondent in the trial court secured a judgment of mandate against Barton and others, trustees of the city of San Bernardino, requiring them, as such trustees, to issue to him a retail liquor license. This is an appeal prosecuted from such judgment. It is provided by ordinance of that city that "for every saloon, bar, or place where spirituous, vinous, etc., liquors are sold or given away in less quantities than one quart, a license tax of fifty dollars a month is imposed." It is further provided that any person desirous of engaging in such business must make written application to

the board of trustees for a license therefor, and such application must be accompanied with a bond, with two sureties, in the sum of \$2,000, conditioned that the applicant shall keep a quiet and orderly house, etc. The application contemplated by the ordinance was made, accompanied by a good and sufficient bond. This is conceded by the trustees, but they denied the application, upon the ground "that in the exercise of their best judgment and discretion in said matter, and under and in pursuance of an honest belief on the part of the members of said board that the welfare and good order of said city and the inhabitants thereof required that the granting of such license be refused." No evidence was taken in the case, and consequently we know nothing of the specific facts or grounds upon which this action of the trustees was based; but as we look at the case, the grounds, whatever they may have been, are wholly immaterial. This action of the trustees cannot be successfully maintained. The ordinances of the city of San Bernardino, as they now stand, entitle every man who complies with their provisions to a retail liquor license, and this respondent complied with these provisions. Trustees of cities have no power except that given them by express provision of law, and we find no power in any of these ordinances vesting in them discretion as to the granting or denying an application for a liquor license. In the absence of some express legislative enactment granting such right, there is no principle of law that will allow the trustees of any city to say that a liquor license shall be granted to A., and the same right denied to B. For the foregoing reasons, the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.*

(107 Cal. 487)

EATON v. JONES. (No. 19,516.)¹

(Supreme Court of California. June 24, 1895.)

NEW TRIAL—ERROR IN JUDGMENT—MODIFICATION—NOTICE.

1. Where, in an action to quiet title, the judgment for defendant included, by mistake, property which the court did not intend to include therein, the court could grant a new trial unless defendant consented to a correction.

2. When a judgment for defendant, in an action to quiet title, included, by mistake, property which should not have been included, and defendant filed a refusal to modify the judgment, in compliance with an order of the court granting a new trial unless defendant consented to such modification, there was no necessity to give defendant further notice before setting aside the judgment and granting a new trial.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Frederick Eaton against Doria Jones to quiet title. There was judgment for defendant. From an order granting a new

¹ Rehearing denied.

trial unless defendant consented to a modification of the judgment, and an order setting aside the judgment and granting a new trial, defendant appeals. Orders affirmed.

Chapman & Hendrick, for appellant. C. McFarland, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to a parcel of land lying and being in the city of Los Angeles, bounded and described as follows: "Commencing at a granite stone monument set at the intersection of the produced center line of Rouland street and the western boundary of the city of Los Angeles, said center line being the present northern boundary of said Rouland street in the Wiesendanger city tract, and running thence along said west city boundary N. 0° 26' W. 37.72 feet to a stake in the southwest corner of the John Jones property; thence along a board fence S. 61° 55' 913.88 feet; thence S. 27° 47' W. 43.5 feet; thence N. 61° 15' 30" W. 896 feet, to the place of beginning." Defendant answered, denying the title and possession of the plaintiff to the land, or to any portion thereof, and set up title to the land in herself. The cause was tried by the court without a jury, and written findings filed, to the effect that plaintiff is not the owner of the land, and that defendant claims an interest therein adverse to the plaintiff, which claim is not without right. Judgment was entered thereon accordingly. Plaintiff moved upon a statement for a new trial. Upon the argument and submission of the motion for a new trial, the court made an order as follows: "The motion for a new trial is argued and submitted, and the court now orders that the motion for a new trial be granted, unless within ten days after plaintiff furnishes defendant with a description of the property, so as to include only the property to the fence as it now stands on the south boundary of defendant's property, the defendant's counsel to have the judgment given herein so modified as to make the line of said fence the south boundary of defendant. And in case such consent be given, then the motion for a new trial be denied." This order was made April 16, 1894. The record shows that within 10 days counsel for defendant were furnished with the description called for by the order, for the purpose of a modification of the judgment, and that counsel for said defendant refused in writing to consent thereto or to concur in the proposed modification of the judgment, which descriptions and refusal were filed with the clerk of the court. Thereafter, and on the 1st day of May, 1894, without further notice to the defendant or her attorneys, and in their absence, the court entered an order reciting that at the hearing of the motion for a new trial it appeared that the judgment for defendant "included property which the court had not intended to be included therein"; that the court had

thereupon ordered, etc. (reciting the provisions of the former order); "that the plaintiff had served the description of the property as called for, and that the defendant not only having failed within said time (ten days) to consent to such modification of the judgment, but having also refused in writing to consent thereto." Wherefore it was adjudged that the judgment be vacated and set aside, and that a new trial be granted. The statement of a few leading facts from the record will tend to an understanding of the question involved in the motion for a new trial, as well as the reasons for granting such motion. In 1853 a tract of land upon the westerly border of the city of Los Angeles was surveyed in 35-acre lots, which is known as the "Hancock Survey." Defendant is the owner of lot 4 in such survey. Plaintiff is the owner of the northerly part of lot 5 in such survey, which lies south of and adjoins lot 4 of the defendant. A street 60 feet in width has been laid out, running in an easterly and westerly direction through the tract, and between the lots of plaintiff and defendant. This street is laid out entirely upon the southern tier of lots, of which defendant's lot No. 5 is one, and no part of it is upon the northern tier, of which defendant's lot No. 4 is one. The street is known as "Rouland Street," and the easterly portion of it has been opened to the public, but it has not been opened as far west as the lots of plaintiff and defendant, although the center line of such street has been produced, surveyed, and marked by monuments upon the ground. Defendant or her grantors, say 15 to 20 years before the commencement of this action, had fenced lot 4 or a portion thereof, and on the south side and adjoining lot 5 the fence did not coincide with what would be the northerly side of the survey of Rouland street, being say 13½ feet northerly therefrom at the easterly end, and 3¼ feet at the westerly end, viz. at the westerly boundary of the city. Treating this fence as the southerly boundary of lot No. 4, owned by defendant, and as the northerly boundary of lot No. 5, owned in part by plaintiff, the description in some of the conveyances under which plaintiff deraigned his title to land in lot No. 5 had described the fence as the northerly line of lot No. 5. This narrow strip of land between the northerly boundary of Rouland street, as projected, and defendant's fence was really the subject-matter of the dispute. Defendant had moved her fence from its original position to the northerly line of the projected Rouland street, and plaintiff brought this action. In his complaint he commenced his description at the monument on the center line of Rouland street, and ran around the northerly half of that projected street, as well as the land up to the old fence, thus including a portion of the street in the land the title to which he sought to quiet. Defendant denied the title of plaintiff to any portion of the land described in his complaint, and averred title in

herself. At the trial, counsel for defendant did not claim that she owned any land in lot 5, but stated as follows: "We will stipulate we do not claim anything in lot five, block B, Hancock's survey." The evidence showed, without contradiction, that all of the projected Rouland street was on lot 5, and hence was not in dispute; yet the court in its findings found that plaintiff was not the owner of the land described in his complaint, and gave judgment accordingly.

As to so much of that land thus described in the complaint as includes the produced Rouland street, which is a part of lot 5, the finding is not supported by any evidence, and is in direct conflict with the evidence and admission of defendant as shown by the record. That this was a mistake is quite apparent; and when, on the motion for a new trial, the court discovered the error, it very properly called upon defendant to consent to its correction with the alternative of granting a new trial upon a refusal. This action was, as we think, clearly within the discretion of the court, and had the motion for a new trial been under such circumstances denied, it would have been good cause for reversal.

There was no necessity for further notice, or a further hearing, upon the filing of the refusal of defendant to modify the judgment so as to make it conform to the fence on the south boundary of defendant's lot. The result of such refusal was clearly indicated in the first order appealed from, and the second order was the natural sequence of such refusal. The orders appealed from, and each of them, should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from, and each of them, are affirmed.

(107 Cal. 530)

GEARY v. BOARD OF SUP'RS OF SAN DIEGO COUNTY. (No. 19,462.)

(Supreme Court of California. June 27, 1895.)

LAYING OUT PRIVATE WAY—BOND—INSUFFICIENCY—AMENDMENT.

1. Under Pol. Code, § 2683, providing that a bond must accompany the petition for the opening of a private road, a bond reciting that whereas W. and others have petitioned for the laying out of a road, when in fact the petition was not signed by W., is fatally defective, and therefore the board of supervisors acquires no jurisdiction in the proceedings.

2. Nor does the board acquire jurisdiction where the bond fails to contain the condition that the bondsmen pay to the person over whose lands the road is sought to be opened his costs in contesting the opening of the road (Pol. Code, § 2692), in case the petition be not granted.

3. Where, in proceedings for the opening of a private road, the bond filed with the petition was fatally defective, and the board of supervisors therefore acquired no jurisdiction of the proceeding, previous acts of the board cannot be validated by amending the bond at a very late stage in the proceedings.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Juc.

Petition by Catherine Geary against the board of supervisors of the county of San Diego. There was a judgment for defendant, and petitioner appeals. Reversed.

W. T. McNealy, for appellant. M. L. Ward and Cassius Carter, for respondent.

GAROUTTE, J. The proceedings upon which this action is based were commenced before the board of supervisors of San Diego county for the purpose of creating a private road. By a writ of review these proceedings were brought before the superior court, and there held to be valid. This appeal is taken from such adjudication.

1. It appears, both by the petition and the order of the board of supervisors laying out the road, that the proceedings were inaugurated for the benefit of one J. F. Wilson, in order that he might secure a way of access to his farm. Wilson is not one of the signers to the petition for the road, and it is insisted that, under section 2692 of the Political Code, one party, at least, who is directly benefited by the laying out of the road must sign the petition. Such a course certainly would be the better practice, and it is somewhat anomalous that Wilson, the party directly interested, did not indicate his assent to the proceedings by attaching his name to the petition; but we think the proceeding is void for other reasons, and therefore do not find it necessary to give a construction to section 2692 of the Political Code in this regard.

2. As is said in *Hill v. Supervisors*, 95 Cal. 242, 30 Pac. 385, the mode prescribed by the statute for the laying out of roads is to some extent the measure of the power of the board of supervisors. The board cannot take a step until a petition is filed, which petition in form must be in substantial compliance with the requirements of the statute. But, even when the petition is filed, something more must be done before the board can act. A bond must be filed. Section 2683, Pol. Code, declares that a bond must accompany the petition, and it is only when the petition and bond are presented to the board of supervisors that power is vested in it to take affirmative action. A bond in substantial compliance with the statute is as necessary to vest the board with jurisdiction to act as is a petition in substantial compliance with the statute. At the time the petition was presented, a bond in the amount of \$50 accompanied it, which recited: "The condition of this obligation is such that, whereas James F. Wilson and others have petitioned the board of supervisors of San Diego county, state of California, for a private highway, the probable cost of viewing, laying out," etc. By its face the bond appears to be given upon a petition for a private road by James F. Wilson and others, and in no way refers to the petition upon which the proceedings in this

case were inaugurated. Wilson is not a signer to the petition here involved, and such reference being the only mark of identification found in the bond, we must assume that the bond was intended to accompany some other petition. We think it wholly void as a bond to support the petition in this case, and in no degree assisted the board of supervisors in securing jurisdiction of the proceeding.

3. Again, as a bond supporting any petition for a private road, it was fatally defective. There was no condition in the bond, as provided in section 2692, *supra*, viz.: "The bondsmen will pay to the person over whose land said road is sought to be opened his necessary costs and disbursements in contesting the opening of such road in case the petition be not granted and the road finally not opened." The foregoing is a necessary and essential condition of every bond accompanying a petition for the laying out of a private road. At a very late stage in the progress of the proceedings the defect in the bond in this regard was attempted to be cured by filing an amended bond. We think nothing was gained by such a course. If a valid bond was necessary to give the board jurisdiction to act at all, we do not see how an amended bond could validate previous acts of the board done without jurisdiction. We do not see how a fatally defective bond could be cured by an amendment at this stage of the proceedings, any more than a fatally defective petition could be cured at that time. For the foregoing reasons we think the proceedings of the board in laying out this road were had without jurisdiction, and therefore void. The judgment is reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

(5 Cal. Unrep. 57)

CURTISS v. BACHMAN et al. (No. 15,769.) 1
(Supreme Court of California. June 20, 1895.)
ACTION ON INJUNCTION BOND—SUFFICIENCY OF COMPLAINT.

A complaint on an injunction bond conditioned that plaintiff will pay to the parties enjoined such damages as they may sustain by reason of the injunction, which fails to allege that plaintiff in the injunction suit has not paid the damages, does not state a cause of action.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

Action by Gilbert L. Curtiss against N. S. Bachman and others on an injunction bond. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Chas. F. Hanlon, for appellant. W. B. Sharp, for respondents.

BELCHER, C. One Nettie Gilman commenced an action in the superior court of the city and county of San Francisco against Gilbert L. Curtiss, the plaintiff in this ac-

tion, and obtained a temporary injunction restraining him from doing certain acts during the pendency of said action. By an order of the court the plaintiff was required to file an undertaking in the sum of \$5,000 to secure the payment of such damages as the defendant might sustain by reason of the injunction, if the court should finally decide that the plaintiff was not entitled thereto; and such an undertaking was executed by the defendants in this action, and filed. That action resulted in a judgment in favor of the defendant therein, and thereupon he brought this action upon the said undertaking to recover the damages alleged to have been sustained by him by reason of the injunction. The undertaking, after setting out the preliminary facts, proceeds as follows: "Now, therefore, we, the undersigned, residents of the city and county of San Francisco, state of California, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of five thousand (\$5,000) dollars, and promise to the effect that in case said injunction shall issue and remain in force and effect the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of five thousand (\$5,000) dollars, as such parties may by reason of the said injunction sustain, if the said superior court finally decide that the said plaintiff was not entitled thereto." The complaint, among other things, alleges: "(7) That the plaintiff, Gilbert L. Curtiss, has been injured and damaged by reason of the issuance of said injunction in the sum of five thousand dollars. (8) That, prior to the commencement of this action, plaintiff demanded of the defendants, and each of them, to pay the said amount of said bond, and the damages sustained thereunder, to wit, the sum of five thousand dollars; but to pay the same, or any part thereof, the defendants, and each of them, refused, and have ever since refused, and still refuse." The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and their demurrer was overruled. They then answered, denying, among other things, that the plaintiff had been "either injured or damaged by reason of the issuance or continuance of said injunction in the sum of five thousand dollars, or in any sum whatever." The case was tried, and the court found that the plaintiff had not been injured or damaged by reason of the issuance or continuance of the injunction, in any sum whatever, and, as a conclusion of law, that the defendants were entitled to a judgment against the plaintiff for their costs. Judgment was accordingly entered that the plaintiff take nothing by his action, and that the defendants recover their costs, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

The judgment and order should be affirmed, for the reason that the complaint fails to allege any breach of the undertaking sued on.

¹ Rehearing granted.

The condition of the undertaking was that "the said plaintiff will pay" such damages, etc. There is no allegation in the complaint that the plaintiff had not paid, or had failed or refused or neglected to pay, the damages. Nor is there any allegation from which such nonpayment can be implied. But an allegation of nonpayment by the plaintiff was necessary, and without it the complaint was fatally defective. *Morgan v. Menzies*, 60 Cal. 341; *Richards v. Insurance Co.*, 80 Cal. 505, 22 Pac. 939; *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094; *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379; *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678. As the complaint failed to state a cause of action, it is unnecessary to consider the case upon its merits, but if it should be so considered, it is doubtful if there could be a reversal on any of the grounds urged. The judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(107 Cal. 504)

BERRY v. WOODBURN. (No. 18,374.)
(Supreme Court of California. June 27, 1895.)

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY INTEREST IN MINE—MINING PARTNERSHIP.

1. Defendant contracted to pay plaintiff "big wages" while employed in procuring for him a "paying" mine and operating the same, and, in case he did secure such a mine, to convey to him "an interest" in the mine, and, on his failure to secure a paying mine, to pay him reasonable wages. *Held*, that specific performance of defendant's agreement to convey "an interest" in the mine, plaintiff having procured for him a paying one, could not be specifically enforced, owing to the uncertainty as to the quantum of interest to be conveyed.

2. Such agreement did not constitute the parties partners *inter se*, under Civ. Code, § 2511, providing that a mining partnership exists when two or more persons who own or acquire a mining claim, for the purpose of extracting the mineral therefrom, actually engage in working the same, or under section 2512, providing that the relation arises from the ownership of shares or interest in the mine, and working the same for the purpose of extracting minerals therefrom.

3. Nor did the agreement amount to a "grubstake" contract, so as to entitle plaintiff to a half interest.

Department 1. Appeal from superior court, Trinity county; T. E. Jones, Judge.

Action by William Berry against Robert Woodburn. There was a judgment for plaintiff, and defendant appeals. Reversed.

D. G. Reid, Galpin & Ziegler, and T. M. Osmond, for appellant. John M. Wright, H. R. Given, and Jas. W. Bartlett, for respondent.

GAROUTTE, J. This is an appeal by defendant upon the judgment roll, without a statement or bill of exceptions. Plaintiff declares this appeal to be from a judgment es-

tablishing a trust estate in a mine, upon full performance of a verbal contract. Defendant declares the appeal to be from a judgment decreeing specific performance of a verbal contract to convey "an interest" in a mine. It is immaterial which of these views is technically true, as in substance there is but little difference. Judgment went for plaintiff, decreeing that defendant held an undivided one-half interest in the mine in trust for plaintiff, and ordering a conveyance thereof to him. The action is based upon the following parol contract, entered into between the parties, which contract is set out in the complaint, and found as a fact by the court: "That if plaintiff would go up to Trinity county, California, and endeavor to procure such a quartz mine, to wit, a quartz mine that would pay, that in the event of defendant's securing such a paying quartz mine in Trinity county, through the efforts of plaintiff, that defendant would pay to plaintiff big wages, and pay his expenses for the time occupied by him while securing the mine, and until it was demonstrated that the mine was a paying mine; and, in the event of the mine being a paying mine, that defendant would also give to plaintiff, in addition to the wages aforesaid, an interest in such mine; that, in the event of defendant not securing a paying quartz mine through the efforts of plaintiff, defendant was to pay plaintiff reasonable wages, and his expenses as compensation for his services." The court, by its findings, declared that plaintiff found a "paying quartz mine"; that defendant secured the same through the efforts of plaintiff; and decreed a conveyance of one-half thereof by defendant to plaintiff, as previously stated.

The case has been elaborately argued from many standpoints, but, as we view it, only one question is necessary to be considered, for the solution of that question presents an impassable barrier to plaintiff's right of recovery. The contract provides that, in case plaintiff's labors under it meet with success, defendant is to give him "an interest in such mine." We think this provision, as to the interest to be given, so uncertain and indefinite as to be unenforceable by a court of equity. It is elementary that a contract must be certain as to the interest to be conveyed, or equity will not take hold of it. What interest is here to be conveyed? One-half, one-fourth, or one-eighth? Upon what principle of law has the court the right to decree the conveyance of a one-half interest, rather than a one-eighth interest? Upon what sound line of reasoning may the court say that this provision of the agreement can only be satisfied by a transfer of a one-half interest, and would not be satisfied by a transfer of the smallest fractional interest? Before a contract has life, the minds of the parties must meet; and it is the court's duty alone to declare what the parties contemplated and intended when the contract was made. While plaintiff found a "paying" mine, still he was paid all his

expenses and "big wages" while engaged in the labor of finding it; and it is not at all apparent from the face of the contract that if defendant should make a purchase, he should thereupon redeem to plaintiff a one-half interest. A mine paying a small net profit upon the capital invested would probably be a paying mine; yet the purchase price might be very great, and the cost of a one-half interest thereof exceed the accumulated net profit of many years. We only cite these illustrations to show that a court of equity could not from the contract say that these parties intended that defendant should be entitled to a one-half interest in the mine discovered. "An interest" is a most indefinite term, for any fraction of a unit would satisfy it; and consequently the amount of estate to be conveyed is unknown to the court, and, being unknown to the court, no decree could possibly be made passing title to it. If the decree in this case followed the language of the contract, and decreed the conveyance of "an interest," it could not be said that a half interest was the quantum upon which the decree acted; and, if the deed following the decree purported to pass "an interest," no principle of law with which we are acquainted would justify the court in declaring that a one-half interest passed.

The fact that the evidence is not before us upon which the findings of the court are based is not material to this investigation, for there is no allegation in the complaint, nor finding of fact, that the parties, or either of them, understood by their contract that they were to own equal, undivided interests in the mine, conceding, for the purposes of the case only, the propriety of such an allegation, and the admissibility of extrinsic evidence thereunder. If plaintiff's labors under the contract had looked to the finding of a farm, or a vineyard, or an hotel, rather than a mine, and such labors had met with success, there would be no question but that the character of action here presented would not lie. It would not lie for the reasons already given, regardless of other serious objections which might be interposed to it. But respondent seeks to steer clear of these obstacles in his pathway by claiming that the contract, taken in connection with the acts of the parties thereunder, created a mining partnership as to this particular mine; and being partners, in the absence of an express agreement as to their respective interests, the law would declare them equal partners. Conceding this principle to be sound, it would probably apply equally as well to any ordinary business partnership. *Griggs v. Clark*, 23 Cal. 427. But there is no element of such a partnership here, and neither do we think that this record discloses a state of facts even approximating to a mining partnership. Section 2511 of the Civil Code provides: "A mining partnership exists when two or more persons who own or acquire a mining claim, for the purpose of working it and extracting the mineral there-

from, actually engage in working the same." Tried by the test here provided, the facts wholly fail to meet the requirements demanded to constitute a mining partnership. The complaint does not allege a mining partnership; neither do the findings so declare. The complaint does not allege probative facts sufficient to constitute a mining partnership, nor do the findings of fact point to any such business relation. Partnerships are formed by agreement, and the subsequent acts of these parties, as disclosed by the findings, in no sense can create a partnership, but simply serve to furnish light by which we may read and construe the original agreement. This agreement shows that plaintiff was employed to seek for a paying quartz mine. If he found it, he was to be allowed by defendant his expenses incurred in the search, and also "big wages" for his time and labor. In addition thereto, he was to be given "an interest" in the mine by defendant. These were the three elements forming his compensation. He found a "paying mine," and therefore, under the contract, was entitled to the compensation agreed. It appears to be a pure contract of hiring, and lacks every element of a partnership. The fact that defendant was to give plaintiff an interest in the mine, in addition to certain sums of money, has no more tendency to make the contract one of partnership than if he had agreed to give him cattle or horses, or deed him some piece of realty.

Section 2512 of the Civil Code declares: "The relation [of partnership] arises from the ownership of shares or interests in the mine, and working the same for the purpose of extracting minerals therefrom." Inasmuch as this action may be deemed one brought by plaintiff for the express purpose of obtaining a share or interest in a mine, we think it cannot be said that plaintiff as yet has an interest therein; or, if it be said that plaintiff is an owner, but that defendant holds his interest or share in trust, still his contention for a partnership fails, for he never in conjunction with defendant worked the mine for the purpose of extracting minerals therefrom. Whatever work plaintiff did in the mine before the purchase by defendant he did under the original agreement, and was entitled to big wages therefor. He himself recognizes that fact, for in this action he has sued for and recovered the "big wages" promised by defendant. Whatever work he did in the mine after the purchase was either done under a new contract of hiring, or under the big wages contract, and in either case proves nothing looking towards a partnership. We find nothing in the findings of fact strengthening plaintiff's claims that the oral agreement constituted even a quasi or qualified mining partnership. There is nothing in the facts of this case bearing any analogy to the general principle applicable to those cases where a deed or devise is made to two or more parties, without specifically naming their respective interests thereunder. Neither may

this contract be considered one in the nature of a "grubstake" contract,—a peculiar and novel character of contract, so common in the early mining history of this state, where two parties enter into a common venture, one furnishing the "grub," the other the labor, in prospecting for valuable mining properties. Clearly, such ventures were joint in their character, and all valuable discoveries would inure to the equal benefit of both. The courts declare such ventures to partake of the character of qualified partnerships; but here we have no common venture, no common ownership, no sharing of profit and loss, no furnishing of labor by one party and "grub" or money by the other. The facts in the case of *Settembre v. Putnam*, 30 Cal. 490 (a case upon which respondent largely relies for support in this branch of the litigation), are so dissimilar in important particulars to the facts of the case at bar that we refrain from viewing at length the principles of law there declared.

For the reasons stated, the judgment is reversed, and the cause remanded.

We concur: VAN FLEET, J.; McFARLAND, J.

(107 Cal. 482)

FLAGG v. DARE et al. (No. 19,522.)

(Supreme Court of California. June 24, 1895.)

RIGHT TO ATTACHMENT—ACTION ON CONTRACT—SUFFICIENCY OF AFFIDAVIT—AGREEMENT TO BUY STOCK.

1. An agreement to buy, after notice, bank stock, at not less than a certain price, is a contract, within Code Civ. Proc. § 538, providing that a writ of attachment may issue in an action upon a contract, express or implied, for the direct payment of money.

2. Under Code Civ. Proc. § 538, providing that the clerk must issue a writ of attachment upon receiving an affidavit showing that defendant is indebted to plaintiff on a contract, express or implied, for the direct payment of money, an affidavit stating that the indebtedness was "upon a contract for the direct payment of money, to wit, for forty shares of * * * stock, at \$125 per share," is sufficient.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by O. J. Flagg against D. D. Dare and others. From an order dissolving a writ of attachment, plaintiff appeals. Reversed.

T. J. Capps, D. M. Hammack, and Haines & Ward, for appellant. Wellborn, Stevens & Wellborn and C. L. Barber, for respondents.

BELCHER, C. This is an appeal from an order dissolving an attachment. It is alleged in the complaint that on the 20th day of January, 1891, the plaintiff purchased, and had issued to him, 40 shares of the capital stock of the California National Bank of San Diego, for which he then paid \$5,000,

and that he afterwards received as dividends on the stock \$125, and no more: that to induce plaintiff to purchase the said stock the defendants, prior to the said purchase, made and executed their agreement in writing, reading as follows: "San Diego, California, Jan. 20, 1891. In consideration of the subscription of Mr. O. J. Flagg for forty shares of the capital stock of the California National Bank of San Diego, California, at the price of one hundred and twenty-five dollars per share, we, the undersigned, hereby agree that, in the event of the said O. J. Flagg desiring to dispose of the said forty shares of bank stock, that we will, on sixty days' notice, purchase the same at a price not less than one hundred and twenty-five dollars per share, and allow the said O. J. Flagg interest on said stock at the rate of not less than ten per cent. per annum for the time the money was invested, less any dividends which may have been paid on said stock. [Signed] D. D. Dare, J. W. Collins, S. G. Havermale." It is further alleged that on the 8th of August, 1891, plaintiff desired to dispose of his said stock, pursuant to the terms of said agreement, and so notified defendants; that he was then, and at all times mentioned, able to return said stock to defendants, and thereafter, on the 10th of October, 1891, he offered to return the same to them, and demanded of them the performance of their agreement, and that they take and purchase from him the said shares of stock at the price he paid for the same, and allow him 10 per cent. per annum on his investment of \$5,000 for the time said money was invested, but to perform the same, or any part thereof, defendants failed and refused, and still fail, neglect, and refuse, to do so; that plaintiff tenders said stock into court; and prays judgment against defendants for the sum of \$5,000, and interest thereon at the rate of 10 per cent. per annum from January 20, 1891, less the sum of \$125 received by him as dividends thereon. At the time of filing his complaint, plaintiff asked for a writ of attachment, and, to obtain the same, presented and filed with the clerk an affidavit reading as follows: "[Title of court and cause.] State of California, County of San Diego—ss.: O. J. Flagg, being duly sworn, says that he is the plaintiff in the above entitled action; that the defendant in the said action are indebted to him in the sum of five thousand and four hundred and one and thirty-eight one-hundredths dollars, lawful money of the United States, over and above all legal set-offs and counterclaims, upon a contract for the direct payment of money, to wit, for forty shares of the California National Bank stock, at \$125 per share, with ten per cent. per annum interest from January 20, 1891, less \$125, semiannual dividends on said stock; and that such contract was made and is payable," etc. A writ of attachment was issued, and thereafter the defendant Haver-

male moved the court for an order dissolving the same, upon the grounds (1) that the action was not based upon a contract, express or implied, for the direct payment of money; (2) that no legal affidavit, as required by section 538, Code Civ. Proc., was filed with or given to the clerk of the court before the issuance of the writ. The court granted the motion, upon both of the grounds named, and from the order so made the plaintiff appeals.

Two questions only are presented for review. They are: (1) Was the action one in which, under the provisions of the Code, an attachment could be issued? And (2) was the affidavit sufficient to authorize the issuance?

Section 538 of the Code of Civil Procedure provides that a writ of attachment may be issued "in an action upon a contract, express or implied, for the direct payment of money," etc. As we read the complaint in this case, it sets up an express contract for the direct payment of money. By the agreement set out the defendants, in effect, promised to purchase from the plaintiff 40 shares of certain bank stock, and to pay him therefor not less than \$125 per share, with interest, on receiving 60 days' notice that he desired to sell the same. The complaint alleges that plaintiff gave the defendants the required notice, and offered to return the stock to them, and demanded that they purchase the same, and pay therefor the agreed price of \$125 per share, and interest, and that they refused to accept and pay for the stock, or to perform their agreement, or any part thereof. This clearly shows that the action was founded on contract, and was one in which an attachment might properly be issued. See *Donnelly v. Strueven*, 63 Cal. 182, and *Dunn v. Mackey*, 80 Cal. 104, 22 Pac. 64. Section 538, Code Civ. Proc., provides that the clerk of the court must issue the writ of attachment upon receiving an affidavit showing that the defendant is indebted to the plaintiff "upon a contract, express or implied, for the direct payment of money." In *Hawley v. Delmas*, 4 Cal. 196, the affidavit for attachment followed the language of the statute, and stated that the defendants were indebted to the plaintiff "upon a contract, express or implied, for the direct payment of money"; and it was held insufficient, because the statement was in the alternative. In *Simpson v. McCarty*, 78 Cal. 175, 20 Pac. 406, the words "express or implied" were entirely omitted from the affidavit, and it was simply stated that the indebtedness was "upon an account stated, a contract for the direct payment of money." This affidavit was held to be sufficient, and the court said: "As regards the right to attach, it makes not a particle of difference whether the contract is express or implied." The court further said: "It may be true, as contended by counsel for appellant, that an account stated can be either an express

or implied contract; but, on the other hand, it is undeniable that in either case it is a contract for the direct payment of money. The allegation that there is an account stated makes it certain that at least the elements of the implied contract exist." In this case we think it sufficiently appears from the affidavit that there was an indebtedness arising on contract for the direct payment of money. It was not necessary that the affidavit should state whether the contract was express or implied. "The indebtedness to plaintiff is the principal element required in the affidavit, and when that appears by direct statement, and there is nothing in the affidavit inconsistent with such direct statement of indebtedness, the affidavit as to such indebtedness should, in our judgment, be held sufficient." *Bank v. Boyd*, 86 Cal. 388, 25 Pac. 20. We think the court erred in dissolving the attachment, and its order should be reversed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

(107 Cal. 497)

PEOPLE v. FLY. (Cr. 6.)

(Supreme Court of California. June 26, 1895.)

EMBEZZLEMENT—CONVICTION AS TO PART OF PROPERTY—INFERENCE AS TO BALANCE.

Where defendant was indicted for embezzling a horse, wagon, and harness, and it appeared that he took the property into another county, in which he sold the horse, and that he retained the wagon and harness, the fact that the jury found him guilty as to the horse, and was silent as to the wagon and harness, does not show that they found the embezzlement to consist of the sale of the horse, so as to make the place of the commission of the crime the county in which it was sold.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Leong Fly was convicted of the embezzlement of a horse, and appeals. Affirmed.

Rawson & Merchant, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. The defendant was informed against, tried, and convicted in the county of San Diego of the crime of embezzlement, and sentenced to the state prison for a term of two years. He appeals from the judgment, and from an order denying him a new trial. The property charged to have been embezzled was a horse, wagon, and harness. It appeared without conflict that defendant and a confederate took the property charged in the county of San Diego, and carried it into the county of Orange, where they sold or traded off the horse, but retained the wagon and harness, which latter were found in their possession when they were arrested in Orange county. The defense was that there was no intention to embezzle the prop

erty, but to return it in due time to the owner. The defendant was tried separately, and the jury found him guilty of embezzling the horse, but the verdict was silent as to the wagon and harness, which in legal effect was an acquittal as to the latter.

Although not so stated in terms, the real and only question involved in the appeal is whether the evidence sustained the verdict. The position taken by defendant is somewhat novel, not to say peculiar. The argument is that, inasmuch as the evidence shows that all the property was taken by the same act in San Diego county, and was carried together into Orange county, if defendant was guilty of embezzling the horse in San Diego he was equally guilty of embezzling the wagon and harness, and the jury would, under the evidence, necessarily have so found; and from this it is argued that the only consistent deduction to be drawn from the verdict is that the jury took the sale of the horse in Orange county to constitute the act of embezzlement, since, counsel argue, "had they found the offense to have been committed in San Diego county, as charged in the information, consistency and reason would have caused them to find the defendant guilty of embezzling the wagon and harness also." Upon these premises, counsel base the contention that the verdict is inconsistent with the evidence upon which it is based, and that the effect of the verdict is to show that defendant was prosecuted in the wrong county. However plausible the reasoning, the conclusion does not follow. Unfortunately for defendant's position, we cannot review the verdict for its apparent want of "consistency and reason," if it be good in form, and is supported by the facts and the law. It is true, as contended, that it is difficult to perceive upon what theory the jury, under the evidence, arrived at the conclusion that defendant embezzled the horse, and not the wagon and harness, since in law he was as guilty of converting the latter as the former. But we are not called upon to reconcile this apparent inconsistency. The fact remains that the verdict rendered was one which the jury were authorized under the law to find. They were not required, in order to convict, to find that defendant had embezzled all the property charged, and it was for them to say what part, if not all, had been converted. They found that he had embezzled the horse, and this finding is amply sustained by the evidence. The necessary implication of the verdict is that the act was committed in San Diego county, and this fact, likewise, there is evidence in the record to sustain. The offense was complete the moment defendant took the property with intent to wrongfully appropriate it, and this intent the jury have said by their verdict was formed in San Diego. The fact that the jury might or should, under the evidence, in order to be "consistent," have found defendant guilty of embezzling all of the property, cannot militate

against the sufficiency of the verdict as found. Consistency does not always find lodgment in the jury room. The vagaries of verdicts are not infrequent, and are often inscrutable; but so long as the verdict is good in substance, and the substantial rights of the parties remain unaffected, it cannot be set aside on that ground. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

PEOPLE v. JOHNS. (No. 21,191.)

(Supreme Court of California. June 27, 1895.)

Department 1. Appeal from superior court, Butte county; John C. Gray, J.

David Johns was convicted of grand larceny, and appeals. Affirmed.

John Guidery and C. F. Lott, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. The defendant was convicted of the crime of grand larceny, and appeals from the judgment and order denying his motion for a new trial. We have carefully examined appellant's brief, and also the record on appeal, and find nothing whatever demanding a new trial of the case. There is no assignment of error demanding any extended consideration. The evidence was ample to support the verdict, and the question as to the sufficiency of the identification of the hides claimed by the prosecution to have been taken from the stolen cattle is not material upon this appeal. The production in evidence of these hides was but one element or circumstance in the case tending to prove guilt. If the identification was complete, the evidence was strong. If the identification was weak, the evidence was likewise weak. The weight and importance to be attached to it was purely a matter for the jury. The instruction of the court bearing upon this question was clearly correct. We see no valid objection to the admission of the evidence of the accomplice Johnson, and find nothing in the record that would have justified the court in rejecting it upon the ground that it was given under promise of reward. Judgment and order affirmed.

(107 Cal. 501)

WOOD et al. v. OAKLAND & B. RAPID TRANSIT CO. (No. 15,779.)¹

(Supreme Court of California. June 28, 1895.)

MECHANICS' LIENS—SUIT TO FORECLOSE—PARTIAL—FAILURE TO RECORD CONTRACT—EFFECT.

1. Though, where the contract with the original contractor is void on account of the failure to record the same with the county recorder, the contractor is not a necessary party to an action by laborers and material men to enforce mechanics' liens, yet he may be made a party, so as to enforce his personal liability, thereby avoiding a multiplicity of suits.

2. In an action to enforce a mechanic's lien, a complaint alleging the completion of the building "on or about" a certain time, and further alleging that the claim of lien was filed within 30 days after such completion, is not demurrable for failure to allege more specifically the date of the completion of the building.

3. In an action to enforce a mechanic's lien, error in overruling a demurrer on account of the failure to allege in the complaint the char-

¹ Rehearing denied.

acter of the extra work is not ground for reversal, where the claim for extra work was not allowed.

4. A memorandum of a building contract filed with the recorder, reciting that the contractor is to furnish the material and labor for the erection of a "one-story brick building, and all work mentioned in the specifications in connection therewith, in a workmanlike manner, and in conformity with the plans * * * by the construction committee" of plaintiff, does not contain "a statement of the general character of the work to be done" (Code Civ. Proc. § 1183, as amended in 1887); and hence the contract does not limit the owner's liability for mechanics' liens of laborers and material men.

Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Al. Wood and others against the Oakland & Berkeley Rapid-Transit Company and another. There was a judgment for plaintiffs, and the defendant transit company appeals. Affirmed.

J. E. McElrath, for appellant. Jas. C. Martin and W. H. Mahoney, for respondents.

VAN FLEET, J. This is an appeal by the defendant the Oakland & Berkeley Rapid-Transit Company from the judgment rendered against it, and an order denying it a new trial in three separate actions, consolidated and tried as one, brought for the foreclosure of certain mechanics' liens for materials furnished and labor performed in the construction of a power house for said defendant.

1. It is claimed that the court below erred in overruling the demurrers of appellant to the several complaints, which were alike in the particulars objected to. The first ground of objection is that there was a misjoinder of parties defendant, in the making of J. S. Ecker, the original contractor, a party defendant. The complaints proceed upon the theory, and allege, that the contract between the defendant corporation, the owner of the property, and the original contractor, was void, because neither the contract nor a sufficient memorandum thereof was filed with the county recorder; and the argument of appellant is that, taking this allegation to be true, there is in legal contemplation neither a contract nor an original contractor, and the laborer or material man has the right under the statute to sue the owner of the building directly to enforce his lien; that in such instance the contractor is not a necessary party to a determination of the matters involved in the action; and that making him a defendant is therefore improper. It is true that, under the facts alleged, Ecker was not a necessary party to the action, but it does not follow that he was not a proper party; and, if he was either the one or the other, the demurrer on that ground was correctly overruled. While plaintiffs could maintain their action against the owner alone to enforce their liens, the contractor with whom they dealt was alone personally liable to them for any deficiency that might arise; and, if a personal judgment against the contractor was for any reason de-

sired, it was proper to make him a defendant. The practice has, in fact, been commended, as tending to avoid a multiplicity of actions. *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 198, 20 Pac. 419.

It is claimed that neither of the complaints stated a cause of action, because they fail to allege the date of the completion of the building. The particular allegation objected to is: "That the said building and structure was completed on or about the 15th day of February, 1891." Defendant contends that to allege the completion "on or about" such a date is too indefinite and uncertain to amount to an allegation of the fact, even as against a general demurrer. Assuming this to be true, the defect was cured by the further allegation that the claim of lien was filed "within thirty days after the completion of said building and structure." The only purpose of alleging the date in question was to show that plaintiffs were within the provision of the statute requiring them to file their claims of lien within 30 days from the date of the completion of the structure or improvement, and this latter allegation meets that requirement.

It is further objected that the demurrer, on the ground of uncertainty, should have been sustained, because the extent and character of the extra work alleged is not shown. It is sufficient to say that this ruling, if wrong, did not injure appellant, as nothing was allowed or awarded in the decree on account of extra work, and the ruling, therefore, does not afford ground of complaint.

2. The memorandum of contract filed in the recorder's office was wholly insufficient. It did not contain "a statement of the general character of the work to be done," as required by the statute.¹ It recites that Ecker, the contractor, is to furnish the material and labor for the erection of "a one-story brick building, and all work mentioned in the specifications in connection therewith, in a workmanlike manner, and in conformity with the plans, drawings, and specifications for the same made by the construction committee of said company," etc. But the plans, drawings, and specifications referred to for the character of the work are neither set out, nor filed in the recorder's office, nor is there any attempt to state their contents or character in the memorandum. This did not comply with the statute, and the lower court was right in holding the contract void on that ground. *Yancy v. Morton*, 94 Cal. 561, 29 Pac. 1111; *Willamette, etc., Co. v. Los Angeles College Co.*, 94 Cal. 235, 29 Pac. 629; *Butterworth v. Levy*, 104 Cal. 506, 38 Pac. 897.

The other points do not require special mention. We have examined them, and are satisfied they are without merit.

The judgment and order are affirmed, and the court below is directed to allow respondents, as a part of their costs of appeal, a

¹ Code Civ. Proc. § 1183, as amended in 1887.

reasonable fee for the services of their attorneys in this court.

We concur: GAROUTTE, J.; HARRISON,

(107 Cal. 492)

MCDONALD v. MEZES. (No. 15,872.)

(Supreme Court of California. June 24, 1895.)

CONTRACT FOR STREET PAVING—VALIDITY—WORK NOT CALLED FOR BY CONTRACT—EFFECT—APPORTIONMENT OF ASSESSMENTS.

1. A provision in a street-paving contract, which exempts the superintendent from the performance of official duties, as between himself and the contractor, will not affect the validity of assessments for work done under the contract.

2. The fact that a contractor has done work not called for by the contract and resolution of intention, and has demanded payment therefor, will not invalidate assessments for work called for by the contract, where the apportionment of assessments for the work uncalled for is separate from the apportionment for that called for, and the demands for apportionment are separately made.

3. A provision in a contract for street paving that the work shall be commenced "within 14 days" from the date of the contract is sufficient, under St. 1885, p. 151, providing that the time for the commencement of the work shall be fixed at not more than 15 days from the date of the contract.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene Garber, Judge.

Action by J. W. McDonald against Juliet J. Mezes to recover the amount of a street assessment. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Modified and affirmed.

F. R. Whitcomb, for appellant. J. O. Bates, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff in an action to recover the amount of a street assessment in San Francisco, and from an order denying a new trial. This litigation has arisen—as much former litigation arose—out of the carelessness of officers and contractors when attempting to follow statutory provisions about street work, or willful efforts to evade some of those provisions. We do not think, however, that in the case at bar any of the points made for reversal are tenable.

It is contended by appellant that the contract for the work is absolutely void because it contains the following clause: "Nor shall the said James Gilleran, said superintendent, nor his sureties or bondsmen, be liable or holden * * * for any delinquency on his part." This clause should not have been in the contract; for the superintendent can only be relieved from the "delinquency of persons and property assessed." The clause is not authorized by the statute. It proposes to relieve the superintendent from the consequences of his failure to do certain acts necessary to the validity of the assessment, upon which alone the contractor could collect

the money due for his work. It proposes to exempt the superintendent from the performance of official duties, and as between the parties to the contract is probably void as against public policy. But it did not affect or prejudice the rights of the property owner, and therefore, as to appellant, did not make the contract void. Appellant relies on *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701; but in that case the unauthorized proposition that the contractor, after the completion of the work, should keep the streets in thorough repair for five years, was included in the proposal for bids, and it was held that as the bids were made on that basis they would necessarily be higher than if the unauthorized proposition had not been in the proposal, and the burdens of the property owner were thus increased. But in the case at bar the unauthorized proposition in the contract relating to the delinquency of the superintendent was not in the proposal, and the bids were not influenced by it.

It is contended that the judgment should be reversed because both the assessment and the demand included the cost of work not authorized by the resolution of intention. The resolution provided for granite curbs on Tenth street, between Folsom and Harrison; for paving the roadway with basalt blocks; "and that granite curbs and plank sidewalks be laid on the angular corners of the intersection of Sheridan and Tenth streets, and that granite crosswalks be laid across said intersection." The language of the contract substantially followed that of the resolution of intention, although the latter part of it is a little ambiguous. It seems, however, that the contractor, in addition to the work clearly specified in the resolution, also laid a sidewalk in front of lot 2, the lot owned by appellant. The assessment was divided into three apportionments: The first, as against said lot 2, was for \$348.86; the second, for \$66; and the third, for \$82.92,—and appellant contends, and, we will assume, correctly, that the first and third apportionments include all the work embraced in the resolution of intention, and that the second apportionment is exclusively for work not embraced in said resolution. But the second apportionment of \$66 was entirely for laying a sidewalk in front of said lot 2, and is completely separable from the two other apportionments; and it therefore did not vitiate the other apportionments. Moreover, it is apparent that the demand for each apportionment was separately made. The demand on lot 2 was made for \$348.86, for \$66, and for \$82.92. The demands for the valid apportionments were therefore good, notwithstanding the demand for the separate amount of \$66 for sidewalks. This view is within the principle of *Ede v. Knight*, 93 Cal. 165, 28 Pac. 860, and *Parker v. Reay*, 76 Cal. 103, 18 Pac. 124. The judgment should therefore be modified by striking out the \$66 and interest, and in all other respects should be affirmed.

Respondent contends that the whole judgment should be affirmed, because appellant's only remedy for the unauthorized work was an appeal to the supervisors, and cites as authorities on the point *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226, and the cases there cited. We are not clear, however, that the facts of the case at bar bring it within the principle of those cases. The language of the superintendent with respect to the commencement of the work is as follows: "The work to be commenced within fourteen days and completed within ninety days from the date of this contract;" and appellant contends that this was not a fixing of the time for the commencement of the work, as provided by section 6 of the act. St. 1885, p. 151. That section provides that the superintendent shall fix the time for the commencement of the work, "which shall not be more than fifteen days from the date of the contract." And appellant contends that he should have named the particular day within the 15 days. "Within fourteen days," was held good in *Fletcher v. Prather*, 102 Cal. 424, 36 Pac. 658; but, as appellant says, the precise point here made seems not to have been made in that case. However, we do not think that there is any force in the contention. If the statute had provided that the work must be completed within a certain time after its commencement, it might be of some importance to fix the very day on which it should be commenced; but there is no such provision, the time of completion being left to the discretion of the superintendent. In the case at bar he fixed 90 days from the date of the contract for the completion, and within 14 days from said date for the commencement of the work. The date of the contract was June 9th; and if, instead of saying "within fourteen days," he had named the fourteenth day, which would have been June 23d, the effect would have been the same. Under the present condition of the statute we really can see no importance attaching to this contention.

There are no other points necessary to be considered. The order denying the motion for a new trial is affirmed, and the cause is remanded, with instructions to the superior court to modify the judgment by striking out and deducting therefrom the sum of \$66, and all interest on said last-named sum of money. In all other respects the judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(107 Cal. 513)

HALL v. CAPPS et al. (No. 19,542.)

(Supreme Court of California. June 27, 1895.)

TAX DEEDS—AFFIDAVIT OF NOTICE—UNOCCUPIED LANDS.

1. Under Pol. Code, § 3785 (before amendment of March 19, 1891), requiring the purchaser of property sold for taxes, 30 days before applying for a deed, to serve notice on the owner

of, or the person occupying, the property, except where the premises are unoccupied, in which case it may be served by posting, and providing that no deed shall be issued until an affidavit is filed that the notice required has been given, an affidavit of notice by posting gives the tax collector no authority to issue a deed, when it does not show that the property was unoccupied.

2. The presumption arising from a recital in a deed that an affidavit was filed "showing that the above-described property is unoccupied, and that notice has been given," etc., is rebutted by the affidavit's showing nothing of the kind, and parol evidence is inadmissible to show that the property was unoccupied.

Commissioner's decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Mary C. Hall against Thomas J. Capps and another to quiet title. Plaintiff had judgment. From an order denying a motion for a new trial, defendants appeal. Affirmed.

Daney & Wright, T. J. Capps, and E. E. Capps, for appellants. McDonald & McDonald, for respondent.

SEARLS, C. This action is to quiet the title of Mary C. Hall to lot 16 in block 175 of the San Diego Land & Town Company's addition to the city of San Diego, county of San Diego, state of California. Defendants set up title in themselves, as grantees of one J. W. Payne, who claimed title to the premises under a tax deed executed March 21, 1891, upon a sale of the property made March 14, 1890, for delinquent taxes for the fiscal year 1889-90. The statement on a motion for a new trial shows that the cause was submitted in the court below upon an agreed statement of facts, in which was incorporated (1) certificate of sale; (2) notice to redeem, with affidavit of service thereof; (3) the tax deed. Pending the argument in the court below, counsel for plaintiff objected to the sufficiency of the affidavit attached to the notice of redemption, which is in the following language:

"State of California, County of San Diego—ss.: J. W. Payne, being duly sworn, says that he is the purchaser at tax sale of property described in the foregoing instrument; that on the 16th day of February, 1891, he personally posted in a conspicuous place upon said property, to wit, upon lot 16, block 175, of the San Diego Land and Town Company's addition to San Diego, a written notice, of which the foregoing is a copy. S. W. Payne. "Subscribed and sworn to before me, 7th day of March, 1891. H. W. Weineke, Tax Collector."

Defendants thereupon offered to prove by parol evidence that the property was, at the time of posting the notice of redemption, and at all times, vacant and unoccupied, to which proposed proof the plaintiff objected, upon the ground that the same was incompetent. Irrelevant, and immaterial; urged, in substance, that the point was not as to whether the premises were in fact vacant and unoccupied, but whether the tax collector, at the time he ex-

ecuted the deed, had sufficient evidence of such fact, based upon an affidavit, etc. The court sustained the objection, and the ruling is assigned as error.

The notice of redemption, as above stated, was served by posting upon the property on the 16th day of February, 1891. At that time section 3785 of the Political Code (which was thereafter, and on the 19th day of March, 1891, amended) required the purchaser of property sold for delinquent taxes, or his assignee, 30 days before applying for a deed, to "serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice, stating," etc. "In the case of unoccupied property a similar notice shall be posted in a conspicuous place upon the property at least * * * thirty days before the purchaser applies for a deed, and no deed of the property sold at delinquent tax sale shall be issued by the tax collector, or any other officer, to the purchaser of such property until after such purchaser shall have filed with such tax collector, or other officer, an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the tax collector as other files, papers and records kept by him in his office." It will be observed from the foregoing statute (1) that the notice must be served upon the owner of the property, or the person occupying it, in all cases, except where the premises are unoccupied, in which case it may be served by posting upon the property; (2) that the tax collector has no authority to issue a deed for property sold until the affidavit is filed showing that the notice "has been given as herein required." Proof of two things are requisite to authorize the tax collector to issue his deed in such a case: (1) The fact of posting the notice on the property; and (2) the fact that the premises are unoccupied. Every fact stated in the affidavit of S. W. Payne may have been true, and yet the premises may have been occupied, in which event the posting would have been of no avail. The tax collector had no authority to issue the deed until he was supplied by affidavit with the proof of notice given as by the statute provided, and, as the affidavit in question failed to show that such notice was given, he was without authority to issue the deed. His power comes, not alone from the existence of the facts, but from the proof of their existence, made in the manner specified in the statute, and the mode becomes the measure of his power. Service of notice in such cases by posting upon the premises constitutes an exception to the rule of the statute requiring personal notice, and he who would avail himself thereof must establish by proof the facts bringing the case within the exception.

Appellants' counsel aver in their brief that it was conceded at the trial "by respondents, in the stipulations herein filed, that the real property in controversy was vacant and un-

occupied property on the 16th day of February, 1891,—the time when the purchaser thereof at the delinquent tax sale posted his notice to redeem in a conspicuous place thereon." We fail to find any such admission in the record. In *Clarke v. Meade*, 102 Cal. 516, 36 Pac. 862, the point made here in reference to the affidavit was not, so far as appears, made, considered, or decided. A witness in that case testified, without objection, so far as appears, that the land was vacant and unoccupied, and that he posted the notice thereon. The opinion shows also that the notice and affidavit were in evidence, and holds that the notice contained the matters required by section 3785 of the Political Code; but no point was made, so far as appears, as to the sufficiency of the affidavit. Its contents do not appear, and no comment is made thereon by the court. The deed in the present case did contain a recital that the purchaser at the tax sale had filed an affidavit "showing that the above described property is unoccupied, and that notice has been given," etc. This we may concede to be prima facie evidence of the facts stated therein, but the presumption arising therefrom is rebutted by the affidavit, from which it appears that it did not show anything of the kind. There was therefore no error in the ruling of the court excluding the parol evidence offered by the plaintiff to show that the property was vacant and unoccupied.

As the error considered involves the validity of the tax deed, which is deemed void for want of a sufficient predicate to warrant its issue, the other errors assigned need not be considered. The order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(107 Cal. 587)

MORFFEW et al. v. SAN FRANCISCO & S. R. R. CO. et al. (No. 15,243.)

(Supreme Court of California. June 29, 1895.)

CONSTRUCTION OF WILL—POWER OF SALE—EVIDENCE OF EXECUTION—VESTING OF TRUST ESTATE.

1. A testator devised his half interest in the real property of the community estate to his wife, in trust for their children, subject to a life estate in herself, the expenses of the estate to be paid out of the income, and final distribution to be made on death of the widow, and after the youngest child attained its majority; none of the productive property to be sold before final distribution, and the executors to have power to sell, in their discretion, the unimproved lands; the proceeds of such sales to "be divided among the heirs as before directed." The widow qualified as executrix, and under a partial distribution took her half interest in the lands in fee, and a life estate in the other half, under the will. Held that, after the partial distribution, the widow had a power of sale as to the remainder in the unimproved lands as trustee, and not as executrix,

and hence a sale thereunder need not be confirmed by the court as provided by Code Civ. Proc. § 1561, in the case of sales of property made by direction of a will.

2. Where one by the express provisions of a will takes a life estate in land, with limitation over, and is also given a trustee's power of sale of the land, to be exercised at his discretion, the life estate is not enlarged to a fee by the granting of the power.

3. Where one given a trustee's naked power of sale of land by a will executes a deed of the land, the situation and circumstances under which it was executed are admissible to show that such deed was intended as an execution of the power of sale; Code Civ. Proc. § 1860, providing that the circumstances under which an instrument was executed may be considered in its construction.

4. A widow, advanced in years, holding a life estate in a tract of land, with a trustee's naked power of sale as to the remainder, conveyed the land to the agent of a railroad by a deed which failed to show an execution of the trustee's power of sale. When the deed was executed, an action by the railroad for condemnation of the land for use for railroad purposes had been properly commenced against the widow and heirs, and the widow knew that the grantee was agent for this railroad company, that the railroad was being built, and that a station was to be established on the property in question. *Hdd*, that the widow intended to execute her trustee's power of sale as to the remainder.

5. Civ. Code, § 863, providing that an express trust vests the whole estate in the trustee, and that the beneficiaries take no estate or interest in the property, does not prevent one with a life estate in land from having a trustee's naked power of sale as to the remainder.

Commissioners' decision. Department 2. Appeal from superior court, Marin county; E. B. Mahon, Judge.

Action by Margaret J. Morffew and others against the San Francisco & San Rafael Railroad Company and others for the possession of land. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Mich. Mullany and Wm. Grant, for appellants. Chas. F. Hanlon and Constantine E. A. Foerster, for respondents.

BRITT, C. Matthew Crooks died in the month of February, 1879, being then the owner of property amounting to \$750,000 or thereabouts in value, and consisting mainly of real estate in Marin and other counties of this state. He had at that time about 2,500 acres in the county named, including two certain parcels of salt marsh and tide lands, containing together 15.21 acres, which marsh and tide land was unproductive and unimproved. Decedent left a widow, Susan Crooks, who yet survives, and the whole estate was community property. Plaintiffs are the children of said Matthew Crooks and his said wife, and claim, under the provisions of his will below stated, to be the owners as tenants in common of an undivided one-half interest in said 15.21 acres of land. They prosecute this action to quiet their alleged title to the same, though in the argument it is admitted by their counsel that their assumed interest is subject to a precedent estate vested in one of the defendants during the life of their said

mother. Those of the defendants who resist the action deny that the plaintiffs have any interest in the lands, and claim that the defendant the San Francisco & North Pacific Railway Company is the owner of the whole thereof. The court below was of this opinion, and rendered judgment that the plaintiffs take nothing; from which judgment, and an order denying their motion for a new trial, the plaintiffs appeal.

Said deceased left a holographic will, of which the portions material to the present controversy are as follows: "I bequeath all my property, both real and personal, to my beloved wife, Susan Crooks, in trust for our children [naming them, there being ten in all], subject to the following conditions: That out of the income of the estate my wife, before mentioned, will pay all taxes and assessments, all just debts and current expenses, as they become due, maintain and educate our before-mentioned children; that she will pay, after my decease, the sum of \$5,000 in gold coin to those of the before-mentioned children who attain the age of twenty-one years. It is my wish and desire that none of my property be sold or disposed of in any other way than by lease until my youngest surviving child shall be twenty-one years of age. It is my wish and desire that my wife, Susan Crooks, shall have control of my estate, as well as the income derived from it, during her natural life, and, in case of her death or disability to manage the estate, then I appoint the majority of the surviving heirs who have attained the age of twenty-one years to carry out the trust herein set forth. And it is my desire and will that on the death of my wife, Susan Crooks, and after my youngest surviving child shall have attained the age of twenty-one years, that the estate shall be divided among the surviving heirs share and share alike. Should it be desirable by a majority of my executors herein appointed to sell a part of the unproductive estate hereby granted before the final distribution of the same, I desire that the proceeds be divided among the surviving heirs as before directed; but none of the improved or productive property shall be sold before final distribution of the same, and it is my will and desire that the before-mentioned executors shall carry out the provisions of this will without the giving of bonds or the interference or intervention of any court." No person was in direct terms appointed executor of the will, but (in accordance, we suppose, with the testator's apparent intent,—Civ. Code § 1871) letters testamentary thereon were in March, 1879, issued to Susan Crooks, the surviving widow, by the probate court of the city and county of San Francisco, in which court the will was admitted to probate. Two of the children of said deceased were yet minors at the time of the commencement of this action, February 18, 1889.

Upon the petition of the executrix, said probate court, on the 18th day of December, 1879,

made a decree of partial distribution of the estate of said deceased, containing, among other directions, the following: "That there be and is hereby distributed to her [said Susan] one undivided one-half of the property and tracts of land hereinafter described, to be held by her in her own right, being the one-half thereof belonging to her as common property of the community of the said Matthew Crooks and herself, and the remaining half, for the term of her natural life, upon the trusts declared in the will of said Matthew Crooks, deceased, as construed by this court as follows: To pay from the income as it accrues, after maintaining, supporting and educating the children of the said decedent, as directed by said will, the legacies mentioned in said will as follows: [Naming the children and the amount to be paid to each], as they shall respectively arrive at the age of twenty-one years, and for the other purposes designated in the will of the said Matthew Crooks, reference to which for that purpose is hereby made." The lands involved in this action were included among the tracts described in said decree. On April 21, 1884, said Susan Crooks executed to James M. Donahue two certain deeds, each purporting to "grant, bargain, sell, and convey" to said Donahue, his heirs and assigns, forever, one of the parcels of land, respectively, in which the plaintiffs assert an interest here. Such deeds were signed and acknowledged by Mrs. Crooks in her individual name, no reference being made in them to her capacity of executrix or trustee, or to the power of sale. The two deeds were substantially identical in form, differing as to the premises described. The sale was not reported to the superior court, nor was any confirmation of the same asked or obtained. Donahue paid to Mrs. Crooks for such land, at the time of the execution of said deeds, the sum of \$4,000. Such title as he then acquired has passed to and is now vested in the defendant the San Francisco & North Pacific Railway Company, which has apparently succeeded to the interests of the other defendant companies. Since the execution of said deeds, Donahue and the successive railroad companies claiming under him have had actual possession of the lands, and erected thereon, as the court found, "expensive and valuable improvements of a permanent character partaking of the reality." Some other facts attending the execution of said deeds will be stated in connection with our views of the intent of the grantor. It was alleged in the complaint that Susan Crooks refused to join in the action as plaintiff, and she was therefore made a party defendant. She filed an answer admitting all the allegations of the complaint.

1. Susan Crooks was, of course, the owner of an undivided one-half of the land, and the judge who tried the case was of the opinion that in virtue of the will and the decree of distribution she held the other "one-half in trust for purpose of sale as to unimproved

land," and that "full power and authority was specially delegated to her to sell the unimproved lands and premises as should seem desirable to her." Appellants, however, insist that no trust for the sale of lands is created by the will (and this is conceded by respondents); that the power of sale, such as it is, given to the widow, is conferred upon her as executrix, and not as trustee; that this was a naked power, not coupled with an interest; and hence, under section 1561, Code Civ. Proc., no title passed to Donahue, because the sale to him was not confirmed by the court having probate jurisdiction of the estate of Matthew Crooks. Counsel agree that the will created a trust to receive the rents and profits of the one-half interest subject to Matthew Crooks' testamentary disposal, and to apply the same as in the will directed; and we are of the opinion that the widow took a life estate in such one-half of all the lands upon the trusts created by the will, with an added power of sale—exercisable in her discretion—of the unproductive estate. In our opinion, also, the power of sale is given to Mrs. Crooks as trustee, and not as executrix, during her life and ability to act. It will be observed that the testator provided that the proceeds of sale should "be divided among the surviving heirs as before directed," thus requiring that such proceeds should be held for final apportionment among the heirs who should survive the period of distribution in the same manner as the unproductive land itself would be held in default of the execution of the power. The money to be derived from the sale is not to be used to pay expenses, or even legacies, or for any purpose which might be expected to arise in the performance of the duties of an executor. It seems to have been the intention of the testator that the corpus of the estate should be preserved as nearly as possible intact until the specified time for distribution should arrive, and to create a trust for the purpose of such preservation with an ordained succession of trustees, permitting, however, a sale of unproductive property if found desirable. As said in a case not wholly dissimilar to the present: "Under such circumstances the person named as executor takes not as executor, but as the donee of a power in his character as trustee." *Bolton v. Jacks*, 6 Rob. (N. Y.) 228. And see *Denne v. Judge*, 11 East, 288; *Newton v. Bronson*, 13 N. Y. 593. To such a person the property which is the subject of the trust is well delivered upon distribution of the estate. *Barker v. Stanford*, 53 Cal. 451; *Robinson v. Tickell*, 8 Ves. 142; *Cooper v. Thornton*, 3 Brown, Ch. 96, 186. Those were cases of pecuniary legacies, but under our system there can be no essential difference in this regard between the course to be taken by the real estate and that by the personal property of the decedent. Code Civ. Proc. §§ 1452, 1453, 1658, 1665. The lands thus delivered into the hands of Mrs. Crooks as trustee ceased to be

part of the estate in the course of administration, and the probate court, and its successor, the superior court, in the exercise of probate jurisdiction, had no further control of the same. *Barker v. Stanford*, 53 Cal. 451; *Wheeler v. Bolton*, 54 Cal. 305; *Buckley v. Superior Court*, 102 Cal. 6, 36 Pac. 360. The circumstance that at a future time there is to be a division of the property among the remaindermen, beneficiaries of the trust, does not, it seems, affect the rule. In *re Thompson's Estate*, 101 Cal. 351, 353, 35 Pac. 991, and 36 Pac. 98, 508. It was within the province of the probate court to determine whether a valid trust had been created, but the power to regulate and direct its subsequent administration lay with the court possessed of general equity jurisdiction. In *re Hinckley's Estate*, 58 Cal. 518; In *re Thompson's Estate*, *supra*. (It will be noted that the decree of distribution here was made several years before the enactment of sections 1699-1703, Code Civ. Proc., conferring a limited jurisdiction over testamentary trustees on the probate side of the superior court.) It seems clear that after the decree of distribution, if not before, the widow held the power of sale as trustee, and not as executrix; and that section 1561, Code Civ. Proc., has no application to the sale made to Donahue, and no confirmation by the court was required, or indeed authorized, by law; and this view, while not restricting the statute in its proper scope, allows effect to the intention of the testator that the provisions of his will shall be executed without the intervention of any court.

2. It is claimed by respondent that Mrs. Crooks had not merely the life estate, but the fee, in trust; and that, a power of sale being added, she had thus a power coupled with an interest in the fee. If this is so, then the case requires no further consideration, for upon that assumption her deeds were doubtless sufficient to pass the title. But the quantity of interest which passes to the trustee in case of an express trust is commensurate with the necessities of his office. The trustee shall have an estate in fee, if that is necessary to enable him to perform the duties imposed upon him, although it is not in terms given to him by the instrument creating the trust. On this principle a devise of lands in trust to sell clothes the trustee with the fee, because necessary to the execution of the trust; the rule being compendiously stated that the trustee "will take an estate adequate to the execution of the trust; no more nor less." *Perry, Trusts*, § 320; *Young v. Bradley*, 101 U. S. 787. In the present case there is no trust for the purpose of sale, for trusts are always imperative (*Kidwell v. Brummagim*, 32 Cal. 443); and here the power to sell is by the terms of the will left wholly discretionary (Civ. Code, §§ 847, 857; *Cooke v. Platt*, 98 N. Y. 35). And the will does not impose upon the widow any other duty which requires for its discharge an estate in the land

greater than for her life. So that there is no enlargement of her life estate to be implied from the necessities of the trust; and, the life estate in the trustee being created by express words in the will, with limitation over, it is not enlarged to a fee by the power of sale. *Kennedy v. Kennedy*, 159 Pa. St. 327, 23 Atl. 241; *Foos v. Scart*, 55 Md. 310, and numerous authorities cited; *Payne v. Johnson's Ex'rs*, 95 Ky. 183, 184, 24 S. W. 238, 609; *Hatfield v. Sohler*, 114 Mass. 48.

It is suggested by respondents that the trustee took the fee in virtue of the provision of section 863, Civ. Code. But, as said of a like statute by the court of appeals of New York: "This section does not prevent a valid limitation of a remainder to the beneficiaries of a trust to take effect upon its termination. The declaration that a valid express trust shall vest the whole estate in the trustees, and that the beneficiaries shall take no estate or interest in the land, clearly refers, as the subsequent section shows, to the trust estate, and not to an interest in the land not embraced in the trust." *Stevenson v. Lesley*, 70 N. Y. 516, 517. So here we think that said section 863 has application only to the particular estate in trust, and not to the remainder in the plaintiffs. In any aspect of the case, we conclude that the power of sale of this land in the hands of Susan Crooks was, as to the remainder after the termination of her life estate, a naked power to sell such remainder, and, as a consequence, that the efficacy of her deeds to pass more than an estate for her life depends upon their validity as an execution of such a power. Her authority is well illustrated by the case of *Bloomer v. Waldron*, 3 Hill, 361, where it was said that the deed of persons occupying a relation to the title similar to that of Mrs. Crooks here "would carry their life estates, but on any interest beyond that their deed could stand on their power of sale only, independent of their life estates." *Id.* 865. Accordingly it is contended strenuously by appellants' learned counsel that, since Mrs. Crooks owned in her individual right an undivided one-half interest in the fee of the land, and was besides vested with a life estate in the other half, with an undoubted power of sale as to the life estate, therefore her deeds to Donahue, which (they say) make no reference, express or implied, to the power, are to be deemed ineffectual to execute the power to dispose of the residue of the estate; that they operate to convey her individual interest, and no more; and that the case in this branch is governed by the rule which, after considerable fluctuation of judicial opinion, was established in England by the judgment of the house of lords in *Roake v. Denn*, 1 Dow & C. 437, decided in 1830, affirming the same case, sub nom. *Denn v. Roake*, 5 Barn. & C. 720. That case arose upon the construction of a will. Kent says: "The general rule of construction, both as to deeds and wills, is that, if there be an inter-

est and a power existing together in the same person, over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. If there be any legal interest on which the deed can attach, it will not execute the power." 4 Comm. 334. The subject is treated at length in 1 Sugd. Powers, c. 6, § 7. Instances of the operation of the rule may be found in a number of American cases cited by appellants. *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530; *Bliderback v. Boyce*, 14 S. C. 528; *Hollister v. Shaw*, 46 Conn. 248; *Patterson v. Wilson*, 64 Md. 196, 1 Atl. 68; *Insurance Co. v. Shipman*, 119 N. Y. 324, 24 N. E. 177; and others. "The donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appear." 1 Sugd. Powers, 356. The question is as to the evidence by which the intention must appear. Lord Chancellor Thurlow said in one case: "You must not go out of the instrument itself to gather the construction of it." *Andrews v. Emmot*, 2 Brown, Ch. 303. Appellants hardly press their contention so far. As we understand their argument, they deduce the conclusion—it may be correctly—from the authorities they cite that in no case where the power is not coupled with an interest is the power to be deemed executed, unless (1) there is some reference to the power in the instrument of execution; or (2) there is a reference to the property which is the specific subject-matter on which the power must operate (in this case the fee after the termination of the trust estate); or (3) the instrument would be wholly inoperative if not held to be an execution of the power; and that no evidence of matters extraneous to the deeds here can be considered to demonstrate the intent of Mrs. Crooks to execute the power, except it show that the case falls within one of the three categories thus enumerated. Of course such a rule leaves little room for interpretation in the light of facts not apparent on the face of the instrument. It was said in *Roake v. Denn* that: "There is not one instance in which the power of appointment is held to have been executed by a will unless there is a reference in the will either to the power or to the property which is the subject of it, or unless the instrument be wholly inoperative without supposing the execution of a power. * * * It has been argued that this is a question of intention, and so it is; but then there are rules by which the intention is to be collected, and it would be dangerous to leave a question of this kind to loose and vague conjecture." 1 Dow & C. 448, 449. But it was remarked by Lord Wynford, in delivering his opinion in the same case: "I agree that there are certain rules by which the intention is to be collected, but I think they are bad rules, and I hope they will not long continue to be binding on the judges." And Sugden observes,

speaking of the same subject, some years later: "It is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property. The statute [1 Vict. c. 26, § 27, much like section 1330 of our Civil Code in its effect] now executes the supposed intention in every case of a general disposition by will when the testator has a general power. But in other cases the rule of law is to prevail. The mischief has been increased by the courts in some recent instances adopting a strict construction, with a view to establish a certain rule." 1 Sugd. Powers, 401. Of a doctrine evoking such criticism from such sources it may be suspected, as remarked by the supreme court of Illinois, that it "has been pressed beyond its legitimate domain by at least some of the adjudicated cases." *Funk v. Eggleston*, 92 Ill. 535. It is supposed to rest upon the case of *Sir Edward Clere*, 6 Coke, 17. In *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479, which is the leading American authority. Judge Story said of *Clere's Case*: "It affords a strong illustration of the true doctrine. In that case it was held that the power was well executed, notwithstanding it was not referred to, because otherwise the devise in the will would be inoperative and void." Such "true doctrine," as declared by Judge Story, is this: "If the donee of the power intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument." He adds: "It is sufficient that it shall appear by words, acts, or deeds demonstrating the intention." *Blagge v. Miles*, 1 Story, 446, Fed. Cas. No. 1,479. Following this case are many decisions applying, and some of them enlarging, the principle thus stated. In *Funk v. Eggleston*, 92 Ill. 515, the subject of the power being real estate, and the question being as to the execution of the power by a will, the court held that, in order to arrive at the intention of the testator, the facts in the case dehors the will—such as the very small quantity of land involved, the circumstance that the same must be distributed among more than 200 heirs of the donor of the power, if the power was not intended to be executed, the lack of property to satisfy certain legacies, except by exercise of the power—as well as all the provisions of the will itself would be considered; and if these indicate an intention to pass the whole estate, the devise

"should be held to work both by the interest and by the power, and to pass the entirety." *Id.* 545-548. And in *White v. Hicks*, 33 N. Y. 383, the court, while rightly rejecting evidence of parol declarations of intent, yet held that the intention to execute the power might be deduced from a comparison of the amount of personal property which a testatrix assumed to dispose of by will with the amount she had subject to such disposition, without the aid of the power, and in this view dissented from the rule of the later English authorities. To similar effect, *Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. 631. In *Glindrat v. Gaslight Co.*, 82 Ala. 596, 2 South. 327, involving the execution of a power by deed, the purpose for which the realty was sold and purchased, viz. the construction on the same of a system of gas works to be used in lighting a town, was said to "corroborate the intention of the deed to convey an indefeasible title"; that such purpose "implies the idea of a holding in perpetuity." "The intent is matter in pais to be collected from all the circumstances of the case." *Crane v. Morris' Lessee*, 6 Pet. 620. And having the same general drift are *Ladd v. Chase*, 155 Mass. 422, 29 N. E. 637; *McCreary v. Bomberger*, 151 Pa. St. 323, 24 Atl. 1066; *Boyer v. Allen*, 76 Mo. 498; and other cases cited by respondents. In these authorities we see, at bottom, no more than the familiar principle of evidence now embodied in our Code, and which applies alike to deeds and wills: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." Code Civ. Proc. § 1860. This has been said here to be "the only rule of much value" in the construction of written instruments. *Walsh v. Hill*, 38 Cal. 437. And we perceive no substantial reason why an instrument which may or may not be construed as the execution of a power by the donee thereof, according as circumstances may unfold the intent, should form even a partial exception to this general principle; and we hold that it does not. It follows that the court below properly admitted evidence of the situation of the parties to the deeds here in question, and of the property described in the same, and of the circumstances under which they were executed.

But it is said that the evidence admitted is insufficient to sustain the inference of an intent on the part of Mrs. Crooks to act under the power. We recognize the rule that the intent to execute the power must be clear, so that such intent is not left in doubt; but within this principle we are of opinion that the evidence here, taken in connection with the deeds themselves, justifies the conclusion that Mrs. Crooks intended to execute the power and to convey the entirety of the land to Donahue, and that her deeds had that ef-

fect. It appears from the record that prior to such deeds the San Francisco & San Rafael Railroad Company, one of the defendants, had commenced an action in the superior court of Marin county to condemn a large part of the land in question for the purpose of constructing its railroad track thereon, and for the construction of wharves and other terminal facilities at Point Tiburon, on the shore of the Bay of San Francisco. Mrs. Crooks and the plaintiffs, her children, were parties defendant in that action. The company began the work of constructing the track before the deeds were executed. Donahue was a director of the company, and acted in its behalf. Mrs. Crooks testified: "I knew where the land was situated, and had reason to know that Donahue wanted it for some railroad purposes. I knew of the railroad having been built, and in the same public manner I knew he had established a station at Tiburon. I remember being sued by Donahue before I made the deed to him. All my children were joined in that action." The action was withdrawn by the plaintiff December 28, 1888. The price she received for the land—\$4,000—is admitted to have been at least its full actual value. It had been appraised as part of the estate of her deceased husband at about \$75 only. She was advanced in years, and could not reasonably suppose that the purchaser would desire to place improvements of the nature had in view on this land, if one moiety of it must be held upon the uncertain tenure of her life only. "The life estate of an old lady in unimproved lands would hardly have been salable unless under execution." *Owens v. Ellis*, 64 Mo. 89. It seems incredible that she, actuated by fair and honest motives, as we must assume she was, did not intend to transfer the whole estate, or to exercise the power necessary for that purpose. The judgment and order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(1 Kan. A. 432)

THRALL v. FAIRBROTHER.

(Court of Appeals of Kansas, Southern Department, C. D. June 7, 1895.)

APPELLATE COURT—JURISDICTIONAL AMOUNT.

The pleadings and the agreed statement of facts show that the amount in controversy, and for which judgment could have been legally rendered, exclusive of costs, in the court below, does not exceed \$100. *Hdd*, that this court has no jurisdiction to hear and determine the case, and that the case must be dismissed from this court, although no question of jurisdiction was raised by either party.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. A. Leland, Judge.

Action by G. E. Thrall against William Fairbrother. From the judgment in the district court on appeal from the justice, plaintiff brings error. Dismissed.

This is a case in which the plaintiff in error, George E. Thrall, brought suit in justice court upon two promissory notes of \$50 each, and interest. Judgment was rendered in justice court in favor of the plaintiff, and an appeal taken to the district court. The case was tried in the district court upon an agreed statement of facts, in which it is admitted that the note set forth in the first cause of action was given in renewal of the note set forth in the second cause of action; that at the time of the execution of the note set forth in the first cause of action the note set forth in the second cause of action was taken up, marked "Paid," and surrendered to this defendant in error; but the only payment of it was the execution of the note set forth in the first cause of action. It is also admitted that the note set forth in the second cause of action was given for a valuable consideration. The petition of the plaintiff below alleges that the note set forth in the second cause of action was dated November 17, 1888, and executed and delivered to the plaintiff in error upon that day, and was for \$50, and due three months after date, and to draw interest at the rate of 12 per cent. after maturity. The bill of particulars in this cause was filed in the justice court on the 24th day of March, 1890, and the amount claimed by this plaintiff in error upon each one of the counts set forth in this action was the sum of \$56.25, with interest at 12 per cent.

R. P. Kelley, for plaintiff in error. Clogston & Fuller, for defendant in error.

DENNISON, J. (after stating the facts). Section 542a of chapter 80 of the General Statutes of 1889 reads as follows: "No appeal or proceeding in error shall be had or taken to the supreme court in any civil action unless the amount or value in controversy, exclusive of costs, shall exceed one hundred dollars (\$100)." This section became a law March 20, 1889. This section also excepts certain cases, but this is not one of them. The amount in controversy in this case, as is conclusively shown by the pleadings and the agreed statement of facts upon which the case was tried, was \$56.25, and interest from the 24th day of March, 1889.

Before we can review the errors complained of in this case, it will be necessary for us to know that we have jurisdiction. The question of jurisdiction in this case has not been raised by the defendant in error, nor has he in fact made any appearance in the case, or filed any brief. In the case of *Skoin v. Limerick*, 50 Kan. 465, 31 Pac. 1051, in passing upon the question of jurisdiction where the question has not been raised by

either party, the court says: "We think, however, it is the duty of this court, on its own motion, where the question is not otherwise raised, to raise the question ourselves, and to consider the same." Following the decision laid down in this case, and in the cases therein cited, we must hold that this court has no jurisdiction of this case, and the appeal will be dismissed from this court at the costs of the plaintiff. All the judges concurring.

(1 Kan. App. 447)

STATE v. COX.¹

(Court of Appeals of Kansas, Southern Department, C. D. June 7, 1895.)

ILLEGAL SALE OF LIQUORS—INSTRUCTIONS.

1. Instructions in this case examined, and held to fairly present the law under the evidence in this case.

2. As a general rule, where the court properly instructs the jury, except that it omits some matter which might properly be given, no available error is committed unless the court has been properly requested to instruct in reference to such matter. *State v. Peterson*, 16 Pac. 263, 38 Kan. 211, followed.

(Syllabus by the Court.)

Appeal from district court, Lyon county; W. A. Randolph, Judge.

William Cox was convicted of keeping a place for the illegal sale of liquor, and appeals. Affirmed.

J. Jay Buck and Graves, Lambert & Dickson, for appellant. F. B. Dawes, Atty. Gen., and W. C. Simpson, Co. Atty., for the State.

COLE, J. William Cox was tried in the district court of Lyon county upon an information in three counts, the first two of which charged him with the unlawful sale of intoxicating liquors, and the third charged him with maintaining a nuisance by being the keeper of a place where intoxicating liquors were unlawfully sold, and where persons were permitted to resort for drinking intoxicating liquors as a beverage. Upon the trial, the jury found him guilty under the third count, and not guilty under the first two counts, and from this conviction the defendant appeals to this court. The particular errors alleged on behalf of the appellant are: First. That the court committed error in the ninth instruction given to the jury, which reads as follows: "If you believe from the evidence that the defendant was, from April 1st, 1894, to September 8th, 1894, the proprietor of the Fifth Avenue Hotel, in the city of Emporia, Lyon county, Kansas, and was in charge and had control of the same, and during said time he permitted persons to resort to such place for the purpose of drinking intoxicating liquors as a beverage, then you will find the defendant guilty as charged in the third count of the information, and it will make no difference if the liquors were kept under the charge of some other person in said building." Second. That the

¹ Rehearing pending.

court should have specially instructed the jury in regard to a certain lease which was introduced in evidence upon the defense in the trial of said case.

We are unable to discover any error, either in the instructions given or failure to specially instruct upon the point indicated. The main question for the jury to decide, under the information and the evidence in the case, so far as the third count of the information is concerned, was whether the defendant, William Cox, was the keeper of a place where intoxicating liquors were unlawfully kept for sale, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage.

Counsel for appellant urge that as the jury found the defendant not guilty on the two counts, in which he was charged with the unlawful sale of intoxicating liquors, by the same token they should have acquitted him as to the third count, and argue that they would undoubtedly have done so had it not been for the instruction complained of. But we think, from the evidence in the case, that while the jury believed that appellant did not make the unlawful sales of intoxicating liquors, as charged, yet they did believe, notwithstanding the lease introduced, the force of which counsel urged so strongly, that he was the actual keeper of the place where the information charged said sales were made; and the instruction complained of submits that question fairly to the jury.

So far as the second assignment of error is concerned, no request was made for a special instruction upon the lease introduced, and no objection made, so far as the record discloses, to the fact that the trial court failed to give such special instruction. This, we think, clearly brings the question within the numerous authorities in this and other states. See *State v. Peterson*, 38 Kan. 211, 16 Pac. 263; *State v. Rook*, 42 Kan. 419, 22 Pac. 620. In the latter case, Johnson, J., in delivering the opinion of the court, says: "Complaint is made that no special instructions . . . were given by the court. No such instructions were asked for by the defendant, and hence no reversible error was committed by its failure to give them." An examination of the record convinces us that the verdict is fully sustained by the evidence, and that no errors occurred upon the trial, and we think the judgment should be affirmed. All the judges concurring.

3 Kan. A. 346)

BAIN v. CONNECTICUT MUT. LIFE INS. CO. et al.¹

(Court of Appeals of Kansas, Southern Department, C. D. June 7, 1895.)

APPEAL—DISMISSAL.

Where a judgment against several parties is brought into the court of appeals for review, and it is apparent that a modification or reversal thereof will affect other parties not

made parties to the proceeding for review, the court cannot entertain the case, and it will be dismissed.

(Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by the Connecticut Mutual Life Insurance Company against Robert Martin and others. From the judgment, Lucy Bain brings error. Dismissed.

John G. Hutchinson, for plaintiff in error. C. N. Sterry and Cunningham & McCarty, for defendant in error.

JOHNSON, P. J. This action was commenced in the district court of Lyon county, by the Connecticut Mutual Life Insurance Company against Robert Martin, John L. Butler, Lucy Bain, and Calvin Hood. The suit was on a promissory note executed by Robert Martin to the Connecticut Mutual Life Insurance Company, dated November 1, 1887, secured by a mortgage on real estate in Lyon county. Summons was personally served on the defendants Robert Martin, Calvin Hood, Tressler & Lowery, and John L. Butler. On the 10th day of December, 1889, Lucy Bain voluntarily appeared, and, by leave of court, filed her motion to require the plaintiff to make its petition more definite and certain, which motion was afterwards sustained as to the first point set out in the motion, and the plaintiff was required to state in its petition whether it is a duly-organized corporation under a general law of the state of Connecticut applicable to all corporations, or whether it derives its corporate existence and powers from and by reason of a special act of the legislature of the state of Connecticut creating it. As to the second, third, fourth, fifth, seventh, and eighth points in said motion set out, the motion was overruled. As to the sixth point in the motion, the motion was sustained in part and overruled as to part, as follows: That said plaintiff state in its petition the date or dates of the act or acts of the legislature of the state of Connecticut under which said plaintiff claims its corporate existence, and give the book, chapter, and page of the laws of the state of Connecticut where the same may be found. As to the other parts of the said sixth point, the same was overruled, and afterwards the plaintiff complied with the order of the court by amending its petition. On the 18th day of January, 1890, Lucy Bain, one of the defendants, filed a demurrer to the plaintiff's amended petition, setting up two causes of demurrer: First, that the plaintiff had no legal capacity to sue; second, that the petition does not state facts sufficient to constitute a cause of action. On the 21st day of February, 1890, the demurrer of Lucy Bain was overruled; and, on the 26th of February, Lucy Bain filed her answer to the amended petition. The first defense was a general denial; the second, she alleges that she was the owner in fee simple

¹ Rehearing pending.

and in the quiet possession of the real estate described in plaintiff's petition and the mortgage. On the 30th day of June, 1890, the case was tried before the court, without a jury, and resulted in a judgment for the Connecticut Mutual Life Insurance Company against Robert Martin for the sum of \$1,229, and a decree of foreclosure of the mortgage, and also for a judgment in favor of Tressler & Lowery against Robert Martin for the sum of \$165, which amount was decreed a second lien on the mortgaged premises. Lucy Bain excepted to the judgment and decree of the court, and on the 1st day of July filed a motion for a new trial, which was on the same day overruled, and exceptions taken. She was given 90 days' time in which to make and serve a case for the supreme court, and the plaintiff was to have 20 days thereafter to suggest amendments thereto; and the case was to be signed and settled by the court within 125 days from the rendition of the judgment. Case was made and served on counsel for plaintiff below on the 23d day of September, 1890. Case was afterwards signed by the judge of the district court on the 5th day of January, 1891. On February 12, 1891, the petition, with case made attached, was filed in the office of the clerk of the supreme court; and on the 14th day of February, 1891, summons in error was served on the Connecticut Mutual Life Insurance Company, and on the 11th day of April was served on Tressler & Lowery. No summons in error was ever served on Robert Martin, John L. Butler, or Calvin Hood.

The defendant in error Calvin Hood, as assignee of the Connecticut Life Insurance Company, files his motion, and appears in said case, and asks the court to dismiss the case, for the reason that none of the parties who were and are necessary parties to any proceeding to reverse that judgment are made parties here, by bringing them into this court, by either service of summons or entry of appearance; and, more than one year having elapsed since the trial of said case, the parties cannot now be brought into this court. Plaintiff in error contends that this is not a joint judgment; that it is clearly separated into two parts; that Robert Martin alone is affected by the first, and plaintiff in error alone by the second part. The first is a personal judgment against Martin alone, and the second judgment is a foreclosure and sale, and does not affect Martin, for the reason that it is neither alleged nor proven nor claimed that he has any interest in the land to be foreclosed and sold, but, on the contrary, admits that he has none. It is only the last part of this judgment that the plaintiff in error is asking to have reviewed. In this proposition we cannot concur. It is alleged in the petition of the plaintiff below that Robert Martin executed and delivered his mortgage deed to the land described therein. A copy of the mortgage is attached to the petition, and made a part thereof; and

the mortgagor expressly covenants and agrees that, at the delivery thereof, he is the lawful owner of the premises granted, and is seised of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances; this being an allegation in the petition of the plaintiff which is in no manner denied by the answer of the defendant Lucy Bain. In the second paragraph of her answer, she says that she is the owner in fee simple and in the quiet possession of the real estate described in plaintiff's petition and the mortgage; but this allegation is made at the time she filed her answer, on the 26th of February, 1890, and refers to that time only. It is nowhere alleged that she was the owner of the property and in the possession of it at the time of the execution of the mortgage by Robert Martin to the Connecticut Mutual Life Insurance Company. So, taking the mortgage as a part of the petition and the allegation in Lucy Bain's answer that she was the owner in fee simple on the 26th day of February, 1890, leads us to conclude that she has obtained her right and interest in the land subsequent to the execution of the mortgage.

Lucy Bain did not predicate her defense on the ground that the land described in the mortgage belonged to her at the date of the mortgage, and, by reason thereof the execution of the mortgage by Robert Martin, did not create a lien on the property. She denied the delivery of the note and mortgage in her answer, and objected to the introduction of the note and mortgage in evidence. She was seeking to defeat a recovery on the note, as well as to defeat the foreclosure of the mortgage. The judgment sought to be reviewed and reversed is joint, and its provisions and conditions are so dependent that it cannot be reversed or disturbed without affecting the rights and interests of Robert Martin and Calvin Hood, assignee of the plaintiff below.

It is true that Robert Martin and Calvin Hood did not appear in the court below and contest the right of the insurance company to recover on the note and mortgage, as alleged in its petition. He admitted by his failure to appear and answer the execution of the note and mortgage to secure the payment of the money, and was willing that judgment should be taken on the note, decree of foreclosure of the mortgage, and the sale of the land to satisfy the judgment. While the answer of Lucy Bain in no manner would be in conflict with his right in case of a judgment rendered in favor of the insurance company to have the mortgaged premises sold to satisfy any judgment that would be rendered on the mortgage, if the court should now, in reviewing this case, reverse the judgment as to the decree of foreclosure, and affirm the judgment against Robert Martin for \$1,229 on said note, it certainly would be doing him great injustice. There is more involved than the mere question of the judgment against Robert Martin for the payment

of the note sued on in the court below. A reversal would necessarily affect the interest of Robert Martin and Calvin Hood. The supreme court of this state has held in a number of cases that the absence of a party to a judgment who will necessarily be affected by modification or reversal defeats the jurisdiction of the court, and there can be no review of any part of the judgment. *Central Kansas Loan & Inv. Co. v. Chicago Lumber Co.*, 53 Kan. 677, 37 Pac. 132; *McPherson v. Storch*, 49 Kan. 313, 30 Pac. 480; *Paper Co. v. Hentig*, 31 Kan. 322, 1 Pac. 529; *Paving Co. v. Botsford*, 50 Kan. 331, 31 Pac. 1106.

The failure to bring into this court the necessary parties compels us to allow the motion to dismiss; but, however, we have carefully examined the other questions raised in this case, and are satisfied that the overruling of the motion as to the points presented to require plaintiff to make its petition more definite and certain, and the overruling of the demurrer to the amended petition, and the objections to the testimony, and other exceptions taken, were properly overruled, and that no error was committed in these rulings of the court. The absence of the necessary parties, however, compels a dismissal of these proceedings in this court. All the judges concurring.

(1 Kan. App. 510)

HOUGHTON v. LANNON et al.

(Court of Appeals of Kansas, Southern Department, C. D. June 7, 1895.)

FILING BRIEF NOT A CONSENT TO REVIVOR—DISMISSAL OF APPEAL.

1. When the plaintiff in an action dies, and his executors file a motion to revive said action more than one year after the time when the order might have been first made, and the defendant files his brief in said action, *held*, that filing said brief is not a consent to a revivor of the action.

2. When the plaintiff in an action dies, and no steps are taken by his executors, or other person authorized to do so, to revive said action until after the expiration of one year from the time the order might have been first made, and the defendant in such action has not consented that such action may be revived, but, on the contrary, moves the court to dismiss the action, *held*, that the action must be dismissed at the costs of the plaintiff.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by William S. Houghton against R. G. Lannon and A. V. Wilson, partners in the firm name of Lannon & Wilson. From an order discharging an attachment, plaintiff brings error. Dismissed.

This is an appeal from the decision of the court below dissolving, vacating, and discharging an attachment which had been procured by the plaintiff, Houghton, and also discharging the levy on said attachment as to the defendant Wilson. The case is now before this court upon the motion of Allen

V. Wilson, one of the defendants, to dismiss the appeal, which motion is as follows:

"State of Kansas. In the Appellate Court, Southern Department, Central Division. Appeal from District Court, Cowley County. No. 7,405. W. S. Houghton, Plaintiff in Error, v. R. G. Lannon & Allen V. Wilson, Partners Doing Business under the Firm Name and Style of Lannon & Wilson, Defendants in Error. Motion to Dismiss Appeal. Now comes the defendant in error Allen V. Wilson, by Oliver M. Wilson, his attorney of record, and moves the court to dismiss the appeal in the above-entitled cause upon the grounds: (1) That said W. S. Houghton, plaintiff in error, departed this life in December, 1893, and since the proceedings, order, and judgment herein were had, and said appeal taken, that more than one year has elapsed since the death of said plaintiff in error, and that said action has not been revived within one year from the time an order therefor might have been first made. (2) That one C. S. Houghton was made executor of the estate of the said W. S. Houghton, deceased, plaintiff in error, and has not revived said action in behalf of said estate within one year from the time the order to revive said action might have been first made. Wherefore, defendant in error Allen V. Wilson prays that said appeal, and all proceedings therein, be dismissed, and that he receive his costs. Allen V. Wilson, Defendant in Error, by Oliver M. Wilson." (This motion was filed April 2, 1895.)

And also upon the motion of C. S. Houghton and Henry Endicott, as executors of the plaintiff in error, W. S. Houghton, to revive this action in their names, as said executors, which motion is as follows:

"In the Kansas Court of Appeals, Southern Department, Central Division. W. S. Houghton, Plaintiff in Error, vs. R. G. Lannon et al., Defendants in Error. Motion to Revive. Come now C. S. Houghton and Henry Endicott, and move the court to revive this action in the name of said C. S. Houghton and Henry Endicott, as executors of the last will and testament of the plaintiff in error, W. S. Houghton, who died since the commencement of this action in the supreme court, and, as grounds therefor, say: (1) That since the commencement of this action, to wit, on or about the 3d day of January, 1894, the said W. S. Houghton died testate, and thereafter the said C. S. Houghton and Henry Endicott were duly appointed the executors of the said plaintiff in error, and thereafter duly qualified, and as such are the legal representatives of the said plaintiff in error, and as such are entitled to prosecute this action in this court for the reversal of the judgment rendered by the district court of Cowley county, Kansas, against the said W. S. Houghton, as shown in the case made, attached to the petition in error herein filed. (2) That the said legal representatives are entitled to have this action revived, upon the

consent of the said defendants in error, for the reason that since the death of the said plaintiff in error, and after the same was known to the defendants in error, the said defendants in error have, by their counsel, duly appeared in this court, and have filed herein their brief, presenting this cause for the said defendants in error upon the merits, and have requested this court to sustain the judgment of the court below, and have thereby consented that the same may be heard and decided by this court, and, in order that the same may be fully heard and determined, have thereby consented that the same may be revived, so that final judgment may be rendered herein upon the merit of the controversy so submitted. (3) That said executors further show to the court that the said defendants in error have not caused the judgment to be revived in their favor against them as the legal representatives of the plaintiff in error in the district court of Cowley county, Kansas, but have duly appeared in this court, and are now here by their printed brief herein filed, submitting the controversy to this court upon its merits, for which reason the said executors aver that they are entitled to have this action revived without the formal consent of the said defendants in error, or either of them. John A. Eaton, Attorney for C. S. Houghton and Henry Endicott, Executors of the Last Will and Testament of W. S. Houghton, Plaintiff in Error."

The motion of said executors, and the affidavit of O. M. Wilson, attorney for the defendant in error, filed herein, show that the plaintiff in error, W. S. Houghton, died January 3, 1894. A certificate of the register of probate for the county of Suffolk, in the state of Massachusetts, shows that Henry Endicott and Clement S. Houghton, both of Boston, in said county, were appointed and qualified as executors of the last will and testament of William S. Houghton, deceased, on the 1st day of February, 1894. Upon these motions the following briefs have been submitted:

"In the Kansas Court of Appeals, Southern Department, Central Division. No. 12. W. S. Houghton, Plaintiff in Error, vs. R. G. Lannon et al., Defendants in Error. Brief of Plaintiff in Error. Upon Motion to Dismiss & upon Motion to Revive. First. We submit that in this cause the defendants in error, having filed their brief, and presented the case upon its merits, will be treated as having consented that this action may be finally heard in this court, and determined upon its merits, and that such consent authorizes this court to revive this action, upon the plaintiff's motion, and for the reasons therein stated. The act of filing a brief presenting a case upon its merits is equivalent to a trial of all the issues arising upon the petition in error herein filed. It is all that is necessary to be done in order for this court to fully determine all matters in

controversy; and, having done so, we contend that it is too late to make a motion to dismiss on the ground that the action was not revived within the time provided by the section of the Code relating thereto (Gen. St. par. 4531), and that, upon the motion filed herein by the plaintiff in error to revive this cause, we are entitled to an order for such revivor, and a full hearing of all matters presented in the briefs. Second. The petition in error in this case is for the purpose of reversing the judgment of the court in discharging an attachment in the court below, and does not embody for the consideration of this court the issues in the main case, which have long since been determined. And, while it is conceded that more than one year has elapsed since the appointment of the executors of the plaintiff in error, we contend that the defendants in error are not entitled to have this action dismissed, upon the sections of the Code relating thereto, for the reason that same was not revived within one year from the date that the order might have been first made. The Code provisions relating to revivor pertain especially to actions pending and judgments rendered in the district court, and do not, with the same force, relate to proceedings in error for the purpose of reversing judgments of the district court. Especially is this true when the action is of the character of the one at bar, seeking, as it does, to reverse the decision of the court in discharging an attachment. The proper parties being before this court, and the opportunity to determine it so as to bind the executors of the plaintiff in error, the action being one, as shown upon the face of the record, that survives to them, notwithstanding the statute, this court may fully hear and determine the same. See Elliott, App. Proc. §§ 166, 167. We hereby submit that the plaintiff in error is entitled to have this action revived in the name of the executors moving therefor herein, and for a full determination of the case. John A. Eaton, Attorney for C. S. Houghton & Henry Endicott, Executors of the Last Will and Testament of W. S. Houghton, Plaintiff in Error.

"Service of brief acknowledged this 6th day of May, 1895. McDermott & Johnson, Attys. for Defendants in Error." (This brief was filed May 8, 1895.)

"Kansas Court of Appeals, Southern Department, Central Division. W. S. Houghton, Plaintiff in Error, vs. R. G. Lannon et al., Defendants in Error. Memoranda of Authorities in Support of Motion to Dismiss Appeal on Motion of Plaintiff in Error to Revive. Under paragraph 4527, Gen. St., note 7, and note to paragraph 4530, top page 1444, also paragraphs 4531, 4532, and 4533, this action cannot be revived, but must be dismissed. Counsel for plaintiff in error shows death of plaintiff in error to have occurred January 3, 1894. The motion to revive comes too late here. There has been no revival within one year in the court be-

low. The appearance of counsel for defendant in error Wilson in this court, by his brief on the merits of the action, is in no wise equivalent to a consent by the defendant that this action may be revived. The revival of an action must be by petition or order of the court, upon a proper showing, and it must be brought within the statutory period of one year. It must also appear that the order of the court was with the consent of the defendant, if one year has elapsed; otherwise the proceeding must be on petition, by summons. Paragraphs 4522-4525. See, also, *Railroad Co. v. Andrews*, 34 Kan. 563, 9 Pac. 213. Service under the present proceedings,—petition and appeal,—if made on defendant, would be irregular and void. *Green v. McMurtry*, 20 Kan. 189, 195. How, then, could his presence in this court by his counsel restore to the plaintiff in error any lost rights? The defendant, by complying with the rules of the supreme court and this court, in serving his brief, does not thereby consent to waive any statutory right in this behalf. Nor can counsel for plaintiff in error come in at this late day, after service of briefs, and when this action is ready for submission, and be heard to revive the action he has lost by failing to follow the law every day before him, and say, 'Because defendant in error has now filed his brief herein, he consents that I may have my action.' Counsel for defendant in error Wilson respectfully submits, therefore, that plaintiff in error's motion confesses the motion of defendant in error to dismiss this action under the statute above cited, and paragraph 4530, and authorities thereto cited, viz. *Green v. McMurtry*, 20 Kan. 189; *Myers v. Kothman*, 29 Kan. 19; *Scroggs v. Tutt*, 23 Kan. 182; *Angell v. Martin*, 24 Kan. 334; *Halsey v. Van Vleet*, 27 Kan. 474; *Tefft v. Bank*, 36 Kan. 457, 13 Pac. 783. Counsel for defendant in error Wilson further submits that the year having elapsed in this action since the death of plaintiff in error, and there having been no application filed to revive the same within the time, and even while pending the appeal in this court, it should be dismissed, and that the proper jurisdiction to have filed such application was the district court, where judgment was rendered. For these reasons the action should be dismissed. Respectfully submitted. Oliver M. Wilson, for Defendant in Error Wilson." (This brief was filed May 8, 1895.)

Eaton, Pollock & Love, for plaintiff in error. McDermott & Johnson and O. M. Wilson, for defendants in error.

DENNISON, J. (after stating the facts). The counsel for the plaintiff contends that this action should be revived in the name of the executors, for the reason that Allen V. Wilson has appeared in this court by his counsel, and filed his brief herein. We think this contention is not well founded. The right to

revive this action is clearly barred by section 434 of chapter 80, Gen. St. 1889, which reads as follows: "Sec. 434. An order to revive an action, in the name of the representatives or successors of a plaintiff, may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his powers have ceased in the meantime, the order of revivor, on both sides, may be made in the period limited in the last section." It is clearly shown that the motion to revive was not made until after one year from the death of the plaintiff, W. S. Houghton, and the appointment and qualification of his executors, and from the time the order might have been first made. It also clearly appears that the defendant Allen V. Wilson is objecting to the revivor being made, and it nowhere appears that these defendants, or either of them, have given their consent to a revival of this action. For these reasons the motion to revive will be overruled.

Section 435 of chapter 80 of the General Statutes of 1889 reads as follows: "Sec. 435. When it appears to the court, by affidavit, that either party to an action has been dead for a period so long that the action cannot be revived in the names of his representatives or successors without the consent of both parties, or when a party sues or is sued as a personal representative, that his powers have ceased, the court shall order the action to be dismissed at the costs of the plaintiff." It appears to this court by the affidavit of O. M. Wilson, and also by the motion to revive filed herein, that the plaintiff, W. S. Houghton, had been dead for more than one year, and these executors had been appointed and qualified for more than one year, prior to the time of filing the motion to revive. For these reasons the motion of the defendant to dismiss will be sustained, and this case dismissed at the costs of the plaintiff. All the judges concurring.

(1 Kan. A. 485)

WELLS et al. v. HICKOX et al.

(Court of Appeals of Kansas, Southern Department, C. D. June 7, 1895.)

CONTRACT OF AGENCY—REVIEW OF CONFLICTING EVIDENCE—ACTION ON NOTE—RES JUDICATA.

1. If the plaintiffs accept the contract of their agent, they must accept it as a whole; they cannot accept that which suits them and reject the balance.

2. When there is a conflict of testimony of witnesses in the court below, and the preponderance of the evidence seems to be in favor of the defendants, and the court finds the facts to be in favor of said defendants, it is not the province of this court to disturb said findings.

3. A promissory note constitutes a single cause of action; and where an owner thereof sues, and recovers upon a portion thereof, such suit is a bar to a recovery upon the remaining portion of said note.

(Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by M. D. Wells & Co. against A. A. Hickox and others. Defendants had judgment, and plaintiffs bring error. Affirmed.

This is an action brought by the plaintiffs in error, who were plaintiffs in the court below, to recover the balance claimed by them to be due upon a promissory note of \$1,959.44. The facts in this case show that on the 28th day of January, 1884, the Lyon County Co-operative Association was doing a general mercantile business in Emporia, Lyon county, Kan., and that these defendants in error were stockholders and members of the board of directors of said association, and that the said association was on that day indebted to these plaintiffs in the sum of \$1,959.44; that they had been about to draw upon said association for said amount, but the managing agent of said association, W. E. McMahon, had asked said plaintiffs not to draw upon him until he had seen Mr. Woolsey, the traveling salesman of these plaintiffs; that these plaintiffs sent Mr. Woolsey to Emporia for the purpose of settling this account, and Mr. Woolsey settled said account by taking in payment therefor a note, and indorsed upon the back by these defendants and each of them. These defendants in error claim that they agreed to indorse said note, and become liable for the payment thereof, provided these plaintiffs would permit them to make payments upon said note by returning to them certain goods; and that Mr. Woolsey, claiming that he had been sent to settle this matter by these plaintiffs, agreed with these defendants that if they would indorse said note, and become liable for the payment thereof, they might return said goods, and should receive credit therefor upon said note. Said note, after being executed by said association, and having been indorsed by these defendants, was delivered to said Woolsey, as the agent of these plaintiffs. Said Woolsey placed said note in the hands of the Emporia National Bank for collection. On September 4, 1884, these plaintiffs received the return of merchandise valued at \$75.60; on September 30, 1884, merchandise, \$333.20; October 24, 1884, \$165,—a total of \$574. It was admitted that on October 3, 1884, the plaintiffs, by C. N. Sterry, their attorney, filed their petition in said court, setting out a copy of the promissory note sued upon in this action, and caused a summons to be issued thereon; that said summons was served upon the defendant Lyon County Co-operative Association, and was never served upon these defendants; that the amount plaintiff asked judgment for was the sum of \$1,573, with interest thereon from October 23, 1884, at 10 per cent. per annum; that Mr. Sterry, who brought the action, was informed by defendants in this case that there had been a payment of \$574, which was not shown upon the note; that the judgment was rendered in that case for the amount prayed for,

and for no more, which judgment was afterwards paid. It was further admitted by the defendants in this case that the amount in controversy in this action was not attempted to be collected in the former suit of M. D. Wells & Co. against the Lyon County Co-operative Association, referred to above. It also appears, that on April 10, 1884, said association purchased a further bill of goods of the plaintiffs in error, amounting to \$557.70. The goods received by these plaintiffs were credited to said association on this open account. The plaintiffs in error deny that any arrangement was ever made to pay the note by goods returned, and claim that the open account of April 10th should be paid in full, and claim that Mr. Woolsey had no authority from them to make any arrangement for crediting goods returned upon the note. The former action upon this note seems to have been brought without the knowledge of the plaintiffs in error at the time.

T. N. Sedgwick, for plaintiffs in error.
Lambert & Dickson, for defendants in error.

DENNISON, J. (after stating the facts). The plaintiffs in error claim: "First. The defendants in error wholly fail to show any contract with the plaintiffs in error by which goods returned were to be credited upon the promissory note. Second. Those dealing with an agent of limited authority are bound at their peril to take notice of the limitations upon his authority. Third. There can be no ratification of an agent's unauthorized acts by the principal, without full knowledge of these acts. Fourth. There was no understanding or agreement that the goods returned were to be credited upon the note. Fifth. No suit was ever brought to recover the amount claimed in this action."

Taking these propositions in the order in which they are laid down, we will say as to the first proposition, "The defendants in error wholly failed to show any contract with the plaintiffs in error by which goods returned were to be credited upon the promissory note": The defendants in error introduced testimony tending to show that there was a contract made with Woolsey, the agent of the plaintiffs in error, by which the goods returned were to be credited upon the promissory note. The only foundation for this proposition would be that Mr. Woolsey had no authority to make said contract. Upon the proposition as to whether or not the defendants in error made this contract with Woolsey, there is a preponderance of evidence to show that they did. The evidence also shows that these defendants did return goods to these plaintiffs in error, and that these plaintiffs in error received them; and there is no evidence of any other contract being made at any time except the evidence of this contract made at the time these defendants in error indorsed the said note. We think it was proper for the court below to take into consideration

the ordinary and usual custom of men engaged in the mercantile business, and of wholesale houses, as to permitting their customer to ship goods back to them without having first made some arrangement or some agreement to do so, and to consider that it is altogether unlikely that these defendants would have sent goods back to the plaintiffs, or that the plaintiffs would have received the goods from the defendants or said association, without some agreement having been made beforehand; and the court was justified in finding from the evidence that Woolsey made such a contract. There was some evidence tending to show that Woolsey was sent by these plaintiffs in error to make a settlement of the account. He made a settlement, took a note, turned it over to the bank for collection in favor of these plaintiffs; and these plaintiffs ratified his action in taking the said note and handing it over to said bank. There was never any settlement made excepting the settlement that was made by Woolsey for the plaintiffs for these defendants. If the plaintiffs accepted the contract of their agent, they must accept it as a whole, and not accept that which suits them and reject the balance. There was some evidence to support the claim that Woolsey was the agent of these plaintiffs to make the said settlement, was sent there for that purpose. And, if he made such settlement in pursuance of such authority, then these plaintiffs are bound by the conditions which were attached to such settlement. At least, they cannot accept the indorsements by these defendants and reject the conditions under which they made the indorsements. This principle has been fully laid down in *Babcock v. Deford*, 14 Kan. 408.

As to the second proposition contended for by the plaintiffs in error, "Those dealing with an agent of limited authority are bound at their peril to take notice of the limitations upon his authority": We are of the opinion that whatever might have been done by Mr. Woolsey in excess of his authority in settling this claim has been fully ratified by these plaintiffs; hence the second proposition can have no bearing upon this case.

As to the third proposition, "There can be no ratification of an agent's unauthorized acts by the principal, without full knowledge of such acts": There is no contention in this case but that these plaintiffs ratified every act of Mr. Woolsey except the one of agreeing to take goods, and crediting their value upon this note. These plaintiffs accepted the note, ratified his act in leaving it at the Emporia National Bank for collection, which makes the Emporia National Bank their agent to collect said note. As their agent, they employed O. N. Sterry to bring suit on the note. Said Sterry notified them that he had brought suit, at the request of the bank. The judgment rendered in that case was for the sum of \$1,583, which said judgment was rendered on the 20th day of November, 1884; and said judgment was fully paid by pay-

ments ranging in time from May 5, 1885, to July 3, 1888. This suit was commenced on October 21, 1889. These plaintiffs were notified by O. N. Sterry, their attorney, on October 3, 1884, that he had brought suit on the note sued on in this case; and these plaintiffs should have known the amount of the judgment rendered in said case; and by accepting the payment of said judgment, and availing themselves of the benefit thereof, and not repudiating the action of their attorney in taking judgment for that amount for about five years, they would seem to be estopped from now claiming that they did not know that the judgment was only for \$1,583, and it would seem that they must have known that the balance of the note had been paid by the return of the goods.

As to the fourth proposition, "There was no understanding or agreement that the goods returned were to be credited on the note": Upon this proposition there is a conflict between the testimony of Mr. Woolsey and the witness for the defense, and a preponderance of the evidence seems to be in favor of the defendants. The court below found in favor of the defendants upon this proposition, that there was an agreement that the goods returned should be credited upon the note; and it is not the province of this court to disturb that finding.

As to the fifth proposition, "No suit was ever brought to recover the amount claimed in this action": Admitting this proposition to be true, if the amount was paid by the return of the goods, it was not proper to bring an action to recover it again. A suit had been brought upon the note sued upon in this case, and judgment rendered as demanded, for a portion thereof. When an owner of a note brings a suit for a portion thereof, and recovers upon such portion, such suit is a bar to a recovery upon the remaining portion of said note. A promissory note constitutes a single cause of action. See *Bolen Coal Co. v. Whittaker Brick Co.*, 52 Kan. 747, 35 Pac. 810.

The judgment of the district court will be affirmed. All the judges concurring.

(1 Kan. A. 442)

BRIDGES et al. v. SARGENT.¹

(Court of Appeals of Kansas, Southern Department, C. D. June 19, 1895.)

RESTRAINING TRESPASS—WHEN LIES—NUNC PRO TUNC ORDER IN EJECTMENT.

1. The petition for injunction alleges that the defendants "unlawfully and with force and arms entered upon said land, and broke the close of this plaintiff, and are now plowing up the clover and orchard grass growing thereon, which is very valuable." *Held* to constitute a trespass for which injunction will not lie.

2. An action for an injunction by Sargent against Bridges and wife is not a proper proceeding in which to procure a nunc pro tunc order for the entry of judgment in the ejectment suit formerly brought by Bridges against Sargent.

(Syllabus by the Court.)

¹Rehearing Pending.

Error from district court, Lyon county; C. B. Graves, Judge.

Action for an injunction by S. L. Sargent against Joab Bridges and another. Plaintiff had judgment, and defendants bring error. Reversed.

This was an action brought by the defendant in error, as plaintiff, against the plaintiffs in error, as defendants, in the district court of Lyon county, Kan., for a perpetual injunction to restrain the defendants below from further interfering with the possession of the plaintiff below, and from entering upon the following described real estate, situated in the county of Lyon, state of Kansas, to wit, all the land on the west side of Wright's creek and on the north end of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 8, township 17, range 10. The plaintiff in said action (this defendant in error) sets up in his petition the following statement showing his title to said lands, and his right of possession thereto, to wit: A contract between him and said Bridges, which is in words and figures as follows:

"Know all men by these presents that we, Story Sargent and Joab Bridges, of Lyon county, Kansas, do this 14th day of June, 1872, bind ourselves in the penal sum of \$500 to abide by the following agreement, made this day between us, to wit: That the party of the second part agrees to sell to the party of the first part all the land on the west side of Wright's creek and on the north end of the E. half of the northeast quarter of section 8, township 17, range 10, situate in said Lyon county, Kansas; and the said party of the second part expressly reserves all the timber on said land described above; and the party of the first part agrees to pay to the party of the second part an advance of one-half above the appraised value of said land as described herein, and also agrees not to interfere or file on said land when it shall come into market. Should the parties herein named faithfully carry out all the stipulations herein specified, then this bond shall be void; otherwise it shall remain and be in full force and effect.

"S. L. Sargent.

"Joab Bridges, His X Mark,

"Per J. L. Stubbs."

—And also sets out that on August 9, 1886, the said Joab Bridges brought his suit against this plaintiff in said court to recover possession of said land. At the trial of said suit of ejectment, the same being tried by the court, the jury being waived, the court found the facts and the law in favor of this defendant in error. The petition herein recites said findings, and the further fact that the court rendered judgment in favor of this defendant in error, S. L. Sargent, and against said Joab Bridges for costs, and it still remains unappealed from, and in full force and effect, but by some oversight it seems that no journal entry had ever been spread upon the record of said court; and said petition asks

that these plaintiffs in error, the defendants below, be enjoined and restrained from further interfering with the possession of said plaintiffs, and from entering upon said real property, and that at the next sitting of said court plaintiff may have a nunc pro tunc order of judgment in said cause, and that upon the final hearing thereof said injunction be made perpetual, and for all further and proper relief.

Jetmore & Jetmore, for plaintiffs in error.
J. Jay Buck, for defendant in error.

DENNISON, J. (after stating the facts). The record presents only one question for us to consider in this case: Does the petition set forth such a statement of facts as would entitle the plaintiff below—this defendant in error—to the relief demanded? The petition alleges "that on July 28 or July 29, 1880, without any permission from this plaintiff, and without any warrant or authority of law, said defendants, being husband and wife, unlawfully and with force and arms entered upon said land, and broke the close of this plaintiff, and are now plowing up the clover and orchard grass growing thereon, which is very valuable; that, if said defendants are permitted to continue their trespasses, it will be to the great and irreparable injury of this plaintiff." The only allegation in the petition as to the acts of the plaintiffs in error, for which the injunction is asked, is that they "unlawfully and with force and arms entered upon said land, and broke the close of this plaintiff, and are now plowing up the clover and orchard grass thereon, which is very valuable." This describes a trespass, and nothing more. Injunction will not lie to restrain the commission of a pure naked and simple trespass. *Railroad Co. v. Wheaton*, 7 Kan. 232. The petition further alleges "that, if said defendants are permitted to continue their trespasses it will be to the great and irreparable injury of this plaintiff." The attorneys for this defendant in error evidently understood that the acts complained of were merely acts of trespass, and so allege in their petition. The prayer of the petition is as follows: "Wherefore this plaintiff prays that said defendants, and all acting under them, be enjoined and restrained from further interfering with the possession of said plaintiff, and from entering upon said real property, and that at the next sitting of this court plaintiff may have a nunc pro tunc order of judgment in said cause, and upon the final hearing hereof said injunction may be made perpetual; and for all other and proper relief." If this defendant in error had obtained all he demanded as to the injunction, he would have obtained an order restraining these plaintiffs in error from further trespassing upon the land set out in the petition. As to the statement that "it will be to the great and irreparable injury of the plaintiff," we do not think the facts set out in petition will

warrant this assertion. There is no allegation that the defendants in said cause were insolvent, or that a judgment for damages against them would not be collectible. On the contrary, the petition seems to show, by inference at least, that this defendant in error owes Joab Bridges an unpaid balance due him upon the contract for the land described in the petition.

As to the nunc pro tunc order of the entry of judgment, there seems to be no controversy or dispute as to the fact that the judgment was rendered in the case of Bridges v. Sargent, and that no appeal had been taken from said judgment. The question is, had the court the right to make the order for the entry of said judgment as of March 11, 1887, and was this a proper proceeding in which to do so? While we do not question the right of the court to make the order in a proper proceeding, we must hold that this is not a proper proceeding in which to do so. The judgment of the court below is reversed, and the case remanded for further proceedings. All the judges concurring.

(1 Kan. A. 473)

DWELLE v. DWELLE et al.¹

(Court of Appeals of Kansas, Southern Department, C. D. June 7, 1895.)

ACTION ON CONTRACT—CONSIDERATION—PLEADING—MOTION TO MAKE DEFINITE—REVIEW.

1. A writing in words and figures as follows: "Marion, Kansas, March 11th, 1889. Messrs. F. E. Dwelle and Charles A. Sayre—Dear Sirs: Upon my own motion, and to show you my earnest desire for peace between us, having in view the great expense to which you have been put in recent litigation in which you were concerned, I voluntarily agree to assume part of that burden, and agree to pay you by the 1st day of October, A. D. 1889, the sum of six hundred (\$600.00) dollars, and for the purpose of privacy would thank you to intrust this paper to Dennis Madden, Esq. Your obedient servant, J. C. Dwelle,"—does not import a consideration upon its face, but the consideration therefor must be alleged and proven by the party who relies upon it for the basis of a cause of action.

2. Where a petition sets forth in plain and concise language the substantive facts upon which the claim for relief is founded, a motion to make more definite and certain the allegations of the petition, and a demurrer to said petition, ought not to be sustained.

3. Where the petition in a case sets forth a cause of action in specific terms, and also contains certain general allegations, and where none of the evidence is preserved in the record, but the record clearly shows that the trial court, in its instructions to the jury, treated the general allegations of the petition as surplusage, and confined the plaintiffs below to the cause of action specifically stated, we cannot say that the trial court committed any prejudicial error in overruling a motion to make the allegations of the petition more definite and certain, and a general demurrer to said petition.

(Syllabus by the Court.)

Error from district court, Chase county; Frank Doster, Judge.

Action by F. E. Dwelle and another against John C. Dwelle on a contract. Plaintiffs had judgment, and defendant brings error. Affirmed.

¹ Rehearing pending.

J. V. Sanders, F. P. Cochran, and Graves Lambert & Dickson, for plaintiff in error. Madden Bros., for defendants in error.

COLE, J. F. E. Dwelle and Charles A. Sayre brought their action in the district court of Marion county upon the following instrument and promise, a copy of which is made a part of their petition: "Marion, Kansas, March 11th, 1889. Messrs. F. E. Dwelle and Chas. A. Sayre—Dear Sirs: Upon my own motion, and to show you my earnest desire for peace between us, having in view the great expense to which you have been put in recent litigation in which you were concerned, I voluntarily agree to assume part of that burden, and agree to pay to you by the 1st day of October, A. D. 1889, the sum of six hundred (\$600.00) dollars, and for the purpose of privacy would thank you to intrust this paper to Dennis Madden, Esq. Your obedient servant, J. C. Dwelle." The petition alleges, in brief, that prior to the execution of said writing by the defendant there had been various disputes between the parties named therein, and claims that defendant had maliciously and without probable cause instigated and set on foot a certain criminal prosecution for murder against the plaintiffs. It states the court in which the prosecution was brought, and names the parties to the case. It then recites that prior to the execution of said writing the plaintiffs were acquitted of said charge, and were about to bring a civil action against the defendant for damages arising out of said malicious prosecution. It further alleges that for the purpose of preventing said suit, and as an accord and satisfaction, the defendant executed and delivered to plaintiffs the writing in question, and that they accepted and have relied upon the same as such accord and satisfaction; that the sum stated in said writing was to be paid by defendant to partially reimburse plaintiffs for the expense they incurred in defending said criminal case charged to have been instigated by defendant. The petition closes with an allegation of refusal by defendant to pay the amount set forth in the writing, and a prayer for judgment. The defendant interposes a motion to make the petition more definite and certain, which was overruled, as was also a general demurrer to the same; and, answer having been made, there was a trial of the issues before the court and a jury, with verdict and judgment for the plaintiffs. A motion for a new trial was duly filed, and overruled, and the defendant, having duly excepted to each of the rulings of the court, brings the case here for review upon a transcript of the record.

There being none of the evidence given at the trial preserved, we must determine the questions involved upon the record as it is before us. We do not think that the writing set out in the petition imports any consideration upon its face, and the trial court therefore properly held that the burden of proving a

consideration was upon the plaintiffs below.

Does the record disclose any error in the rulings of the trial court in overruling the motion to make more definite and certain and the general demurrer filed by the defendant? We think not. The petition stated the cause of action in plain and concise language. No doubt could have arisen in the mind of the defendant below, under the allegations of the petition, as to the claim he was called upon to defend against. His attention was directed to the particular writing relied on, and to the consideration alleged for the execution and delivery thereof. He was advised that the plaintiffs below claimed that the writing was intended by the maker, and accepted by the persons to whom, according to its terms, payment was to be made, as an accord and satisfaction of a claim for damages alleged to have been sustained by reason of a certain malicious prosecution which it was claimed he had instigated. This, we think, was sufficient, both as against the motion and the demurrer, under the Code and the rule laid down in *Railway Co. v. McCormick*, 20 Kan. 107. It is true that the petition contains allegations in regard to other disputes and differences between the parties, and says that the writing in question was given in settlement of all differences existing between the parties. It is also true that these allegations are altogether too broad and general to be good as against a motion to make more definite and certain, or a demurrer. But was the plaintiff in error prejudiced by the ruling of the trial court as regards these allegations? We think not, for the record plainly discloses that the court treated these general allegations as mere surplusage, and confined plaintiffs below to the consideration specifically alleged, viz. the suit about to be brought for malicious prosecution. We fail to see where the plaintiff in error was injured by not being able to prepare his defense to something which the trial court did not compel him to meet. The judgment will be affirmed. All the judges concurring.

(1 Kan. App. 530)

BROWN v. SCHOOL DIST. NO. 41, COWLEY COUNTY.

(Court of Appeals of Kansas, Southern Department, C. D. June 24, 1895.)

SCHOOL DISTRICTS—CONTRACTS WITH TEACHER—ENFORCEMENT—BURDEN OF PROOF—HARMLESS ERROR.

1. Where power is vested in a district board of a school district composed of three to contract for and hire a teacher for and in the name of the district, and all of said members of the board meet together and consult with regard to making such a contract, and consent thereto, and thereupon two of said members of the board enter into a written contract with B. to teach the school of said district in accordance with the determination had at such consultation of all the members of the board, such contract is binding upon the school district, although one of the members of the board was not present when the same was executed.

2. Where an action is brought against a school district upon a written instrument, and

the petition does not allege any authority upon the part of the persons who sign the same to execute said instrument on behalf of the school district, and where the answer specifically denies the authority of such persons to execute the same for the school district, and nowhere admits that the persons so signing the instrument were officers of said district, the burden of proof is upon the plaintiff to establish, not only the execution of the instrument, but also the authority of the persons executing the same.

3. A clause in a contract between a school-district board and a teacher, reserving the right to dismiss the teacher at any time he "does not give satisfaction to the board or a majority of district," is valid, and not in conflict with section 5617, Gen. St. 1889.

4. When the trial court permits incompetent evidence to go to the jury, and afterwards discovers its error, and instructs the jury that they must disregard such evidence, and where it appears from the evidence in the case that such evidence did not prejudice the rights of the party objecting to the admission of the same, the judgment will not be disturbed by reason of the error in the admission of such incompetent evidence.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by L. C. Brown against school district No. 41, Cowley county. Judgment for defendant, and plaintiff brings error. Affirmed.

C. J. Peckham and C. T. Atkinson, for plaintiff in error. McDermott & Johnson, for defendant in error.

COLE, J. This was an action brought by plaintiff in error against the defendant in error in the district court of Cowley county, Kan., upon an alleged written contract dated in July, 1888, setting forth that plaintiff in error was employed to teach school for district 41, Cowley county, for a term of six months, commencing October 1, 1888, at \$50 per month. The defendant in error had judgment below, and plaintiff in error brings the case here.

The first contention between the parties is as to the validity of the alleged written contract sued upon. The evidence discloses that plaintiff in error went to the house of D. N. Wolf, who was the treasurer of the school district, in company with Sampson Johnson, who was director of said district, and, after some conversation between the three in regard to making a contract with plaintiff in error to teach the school in that district, the two district officers drove to the house of Mr. McCullum, for the purpose of there discussing the question with the clerk of the district, Sanford Wade. They found Mr. Wade, and the three officers did discuss the question of entering into a contract with the plaintiff in error to teach the school of said district. Mr. Wade tacitly agreed to the proposition, and the other two officers returned to where they had left the plaintiff in error, and made the contract upon which this suit is brought. Was this the contract of the school district? It is an elementary principle that when several persons are authorized to do any act of

a public nature which requires deliberation, they all should be convened. In determining a question such as entering into a contract with a teacher it is well settled by the authorities in this and in other states that the members of a district board cannot bind the district when acting separately and apart from each other, but, as is said in *Aikman v. School Dist.*, 27 Kan. 129: "They all must meet together, or be notified to meet together, or have an opportunity to meet together or consult over the employment of the teacher, before the contract can be legally entered into by them so as to bind the district." But the statute prescribes no special form or manner by which, and no particular place at which, the district board shall be convened, nor do we think it was intended or necessary that any formal call should be made for the purpose of legally convening a school district board. It is sufficient if all are present, or had an opportunity to be present, and that at least two of them agreed to make the contract in dispute. Applying these views to this case, it seems clear to us that the contract sued upon was one made by the district board, and was therefore the contract of the district.

Plaintiff in error urges that the trial court committed error in compelling him, after he had proven the execution of the contract, to assume the burden of proof, and prove this meeting, and steps which led up to the completed contract. Under the pleadings in this case we think the ruling of the court was correct. The petition nowhere alleges that the persons who signed the said contract were officers of the school district or that they had authority to act for the district. It does not allege that the district had any officers, or who they were. The answer denies generally and specially any authority in the persons who signed the contract to act for the school district, and nowhere admits that either of the persons so signing were officers of said district. There being no sufficient allegations in the petition to require a verified answer, the burden was upon the plaintiff below to prove the authority of those purporting to act for the district.

The next ground assigned as error is in the instruction of the court to the jury with regard to a certain clause in the contract sued upon, which clause reads as follows: "And if such teacher does not give satisfaction to the board, or a majority of district, he is to be dismissed at any time." Plaintiff in error contends that under this clause he must have entered upon discharge of his duty, and then have failed, before advantage could be taken of this clause in the contract. The facts in this case are that, before the time arrived for the plaintiff in error to enter upon his duties under the contract, a large majority of the qualified electors of said district, at a school-district meeting regularly called and held for the purpose of settling the question as to whether they would retain or

dismiss plaintiff in error, expressed their dissatisfaction, and voted to dismiss him; and upon the authority of such vote, and after adopting a resolution of similar import at a board meeting, the said board notified plaintiff in error in writing of the fact that the district did not desire his services; and, when the time arrived for school to commence, he appeared, and demanded the right to teach, and they refused to permit him to do so. In instructing the jury upon this clause in the contract and under the evidence aforesaid the court said, in substance, that this clause did not give either the board or the district the right to dismiss the plaintiff in error without any cause or excuse, but that its import was that at any time the board or the majority of the district had reasonable ground for dissatisfaction they might dismiss the plaintiff in error; and that the question for the jury to settle upon this particular point was whether or not at the time when the plaintiff was dismissed either the board or a majority of the district had reasonable grounds for such dismissal. The court further instructed the jury that it was not absolutely necessary under the contract that the plaintiff should have had an opportunity to try his hand at teaching school before such dismissal took place, or the district or the members of the board had reasonable ground to believe that plaintiff would not prove a satisfactory teacher. It is of these instructions that complaint is here made, and the case of *Tripp v. School Dist.*, 50 Wis. 659, 7 N. W. 840, is cited in support of the position that the instructions were erroneous. A careful examination of this case will fail to support the contention of plaintiff in error. However, the authorities in our own state fully sustain the validity of such a clause in the contract, and of instructions like the above. *School Dist. v. Colvin*, 10 Kan. 284; *Armstrong v. School Dist.*, 28 Kan. 345. While there was a conflict in evidence as to whether the board or the school district had reasonable grounds for dissatisfaction, there is abundance of testimony to sustain a verdict upon that point; and, the question having been settled that there was reasonable ground for such dismissal, and that a contract to the effect that such a dismissal might be made is valid, it follows that the dismissal might occur at any time after the making of the contract, when reasonable grounds therefor existed.

We come now to the last and most serious question in this case. Upon the trial the court admitted the deposition of Ella S. Kelly in behalf of defendant in error, and afterwards withdrew the same from the consideration of the jury on the ground that the evidence was incompetent. Plaintiff in error contends that the admission of said deposition was prejudicial error. We think that the admission of this piece of testimony by the court merits considerable criticism. It frequently happens that testimony once ad-

mitted to the jury and then withdrawn leaves an impression which it is impossible to remove, and, while there may be some excuse for the admission of oral testimony which is afterwards withdrawn, we cannot conceive of any in the case of a deposition which should and ought to be examined by the court, and its competency passed on before being read to the jury, when objection is made to its introduction in evidence. We have, however, carefully examined the deposition in question in connection with the rule laid down by our supreme court in *Whittaker v. Voorhees*, 38 Kan. 71, 15 Pac. 874, and have reached the conclusion that the rights of plaintiff in error were not prejudiced by the same. In the case above referred to, the court adopts the following language from *Hopt v. People*, 7 Sup. Ct. 618: "It is true, in some instances there may be such strong impressions made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in admission of testimony can be corrected by its withdrawal, with proper instructions from the court to disregard it." In the case at bar the court, at the time of the offer of the deposition, cautioned the jury before it was read, by saying that he would "admonish the jury what parts to regard," and after its withdrawal stated that they were "not to consider any part of it." As to the deposition itself, we think a part of it was competent; and as to those parts which were incompetent, in view of the other evidence which was before the jury, and which was competent, the plaintiff in error was not prejudiced, and the case ought not to be reversed because of the admission of said deposition. The decision of the trial court is affirmed. All the judges concurring.

(1 Kan. A. 431)

BALLINGER et al. v. REDHEAD et al.¹

(Court of Appeals of Kansas, Southern Department, C. D. June 7, 1895.)

DORMANT JUDGMENT — EXECUTION — RIGHTS OF SURVIVING PARTNER.

1. If either party to an action die, the action cannot be proceeded in until a suggestion of the death is made to the court, and the action revived in the name of the representative, real or personal, or both, of the party deceased. So, if either of the parties to a judgment die, the judgment becomes dormant until such time as the death of the party is suggested, and the judgment is revived in the name of the representative, real or personal, or both.

2. When the judgment becomes dormant, no execution can issue thereon until it is revived in the manner prescribed by law.

3. Upon the death of one member of a partnership, the partnership is dissolved, and the surviving partner can do nothing by way of car-

rying on the partnership business, only to hold possession of the partnership property, and do such things as are necessary to protect it from loss until he has complied with the statute, and given bond as required by article 2 of chapter 37 of the General Statutes of 1889.

4. The management of a partnership estate by the surviving partner must be under the control of the probate court of the county in which the estate is situated.

(Syllabus by the Court.)

Error from district court, Reno county; L. Houk, Judge.

Action by James F. Redhead & Co. against J. W. Ballinger and another. From certain orders entered, defendants bring error. Reversed.

This case comes to this court from the order and the judgment of the district court of Reno county, Kan., on two separate motions, —one to set aside the sale of real estate made by the sheriff of said county, and one for the confirmation of said sale. The case was submitted to the court on an agreed statement of facts. The execution under which the sale of real estate was made was issued by the clerk of the district court on an abstract of judgment rendered by a justice of the peace on the 26th day of July, 1887. The abstract of judgment was filed in the office of the clerk of the district court on the 2d day of December, 1887. The execution was dated May 10, 1889. The judgment was rendered in a suit before George D. Barclay, justice of the peace, in a suit entitled "James F. Redhead & Co. v. P. P. Anderson and J. W. Ballinger." The firm of James F. Redhead & Co. was composed of James F. Redhead and Thomas Redhead. No execution was issued after the filing of the abstract of judgment until the 10th day of May, 1889, the one on which the sale of real estate was made. On the 30th day of September, 1888, Thomas Redhead, a member of the firm of James F. Redhead & Co., and one of the plaintiffs in said action, died. No administrator was ever appointed of the partnership estate of James F. Redhead & Co. No citation from the probate court of Reno county was issued to James F. Redhead to give bond for the settlement of the partnership estate of James F. Redhead & Co., and no settlement was ever made of said estate. James F. Redhead has continued to conduct the business under the firm name of James F. Redhead & Co., the same as before the death of Thomas Redhead, and has conducted all business pertaining to said partnership of said estate, and is the sole surviving partner, but not in the capacity of administrator; and he is now the sole owner of the partnership business, and the owner of the judgment, and was such owner at the time execution issued under which the land was sold and bought in by James F. Redhead. The abstract of the judgment in favor of James F. Redhead & Co. was, in proper form, filed with the clerk of the district court, and the execution issued thereon was also in proper form. James F. Redhead & Co. resided in Reno county, Kan., and their business

¹ Rehearing pending.

was carried on in said county. After filing the abstract of judgment with the clerk of the district court, the Kansas Manufacturing Company obtained a judgment against J. W. Ballinger et al., and execution was issued on said judgment, under which the same lands were sold to R. J. Graham. Said execution was not issued until more than one year after the judgment had been rendered, and it was the first and only execution that had been issued on said judgment. The execution under which James F. Redhead purchased the land was issued prior to the execution of the Kansas Manufacturing Company, under which R. J. Graham purchased the same land. The sale under execution to James F. Redhead was prior to the sale under execution to R. J. Graham. Subsequent to the issue and levy of the execution under which the sale was had in the case of James F. Redhead & Co. v. J. W. Ballinger et al. the execution was issued on the judgment in the case of the Kansas Manufacturing Company v. J. W. Ballinger et al., and levied upon the same property in which the execution was issued in the case of Redhead v. Ballinger, and a sale had thereunder, at which sale R. J. Graham became purchaser.

Davidson & Williams, for plaintiffs in error.
F. F. Prigg, for defendants in error.

JOHNSON, P. J. (after stating the facts). The only question involved in this case is whether or not the judgment of James F. Redhead & Co. became dormant by the death of Thomas Redhead, a member of the firm of James F. Redhead & Co., and one of the plaintiffs, and whether the judgment should have been revived before an issuance of the execution under which the land was sold.

Section 439, c. 80, Gen. St. 1889, provides: "If either or both parties die after judgment and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered, and execution awarded, as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party." Section 440: "If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment." Section 423: "Where there are several plaintiffs or defendants in an action, and one of them dies, or his powers as personal representative cease, if the right of action survive to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers being stated on the record." Section 425: "When one of the parties to an action dies, or his powers as a personal representative cease before the judgment, or the right of action survive in favor of or against his representatives or successors, the action may be revived and proceed

in their names." Section 426: "The revivor shall be by an order of the court, if made in term, or by a judge thereof, if in vacation, that the action be revived in the name of the representatives or successor of the party who died, or whose powers ceased, and proceed in favor of or against them."

In the case of *State v. McArthur*, 5 Kan. 283, Kingman, C. J., in delivering the opinion of the court, says: "All proceedings upon a judgment while dormant are void, and will be set aside." If the judgment was dormant, no execution could issue thereon, and no proceedings could be had in relation thereto, except such as are authorized for its revivor.

Article 2 of chapter 37 of the General Statutes of 1889, respecting executors and administrators, in the settlement of estates of deceased persons, provides how partnership estates shall be administered. Section 31: "The executor or administrator of the estate of any deceased member of a copartnership shall make a separate inventory of the whole of the partnership estate, goods and chattels, rights and credits, appraised at its true value, as in other cases; but the appraisers shall carry out, in the footing, an amount equal only to the deceased's proportional share of the copartnership interest." Section 32: "The property thus appraised shall remain with the executor or administrator, or be delivered over to the surviving partner, who may be disposed to undertake the management thereof, agreeably to the conditions of a bond, which he shall give to the state of Kansas, in such sum and with such securities as is required in other cases of administration." Section 35: "In case the surviving partner, having been duly cited for that purpose, shall neglect or refuse to give the bond required in this article, the executor or administrator on the estate of such deceased partner, in giving a bond, as provided in the next section shall forthwith take the whole partnership estate, goods and chattels, rights and credits, into his own possession, and shall be authorized to use the name of the survivor in collecting the debts due the late firm if necessary; and shall with the partnership property, pay the debts due from the late firm, with as much expedition as possible, and return or pay to the surviving partner his proportion of the excess, if there be any." Section 38: "Every surviving partner, who shall neglect or refuse to comply with the provisions of the preceding section, may be cited for such neglect or refusal before the probate court; and unless he comply with such provisions, or show sufficient excuse for his omission, the probate court may commit him to the jail of the county, there to remain until he consent to comply, or is discharged by due course of law." These sections provide the duties of a surviving partner, and the manner in which he may proceed to settle up the affairs of the partnership after one of the partners dies.

It is contended by the defendants in error

that no revivor is necessary except in the case of the death of the sole plaintiff or sole defendant. We do not concur with the defendants in this view of the case. The language of the statute is that where there are several plaintiffs or defendants in an action, and one of them dies, or his power as personal representative ceases, if the right of action survives to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers being stated on the record; but, before action can proceed after the death of one of the several parties, there must be a suggestion of the death made to the court, and entered of record, and some order of the court directing that the action may be proceeded in by the surviving parties to the action. Section 439 provided that if either or both parties die after judgment and before satisfaction thereof, their representatives, real or personal, or both, may, as the case may require, be made parties to the same, in the same manner as is prescribed for reviving action before judgment. If either party to the action die, the action cannot be proceeded in until suggestion of the death is made to the court, and the action revived in the name of the legal representative of the party deceased. So, if either of the parties to a judgment die, the judgment becomes dormant until such time as the death of the party is suggested, and the judgment revived in the name of the legal representative of the party. Upon the death of one of the partners, the partnership is dissolved, and the surviving partner can do nothing in the way of carrying on the partnership affairs, only to hold the possession of the property, and do such things as are necessary to protect it from loss, until he has complied with the statute, and given bond as required by article 2 of chapter 37. Thus, the management of the partnership estate by the surviving partner must be under the direction of the probate court of the county in which the estate is situated. Upon the death of one of the partners, the general administrator of his estate is required to make a separate inventory of the whole partnership estate, goods and chattels, rights and credits, appraised at its true value, as in other cases; but the appraisers shall carry out in the footing an amount only equal to the deceased's proportional share of the partnership interest, and the property thus appraised shall remain with the executor or administrator, to be delivered to the surviving partner, who may be disposed to undertake the management thereof, agreeably to the condition of a bond, which he shall give to the state of Kansas, in such sum and with such securities as are required in other cases of administration.

The record in this case does not disclose the fact whether Thomas Redhead left an individual estate or not; nor does it disclose whether there was an administrator ap-

pointed on the estate of Thomas Redhead or not, or whether the partnership estate of James F. Redhead & Co. was appraised under an administration of the estate of Thomas Redhead, deceased. We are not informed whether the property, credits, rights in action, etc., belonging to the partnership estate of James F. Redhead & Co. upon the death of Thomas Redhead, were appraised or taken possession of in any manner by an administrator of the estate of Thomas Redhead. No contract or proceedings can be had respecting the assets of a deceased partner's estate, except by the authority and with the approval of the probate court, and only then to the extent authorized or permitted by the law of the state. *Cox v. Grubb*, 47 Kan. 437, 28 Pac. 157; *Teney v. Laing*, 47 Kan. 297, 27 Pac. 976; *Blaker v. Sands*, 29 Kan. 554. The surviving partner of James F. Redhead & Co., having failed and neglected to comply with the statute in relation to the settlement of deceased partners' estates, had no authority whatever to proceed to carry on the business of the partnership in the name of the late firm of James F. Redhead & Co. While it is true that he was entitled to the possession of the property for the purpose of preserving the same, before he could lawfully proceed to wind up the affairs of the estate he must give bond as required by the statute, and wind up the affairs of the estate, under the direction of the probate court. The agreed statement of facts shows that James F. Redhead was the sole surviving partner of the late firm of James F. Redhead & Co., and, by reason of his being the sole survivor, it is claimed that he became the owner of the judgment, and had the right to control it. But we do not deem such to be the law. The law requires that all actions, where either of the parties dies, must be called to the notice of the court, and a revivor ordered by the court, or an order by the court that the surviving party, plaintiff or defendant, be allowed to proceed to the final determination of the matter in litigation in the same manner as though the deceased party had survived. Under the statute providing for the revivor of actions and judgments, we are clearly of the opinion that the judgment of James F. Redhead & Co. against Ballinger et al., at the time the execution issued on it (10th day of May, 1889), was dormant, and that no execution could legally issue thereon, and all proceedings had after the death of Thomas Redhead were void, and that the sale made under the execution was invalid, and should have been set aside on the motion of the defendant Graham.

It is therefore ordered that the judgment of the district court be reversed, and this case be remanded to the district court, to be proceeded in according to the views stated herein, and that the defendants pay the costs of the proceedings in error herein. All the judges concurring.

(1 Kan. App. 467)

RUSSELL v. THOMPSON.

(Court of Appeals of Kansas. Southern Department, C. D. June 7, 1895.)

APPELLATE COURT — JURISDICTION — PETITION IN ERROR—CASE MADE.

1. In an action of replevin, where the value of the property in controversy, as set forth in the petition of the plaintiff, exceeds \$100, and where the value is fixed by the jury at more than \$100, and an alternative judgment is rendered in said case for over \$100, *held*, that the amount in controversy, exclusive of costs, exceeds \$100, and gives this court jurisdiction.

2. Where no transcript of the proceedings, containing the final judgment or order sought to be reversed, vacated, or modified, or an original case made, as required by paragraph 4618 of the General Statutes of 1889, has been filed with the petition in error, a motion to dismiss the appeal will be sustained.

(Syllabus by the Court.)

Error from district court, Chase county; Frank Doster, Judge.

Action by John C. Thompson against Alexander Russell. Judgment for plaintiff, and defendant brings error. Dismissed.

There has been filed in this court a petition in error in the above-entitled case. Attached to the petition in error are some papers which were filed April 11, 1891, by George M. Hayden, clerk of the district court. Said papers consist of one page of an index, entitled: "John C. Thompson vs. Alexander Russell. District Court of Chase County, Kansas. Action of Replevin." Then follows what seems to be a copy of 89 pages of evidence, without any title, or any statement as to what case the said evidence might have been given in. Then follow 3 pages of instructions of the court, without any statement as to what case said instructions were given in. Then comes a certificate which is as follows: "I hereby certify that the foregoing is a true and correct copy of my shorthand notes taken at the trial of said cause. John H. Swope, Sten. pro Tem. Jud. Dist." Then follows what purports to be a copy of a petition, a copy of an answer, journal entry, including verdict and special findings, and the overruling of the motion for a new trial. Then follows what purports to be a copy of a motion for a new trial, and upon this motion appears the following certificate: "State of Kansas, Chase County—ss.: I, George M. Hayden, clerk of the district court of Chase county, Kansas, do hereby certify the above and foregoing to be a true and correct copy of all the pleadings in the above-entitled cause. Witness my hand and seal of the above court this 11th day of March, 1891." Then follows the following: "Service of the within case made accepted this 19th day of March, 1891. Madden Bros., Attorneys for Plaintiff." And also the following: "No amendments to suggest. Service of notice of case made waived. Madden Bros., Attorneys for Plaintiff. Dated April 7, 1891." Then follows the following certificate: "In the District Court of Chase County, Kansas. J. C. Thompson, Plaintiff, vs.

Alexander Russell, Defendant. I, Frank Doster, judge of the district court of the 25th judicial district, in and for said county of Chase, do hereby certify that the above and foregoing case made contains a full, correct, and true copy and statement of the pleadings, evidence, stipulations, findings of the court, and decisions thereon, and all exceptions by either party thereto, and all proceedings subsequent to the judgment of the court; and I do further certify that this case has been by me examined, settled, allowed, and signed, at the request of the defendant, with the consent of the plaintiff, this 10th day of April, 1891. Frank Doster, Judge. Attest: George M. Hayden, Clerk District Court. [Seal.]" On the 19th day of April, 1895, the defendant in error, by his attorneys, Madden Bros., filed his motion to dismiss the petition in error filed herein, which said motion is as follows: "In the Kansas Court of Appeals, Southern Department, Central Division. Alexander Russell, Plaintiff in Error, vs. J. C. Thompson, Defendant in Error. Motion to Dismiss. Comes now the defendant in error, and moves the court, on profert of the alleged record, to dismiss the alleged petition in error, and all proceedings herein, for each of the following separate reasons, to wit: First, that it does not appear on the face of the record that the amount or value in controversy, exclusive of costs, exceeds \$100, and hence this court has no jurisdiction; second, that there is no case made, or transcript of the proceedings, filed with the petition in error; third, that there is no statement or certificate that there is a record of all the proceedings. Madden Bros., Attorneys for Defendant in Error." This motion was filed April 19, 1895.

Thos. H. Grisham, for plaintiff in error.
Madden Bros., for defendant in error.

DENNISON, J. (after stating the facts). The first reason set forth in the motion to dismiss is that it does not appear on the face of the record that the amount or value in controversy, exclusive of costs, exceeds \$100, and hence this court has no jurisdiction. This is an action for the recovery of specific personal property. The petition filed in the court below in this case by the plaintiff (this defendant in error) alleges that the personal property consisted of 325 bushels of corn, of the value of 65 cents per bushel, all of the aggregate value of \$211.25, and for \$50 damages for the wrongful detention of the same. The verdict of the jury was that the plaintiff (this defendant in error) was entitled to the possession of the property in dispute; that the number of bushels to which he was so entitled is 340, and that the market value of the same is 57½ cents per bushel; that "the defendant wrongfully detains the same, and we assess plaintiff's damages for such detention at 15½/10 cents per bushel, amounting to \$52.02." The judgment of the court was that "the plaintiff [this defendant below] have

and recover the immediate possession of the property in dispute, to wit, a lot of corn, consisting of 340 bushels in the crib, and that, if a delivery cannot be had, he recover its value, at the rate of 57½ cents per bushel, to wit, the sum of \$195.50, and that, in any event, plaintiff have and recover the sum of \$52.02, and the costs herein taxed at \$130.05." The evidence in this case discloses the fact that the original controversy between these parties was for the balance claimed by said Russell to be due from said Thompson, which was probably between \$30 and \$40, and, if this action had been brought by Mr. Russell to recover the balance which he claimed to have been due from Mr. Thompson, that would probably have been the amount in controversy between them; but he did not bring such an action, but the action that was brought by Mr. Thompson against Mr. Russell was for the recovery of the possession of a crib of corn that was valued at \$195.50 by the jury, and for the sum of \$50 as damages for its detention. The units or bushels of corn are in the plaintiff's (this defendant in error's) petition enumerated at 325, and he claims that each unit or bushel was worth 65 cents. The jury found that the number of units was 340, and that each unit was worth 57½ cents, and the judgment of the court was that there were 340 units or bushels of corn, and that each unit or bushel was worth 57½ cents, and that the value in controversy in this suit was \$190.50, and the damages were \$52.02, making the amount or value in controversy between these parties \$247.52. For these reasons this court must decide that the amount or value in controversy, exclusive of costs, exceeds \$100, and that this court has jurisdiction.

The second contention of said motion to dismiss is that there is no case made, or transcript of the proceedings, filed with the petition in error. There has evidently been no attempt at having a transcript of the proceedings of the court below filed with the petition in error in this case, but attached to the petition in error herein are some papers which were filed in the district court of Chase county, Kan., on April 11, 1891. The question for us to decide is whether said papers attached to this petition in error are a legal case made. They consist simply of 1 page of index, 89 pages of evidence, instructions of the court, petition, answer, journal entry, and motion for a new trial. After the instructions of the court is the certificate of a stenographer pro tem. "that the foregoing is a true and correct copy of my shorthand notes taken at the trial of said cause"; and upon the motion for a new trial is a certificate of the clerk of the district court that "the above and foregoing is a true and correct copy of all the pleadings in the above-entitled cause," but without saying what cause, unless it should

refer back to the title at the commencement of the motion for a new trial. This is the exact condition of what purported to be a case made, which was presented to the attorneys for the plaintiff (this defendant in error), and upon which they accepted service, on the 19th day of March, 1891, and upon which they make the following statement: "No amendments to suggest. Service of notice of settlement of case waived. Madden Bros., Attorneys for Plaintiff. Dated April 7, 1891." Following the decisions laid down in *Brown v. Johnson*, 14 Kan. 377; *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. 492; *State v. Board of Com'rs*, 43 Kan. 195, 23 Pac. 101,—and many other Kansas decisions, we must hold that this is not a case made, nor can the defect be remedied by the certificate of the judge. And it would seem proper to say that this should not be so in this case, for the reason that the only statement there is in the paper that it contains a full, correct, and true copy and statement of the pleadings, evidence, stipulations, findings of the court, and the decisions thereon, and all exceptions by either party thereto, and all proceedings subsequent to the judgment of the court, was made by said judge after it had been served upon the attorneys of this defendant in error; and while, when it was served upon them, they said they had no amendments to suggest, and that they would waive service of notice of settlement, it certainly must be held that they accepted service of the papers presented to them, and that they stated that they had no amendments to suggest to whatever paper was handed to them, and not to what might be stated afterwards, and that they waived notice of settlement of such a case made as was presented to them, and not to some further statement which the judge might make in the case. It might have been, if the papers presented to them had stated that they contained a full, correct, and true copy and statement of the pleadings and evidence, stipulations, findings of the court, and the decisions thereon, and all exceptions by either party thereto, and all proceedings subsequent to the judgment of the court, that they might have had some amendments to offer. Paragraph 4647 of the General Statutes of 1889 reads as follows: "That in all actions hereinafter instituted by petition in error in the supreme court, the plaintiff in error shall attach to and file with the petition in error, the original case made filed in the court below, or a certified transcript of the record of said court. * * *" In this case there is no original case made filed in the court below, and no original case made filed with this petition in error, nor was there a certified copy of the transcript of the record of said court filed with this petition in error. For these reasons the motion to dismiss will be sustained. All the judges concurring.

(1 Kan. App. 477)

STATE v. NEWBOLD.

(Court of Appeals of Kansas, Southern Department, C. D. June 19, 1895.)

JURISDICTION OF APPELLATE COURT—MISDEMEANORS.

Chapter 96 of the Laws of 1895 ("An act concerning appellate courts, defining their jurisdiction, and proceedings therein"), does not confer jurisdiction on such courts to hear and determine cases of appeals taken by the state in cases of misdemeanors.

(Syllabus by the Court.)

Appeal from district court, Sumner county; J. A. Burnett, Judge.

W. J. Newbold was indicted for having neglected to keep an account of fees as register of deeds. The information was quashed, and the state appeals. Case returned to the supreme court.

F. B. Dawes, Atty. Gen., and Jas. Lawrence, for the State. C. E. Elliott and W. W. Schwinn, for appellee.

JOHNSON, P. J. The county attorney of Sumner county filed an information in the office of the clerk of the district court of Sumner county charging William J. Newbold, register of deeds of said county, as follows: "That from the 8th day of January, 1894, to the date of the filing of the information, to wit, December 17, 1894, he was and had been continuously the duly elected, qualified, and acting register of deeds of Sumner county, Kansas, and, as such register of deeds, from the 1st day of July, 1894, to October 1st, 1894, charged and collected large sums of money as fees for duties performed as such register of deeds; and that on the 1st day of October, 1894, and ever since said day, he, the said William J. Newbold, as register of deeds of Sumner county, Kansas, aforesaid, did then and there unlawfully and willfully neglect and refuse to keep and file with the county clerk of Sumner county, Kansas, an accurate account, and report all the fees charged by him, the said William J. Newbold, as such register of deeds, during the quarter commencing with the 1st day of July, 1894, and ending on the 30th day of September, 1894, as provided by law." The defendant, Newbold, was arrested on a warrant issued by the clerk of the district court of Sumner county, upon the filing of said information, and gave recognizance for his appearance in said court to answer the charge contained in the information; and on the 22d day of December, 1894, at the December term, 1894, of said court, defendant filed a motion to quash said information on two grounds: First, that the information does not state facts sufficient to constitute an offense against the laws of the state of Kansas, or any public offense; second, that the statute under which the defendant is charged in said information of having violated is in contravention of the constitution of the state of Kansas. The motion to quash the informa-

tion was sustained, and the information quashed, and defendant's recognizance discharged. To the judgment of the court in sustaining said motion and quashing the information, the county attorney excepted, and filed his bill of exceptions, and brought said case to the supreme court on appeal, and the supreme court certified said case down to the court of appeals for its decision. The parties have each appeared in this court, and filed their briefs, presenting the various questions involved on the merits of said prosecution.

Without proceeding to the consideration of the questions involved, we are met at the threshold of this case with a most serious embarrassment, and one that involves the jurisdiction of this court to entertain this case, and to decide upon the questions presented in briefs of counsel. Neither party, in their briefs or otherwise, raise the question of jurisdiction of the appellate court; but the court must, before proceeding to determine any case, ascertain whether it has jurisdiction of the parties and of the subject-matter. Where there is no jurisdiction, it does not belong to the proper function of a court to give an opinion on a matter submitted to it for the guidance of parties or inferior tribunals, even where the parties consent to it. The legitimate business of a court is confined to giving decisions in cases properly before it. This case was taken to the supreme court before the act of the legislature was passed that created the appellate court, and was taken on appeal under section 283, c. 82, Gen. St. 1889, which reads as follows: "Appeals to the supreme court may be taken by the state in the following cases, and no other: First. Upon a judgment for the defendant, on quashing or setting aside an indictment or information. Second. Upon an order of the court arresting the judgment. Third. Upon a question reserved by the state." The act entitled "An act concerning appellate courts, defining their jurisdiction, and the proceedings therein" (passed and approved February 26, 1895, and became a law by publication February 27, 1895), is the law creating courts of appeal, and its powers and jurisdiction are specifically defined and limited thereby, and it can exercise no other than such as are thus defined, or such as are incidental to the carrying into effect the powers thus conferred. The jurisdiction of the courts of appeal is defined in section 9, c. 96, Laws 1895, and is as follows: "Said courts of appeals, within their respective divisions, shall have original jurisdiction, concurrent with and to the same extent as is now given by law to the supreme court in quo warranto, mandamus and habeas corpus; they shall also have exclusive appellate jurisdiction as now allowed by law in all cases of appeal from convictions for misdemeanor in the district and other courts of record; also in all proceedings in error, as now allowed by law, taken from orders and decisions of the district and other courts of

record, or the judge thereof, except probate courts, in civil actions before final judgment, and from all final orders and judgments of such courts, within their respective divisions, where the amount or value does not exceed two thousand dollars, exclusive of interest and cost, except that in any such case as is herein made final in the court of appeals it shall be competent for the supreme court to require by any proper order and process within sixty days after the entry of such final judgment or order in the court of appeals to direct any such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court in the first instance. All other cases of appeal and proceedings in error shall be taken as now provided by law." The jurisdiction as thus defined is limited to all cases of appeal from convictions for misdemeanors in the district and other courts of record. The limitation in cases of misdemeanors, being confined to cases of convictions, as thus expressly defined, precludes the court from taking jurisdiction in cases of appeal by the state in the three causes in which the state may appeal.

In providing the courts of this state, for speedy, universal, and impartial justice between the citizens, for the protection of person, the punishment of crime, to preserve order and protect society, our constitution has wisely provided for a prodigious variety of courts,—some with limited, others with more extensive, jurisdiction; some constituted to inquire only, others to hear and determine in the first instance, others upon appeal and by way of review. The powers and jurisdiction of each are defined by law. All must confine their acts within the jurisdiction conferred upon them, or their acts will be *coram non jure*. The act of the legislature of 1895, creating the court of appeals, containing, as it does, a grant of specific powers, the court cannot take any powers beyond those contained in the specific grant, and which have been given either expressly or by necessary implication. It may seem an anomaly that the courts of appeals are invested with exclusive appellate jurisdiction in all cases of appeal from convictions for misdemeanors, and with full power to determine the very same constitutional questions that are raised in a case where the state appeals. If the district court in this case should have overruled the motion to quash the information, and the case gone to trial, and resulted in a conviction of the defendant, and he had brought the case into this court by appeal, this court would, without any question, have had the exclusive jurisdiction to hear and determine the same questions that are involved in the appeal by the state. Yet this court does not make the law; its only function is to decide upon the law when presented to us for our consideration. Under our form of government its functions are divided between three separate de-

partments,—the executive, legislative, and judicial. Each must act within the limits of its own jurisdiction, and each is responsible for its own acts; and the legislative department, in its wisdom, has placed a limitation on the jurisdiction of the appellate court. We must have respect for its acts.

This court, being without jurisdiction in this appeal, must decline to further consider the matters submitted in the briefs of counsel, and suggest that the case be returned to the supreme court for its determination. All the judges concurring.

(1 Kan. App. 450)

ARMSTRONG v. MOORE et al.

(Court of Appeals of Kansas, Southern Department, C. D. June 24, 1895.)

CONDEMNATION PROCEEDINGS — RIGHTS OF MORTGAGEE.

F., being the owner in fee simple of a town lot in the city of Kingman, gave a mortgage to the Kansas Loan & Investment Company to secure the sum of \$700 on said town lot, due in five years, and said mortgage was duly assigned to A. The Hutchison, Oklahoma & Gulf Railway Company duly applied to the board of county commissioners of Kingman county to lay off its route for railway purposes through said county, and thereafter such proceedings were had by the board of county commissioners as are authorized by law, and in the location of such right of way the entire lot so mortgaged was taken as right of way, and the board of county commissioners found that F. was the owner thereof, and appraised the value of the lot at \$1,250, and awarded the same to F. as owner. After the board of commissioners had concluded the laying out of such route, they embodied their doings in a report in writing, and filed it with the county clerk of said county; and the county clerk forthwith made a copy of of such report, and filed it in the office of the treasurer of said county; and the railway company thereupon deposited with the county treasurer the amount of such award in full; and the county treasurer has paid out the money so deposited to the persons designated in the report of the board of county commissioners as the owners, and to whom the awards were made. A. did not intervene in the condemnation proceedings, or in any other manner, nor present his claim for the award until the same had been paid out by the treasurer to F., the owner of the fee, and to whom the award had been made. *Held*, that A. cannot maintain an action against the treasurer and his bondsmen for the recovery of the money due him on said mortgage.

(Syllabus by the Court.)

Error from district court, Kingman county; S. W. Leslie, Judge.

Action on an official bond by Philando Armstrong against A. B. Moore and others. There was judgment for defendants on demurrer to the petition, and plaintiff brings error. Affirmed.

This action was commenced by Philando Armstrong against A. B. Moore, as treasurer of Kingman county, and the other defendants, as sureties on the bond of said treasurer. The plaintiff alleged in his petition that on the 1st day of September, 1888, the defendant Benjamin F. Frazier, executed a certain

promissory note to the Kansas Loan & Investment Company for the sum of \$700, due five years after date, with interest at 7 per cent. per annum if paid according to the tenor and effect thereof, with coupons attached, but, if not so paid, to draw 12 per cent. per annum; that said note was assigned by the Kansas Loan & Investment Company to the plaintiff, Armstrong, before due. A copy of the note is attached to the petition. Plaintiff also alleges the execution of a mortgage on certain real estate in Kingman county, Kan., to secure the payment of the note, and that no part of the principal or interest has ever been paid, and that the same is due. He also alleges that in March, 1890, the Hutchison, Oklahoma & Gulf Railway Company, a company authorized to construct a road from Hutchison to Oklahoma, on the 1st day of March, 1890, instituted condemnation proceedings to condemn its right of way through Kingman county, and in laying out the route of said railway through Kingman county and condemning the right of way it took and appropriated the entire tract of land mortgaged to secure the payment of said note; that in the condemnation of said land it was appraised at \$1,250, and that on the 10th day of May, 1890, the railway company under said condemnation proceedings paid to the defendant A. B. Moore, who was then the treasurer of Kingman county, Kan., the full appraised value of said land, to wit, \$1,250, and on the same day the money was deposited with the treasurer, and he paid it out to the defendant Benjamin F. Frazier, on account of being the owner of said land, and that at the time of the payment of Moore to Frazier, Moore had full notice and knowledge of the mortgage of the plaintiff on said land. The petition further alleges that Moore was the duly elected, qualified, and acting treasurer of Kingman county, and that the other defendants were sureties on his bond as treasurer of said county; that said bond was duly approved, and filed with the county clerk of Kingman county; and that said Benjamin F. Frazier is, and was on the 10th day of May, 1890, insolvent. Plaintiff prays judgment against all the defendants for the sum of \$700, with interest according to the terms of the note. To this petition the defendants interposed a demurrer on the ground that the petition does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, and, plaintiff electing to stand on his petition, judgment was rendered against him for costs of suit. Motion to set aside the judgment and grant a new trial was filed, and overruled by the court, and excepted to.

Edwin White Moore and Fred W. Bentley, for plaintiff in error. George W. Cooper and Jas. F. Steck, for defendants in error.

JOHNSON, P. J. (after stating the facts). The record in this case presents but one sin-

gle question,—as to whether the petition of plaintiff stated facts sufficient to constitute a cause of action, and whether the county treasurer became liable to plaintiff as mortgagee for the sum secured by the mortgage upon the facts alleged in the petition. It is alleged in the petition of the plaintiff: That on the 1st day of March, 1890, the Hutchison, Oklahoma & Gulf Railway Company, a duly chartered and organized railway corporation, proposed to construct its road through Kingman county, Kan., and at the same date applied to the board of county commissioners of Kingman county to lay off the line of its proposed road in said county as located by said company as a route for said proposed railroad, not exceeding 100 feet in width, and also such lands as might be deemed necessary for side tracks, depots, workshops, water stations, etc. Said board of county commissioners of Kingman county, on or about the 1st day of March, 1890, proceeded to lay off said route over and upon such land as was necessary for said railway company, as set forth in the application therefor, and caused the land for said purposes to be carefully surveyed, and ascertained the quantity of land necessary for said purposes out of each quarter section and other lot of land over which said route was located, and duly appraised the value of each quarter section and other lot of land desired by said railway company, and assessed the damages accruing to each quarter section and other lot of land so desired. That prior to said action of said board of said county commissioners a notice of the time when said proceedings should be commenced was given by the board of county commissioners by the publication thereof for 30 days prior to the time fixed for commencing such proceedings, in the Kingman Leader-Courier, a newspaper published in said county of Kingman, stating the time and place of meeting for the purpose of laying out such route and appraising the value of each quarter section and other lot of land desired for right of way. That under such notice the board of county commissioners met at the time and place designated in said notice, and proceeded to lay off along the line proposed by the railroad company; and, after having concluded their work in laying off such route, and ascertaining carefully the quantity of land necessary for the purposes of said railroad out of each quarter section or other lot of land through which said route was so located, and appraised the value and assessed the damages thereto, and the damage to each owner's interest, on the 10th day of May, 1890, they made out their report in writing, embodying their proceedings therein, and duly filed the same in the office of the county clerk of said county. Said county clerk forthwith on said day prepared and filed in the office of the treasurer of Kingman county a copy of said report. That the piece of land mortgaged as aforesaid was wholly included in the limit of the route of said rail-

way company as located by said company and surveyed, appraised, and assessed by the board of county commissioners; and in said report said land was designated as owned by the defendant Benjamin F. Frazier, and all of said piece of land was reported by said board of county commissioners in said report as necessary for the purposes of said railway company. Said board of county commissioners duly appraised the value of such piece of land at the sum of \$1,250. That on the same day the railway company, pursuant to the proceedings aforesaid, duly paid the defendant A. B. Moore, as treasurer of Kingman county, the said sum of \$1,250, for and on account of said appropriation of said described piece of land for the purpose of said railway. That the said defendant A. B. Moore was the duly-qualified treasurer of Kingman county, and on the same day, as such treasurer, he paid the said sum of \$1,250, received by him as treasurer from said railway company, to the defendant Benjamin F. Frazier, because Frazier was the owner of said piece of land; and at the time of such payment by said Moore to the said Frazier the said Moore had full notice and knowledge of the mortgage of said plaintiff on said land. And plaintiff further alleges that the other defendants are sureties on the bond of said A. B. Moore as treasurer of said county.

Section 235 of article 9 of chapter 23 of the Statutes of 1889, provides: "Upon application being so made in writing, such board of county commissioners shall forthwith proceed to lay off such route, side tracks, etc., for such distance through their said county as may be so desired, and of such width, within the limits aforesaid, and upon such location, as may be desired by such corporation, having the same carefully surveyed, and ascertaining carefully the quantity of land necessary for such purposes out of each quarter section or other lot of land through which said route, side track, etc., is so located, and appraise the value of such portion of any such quarter section or other lot of land, and assess the damages thereto; and when such commissioners shall ascertain that such portion of such quarter section or lot belongs to different owners, they shall appraise the value and assess the damages of each owner's interest; all which doings the board of commissioners shall embody in a written report, and file in the office of the county clerk of such county." Section 236 provides: "Such county clerk shall forthwith prepare and file in the office of the treasurer of such county a copy of such report, and if such company shall cause to be paid to such treasurer the amount in full of such appraisal, within 90 days of the time of filing such report in such treasurer's office, such treasurer shall thereupon certify such fact upon the copy of the report, under his hand and seal of office, and shall upon demand of the persons

severally entitled thereto pay over the amounts of such fund to such persons as shall be respectively entitled thereto." Before a board of commissioners shall proceed to lay off any railroad route as provided in this chapter, notice of the time when the same shall be commenced shall be given by publication 30 days before the time fixed, in some newspaper published in such county, and also provides the manner in which the commissioners shall proceed to lay out the right of way, and also for an appeal from the award of the commissioners in the appraisal of the land and assessment of damages. It is alleged that the proceedings in the condemnation of the right of way were all regular, and that the Hutchison, Oklahoma & Gulf Railway Company obtained the right of way through the county of Kingman, and that in the laying out of the route for said railway company the entire tract of land covered by the mortgage of the plaintiff was appropriated as right of way to said railway company; that due notice of the proceedings was given by publication; that the award was made to Benjamin F. Frazier as the owner thereof; that the mortgagee never attempted to subject the award as a fund in equity to his claim, and never received any portion of the same, or had any benefit therefrom; that the entire amount was paid over to the said Benjamin F. Frazier. In the case of *Railroad Co. v. Sheldon*, 53 Kan. 172, 35 Pac. 1105, Johnston, J., delivering the opinion of the court, says: "General notice by publication is sufficient, and, when legally made, all persons who have an interest in the lands must take notice of the subsequent proceedings, whether they are named in the notice or not. If any owner is dissatisfied with the award when it is made, he may protect his interest by taking an appeal. When the award is paid in to the county treasurer, any one having an interest in the land or a claim upon the fund may take proceedings to protect his interest or claim. The mortgagee, however, had only a lien upon the land out of which the right of way was taken. He was not an owner of the same, nor the owner of an estate therein. Not being an owner within the meaning of our statute, it was not necessary to name the mortgagee in the proceedings, nor to make the award to him. When full compensation was awarded for the right of way, and the award was deposited with the county treasurer, a title to the right of way was obtained by the railroad company as against the owner as well as any others who may have had liens upon the land. The mortgagee is not without protection, as, having had notice by publication, he may, where equity requires, resort to the fund awarded for the right of way." But if he does not appear and demand that his equities be protected before the money is paid over to the owner of the land, to whom the award is made, he cannot have a claim

upon the treasurer, who has paid the money out according to the person named in the award of the commissioners. In the case of Railroad Co. v. Wilder, 17 Kan. 246, Mr. Justice Valentine, speaking for the court, says: "We think Wilder is entitled to the same damages as though he owned the unincumbered fee in the land. Da Lee is not entitled to any portion of such damages. Da Lee is entitled to the \$2,000 which Wilder owes him, and to nothing more, except that he holds the legal title to the land (and possibly a lien on the damages awarded, if he chooses to assert the lien) as a security for his claim on Wilder." In the case of Kuhn v. Freeman, 15 Kan. 427, Mr. Justice Valentine, delivering the opinion of the court, says: "When the right of way was established, it was in fact obtaining an easement on the land of the widow and children of said Hamaker, and not upon the land of Weisbach, and they were entitled to receive the money paid by the railroad company as damages, and Hamaker's estate remained liable to the holder of the notes, just as it was before, for the balance of the purchase money not yet paid on the notes." In the case of Goodrich v. Commissioners of Atchison Co., 47 Kan. 360, 27 Pac. 1006, a public highway was laid out over a quarter section of land in Atchison county owned by Silas H. Hamilton and Francis B. Hamilton, upon which they had given a mortgage to Alexander M. Sutherland, and the mortgage was afterwards foreclosed in the United States circuit court, and the mortgaged property sold by a master in chancery, and bought in by Goodrich. Damages for the location of the highway having been assessed in favor of T. C. Beard as the agent for the Hamiltons, aggregating \$350, and the same having been paid to T. C. Beard, as agent of Hamiltons, Goodrich afterwards, as purchaser of the land at the master's sale, commenced his action against the board of county commissioners of Atchison county to recover the damages awarded for the right of way over said land. All the facts in relation to the execution of the mortgage, the foreclosure and sale of the land, and the purchase by Goodrich at the master's sale, the award of damages, and the payment of the same to T. C. Beard, were all set out in the petition of the plaintiff, and on the trial of said cause an objection to any evidence under the petition for the reason that it did not state facts sufficient to constitute a cause of action against the defendants was sustained, and judgment rendered in favor of the defendant, and the judgment was affirmed by the supreme court. Mr. Commissioner Strang, delivering the opinion of the court, says: "It shall be the duty of at least one of the petitioners to cause 6 days' notice to be given in writing to the owner or owners or their agents, if residing in the county, through whose land such road is to be laid out and established, of the time and

place of meeting as specified in the notice of the commissioners. The notice of the commissioners is pointed out in paragraph 5476 of the same statutes [Gen. St. 1889], and requires the county clerk to give notice by advertisement set up in the county clerk's office, and every municipal township through which any part of said road is designated to be laid out, for at least 20 days, and by publication for two consecutive weeks in a newspaper, if there be one published in the county, setting forth that such petition has been presented, giving the substance thereof, and that viewers will on the day designated proceed to view said road, and give all parties a hearing. In view of the statute of our state in relation to notice in road proceedings, and the law relating to mortgages and rights of mortgagors and mortgagees, we do not think it was necessary to serve notice on the plaintiffs for the purpose of establishing the road which was laid out across the lands upon which they at the time held a mortgage. There is nothing in our statute that requires service of notice upon any one in such proceedings except the 'owner.' It has been seen that in our state the mortgagee of land is not the owner thereof. The mortgagor holds the legal title, and, in the absence of stipulations to the contrary, right of possession. He is regarded as the owner of the land, and, when in possession himself or by an agent, notice to him or his agent is, in proceedings to establish a public road, notice to the 'owner' to the full intent of our statute requiring such notice." In the case of Schermerhorn v. Peck, 43 Kan. 668, 23 Pac. 1043, in which Peck foreclosed a mortgage upon certain lands in Cowley county through which the right of way of the Eldorado & Walnut Valley Railroad had been laid out, and damages were awarded to the owner of the fee, and were paid over to Jennings & Troop, the attorneys for the owner, and a motion and supplemental motion was made to require Jennings & Troop to pay the money to the mortgagee. Mr. Justice Johnson, delivering the opinion of the court, says: "The money sought to be reached was not a fund within the jurisdiction of the court in the foreclosure proceedings. * * * There was no effort by Schermerhorn to interplead in the condemnation case, nor did she by any pleading in the foreclosure action ask that the money awarded or to be awarded in the condemnation case should be held as a fund for the satisfaction of the mortgage. Doubtless the mortgagee could have filed supplemental pleadings in the foreclosure case, bringing all the parties directly connected with the award made or to be made into court, setting forth the facts respecting the condemnation proceedings, and the necessity that the money to be paid for right of way should be held as a fund for the satisfaction of the mortgage, and thus have reached the end sought in this motion. * * * No effort of any kind was made to

control or reach the fund until some time after the money had been awarded and paid. The steps taken were ineffectual. It was not a fund within the jurisdiction of the court in the foreclosure action, and the court rightfully denied the motion."

In *U. S. v. Dunnington*, 146 U. S. 338, 13 Sup. Ct. 79, on appeal from the court of claims, it was claimed that certain lots in the city of Washington, D. C., formerly belonging to Charles W. C. Dunnington, the ancestor of the claimant, which were in June, 1863, seized and confiscated under the confiscation act of July 17, 1862, and duly condemned as enemy's property, and exposed to public sale, and that A. R. Shepherd became the purchaser, and entered into the possession. In 1872 proceedings were commenced in the supreme court of the District of Columbia at the instance of the United States for the acquisition of the land to enlarge the grounds around the capitol, in which contemplated enlargement said lot was included, and such proceedings were had that resulted in the condemnation of the lots by commissioners, and the commissioners filed their report, finding the cash value of said lots, and said appraisement was duly approved, and, the owner failing to appear and demand the award of damages, the amount of appraisement was filed with the court by the secretary of the interior. This property had in the meantime been transferred by Shepherd through several intermediate conveyances to Martin King, and King had died, and on the 3d day of April, 1873, upon petition of the heirs of Martin King, the amount of the appraisement of the lot, amounting to \$9,858, was by order of the court paid over to the attorney of the heirs of said King. By the proceedings for the confiscation of the property of Charles W. C. Dunnington he was divested of all right or title to the lot during his lifetime, but upon his death the forfeiture of the property determined, and the fee simple at once vested in the claimant as heir at law; but by the condemnation proceedings the title of all parties as divested, and the appraised value of the property took the place of the property, and was held by the court for the use and benefit of the owner or owners of the property, and, the amount awarded by the commissioners to the owners of the property having been paid out to the grantees of Shepherd, the purchaser at the sale of the lot, this claimant instituted proceedings for a recovery of the appraised value of the lot from the United States. Brown, J., delivering the opinion of the court, says: "A further question remains to be considered with regard to the proceedings taken after the payment of the money into court. It is insisted by the claimant that it was the duty of the United States, as the plaintiff in the condemnation proceedings, to take proper steps for the payment of the sum fixed by the appraisers to the persons entitled thereto by apportioning the sum between the tenants of the life es-

tate and the heirs of Dunnington, or by the investment of the entire amount in interest-bearing securities for the benefit of the tenants of the life estate, until its termination, and for the ultimate delivery of the same to the heirs. It is a necessary deduction from our conclusion upon the other branch of the case that the appraisement of the property represents the whole fee, and the interest, both present and prospective, of every person concerned in the property; and such are the authorities. *Canal Co. v. Archer*, 9 Gill & J. 479-525; *Ross v. Adams*, 28 N. J. Law, 160. The money, when deposited, becomes in law the property of the party entitled to it, and subject to disposal of the court. * * * It is evident that the gist of the petitioner's complaint in this connection lies in the order of the supreme court of the District of Columbia of April 3, 1873, directing the payment of the entire appraised value of the lot to the heirs of Martin King, the vendee of Shepherd, who had purchased the life estate of Dunnington under the confiscation proceedings. Neither Dunnington, who is still living, nor his heirs, the present claimants, appear to have intervened in the condemnation proceedings, or have raised a question as to the propriety of the payment. * * * The proceedings, however, appear to have been carried on in strict conformity with the act which required the secretary of the interior, in case he should be unable to purchase at private sale, to apply to the court for an appraisement, and, in case the owner neglected to demand of him the appraised value within fifteen days, to pay the same into court, subject to being paid out to the persons entitled to it. Assuming that the payment of the entire amount to heirs of King was a mistake, it is difficult to see how the United States can be held responsible for it. The courts are in no sense the agencies of the federal government, nor is the latter liable for their errors or mistakes. They are independent tribunals, created and supported, it is true, by the United States, but the government stands before them in no other position than an ordinary litigant." In *Crane v. City of Elizabeth*, 36 N. J. Eq. 339-343, it was held: "That the compensation fixed for the taking of certain lands for streets was to include the value of all the interest, and was to be paid to the owner of the land if no other claimant intervened; and that if, in any case, such owner ought not to receive the whole, timely resort must be had to the court of chancery, which would see to the equitable distribution of the fund. The price to be paid," said the court, "by the city is to be the full value of all rights which may be impaired for the public benefit; and this is to be ascertained only after notice, not specially to individuals who alone may appear to guard their claims, but generally by the publicity which attends the doings of the council, and by newspaper advertisements, which will reach all alike, and

under which all may be protected. The action of the city authorities has thus the distinctive qualities of a proceeding in rem, a taking, not of the rights of designated persons in the thing needed, but of the thing itself, with a general monition to all persons having claims in the thing. When, by the appraisalment of the commissioners, the price of the thing is fixed, that price stands in the place of the thing appropriated, and represents all interests acquired. * * * But if, in any special case, the owner ought not, in equity, to receive the fund, the court of chancery will, at the instance of any interested complainant, take charge of its proper distribution, and so secure those particular equities which the generality of the statute has left without express protection." Article 9 of chapter 23, Gen. St. 1889, prescribes the proceedings for acquiring the right of way for railway companies, and fully and particularly sets out and defines the duties of the commissioners, and under the proceedings for acquiring the right of way by exercise of the right of eminent domain the commissioners are required to give public notice by advertisement in some newspaper published in the county, and of general circulation therein, where the proceedings are to be had. The object of this publication is to notify all persons interested in any property to be affected by the taking and appropriating of property along the line of proposed railway, so they may appear, and present their claims to the commissioners, so as to inform them of their claim, if any, as they proceed with the laying out of the route, and in the appraisalment of the value and the assessment of damages, and to present to the commissioners whatever interest such person has in the several quarter sections or other lot of land to be affected by the location of the route. The commissioners are authorized to determine who the owner of each tract of land is through which the right of way is located, and to determine the interest of each owner or claimant thereto, and are required to appraise the value and assess the damages to each of such owners' interest; and, after they have ascertained carefully the quantity of land necessary for the purpose of the right of way out of each quarter section or other lot of land, and appraised its value, and assessed the damage thereto, and determined the interest of each owner, and appraised the value and assessed the damage to each owner's interest, they are required to embody their findings in a written report, and file the same in the office of the county clerk of the county where condemnation is had, and the county clerk shall forthwith prepare and file in the office of the treasurer of such county a copy of such report; and, if the railway company shall cause to be paid to such treasurer the amount in full of such appraisalment within 30 days of the time of filing such copy in such treasurer's office, such treasurer shall thereupon certify

such fact upon the copy of the report under his hand and seal of office, and shall, upon demand of the persons severally entitled thereto, pay over the amounts of such funds to the persons respectively entitled thereto. The finding contained in the report of the commissioners is the only means the treasurer has of determining who are the persons entitled to the funds in his hands, and he should pay it out according to the award of the commissioners. The commissioners appraise the interest of the owner of each quarter section or other lot of land, and determine the damage sustained by the owner of each quarter section or other lot of land appropriated, and the railway company deposits the money with the treasurer to pay the awards of the commissioners; and, if the persons to whom the awards are made are not entitled to receive the same because of some equitable reason, the person or persons who are entitled in equity to receive the money on deposit should come forward while said condemnation proceedings are pending, and present their claim to some court of competent jurisdiction, and obtain in some proper proceeding an order for the equitable distribution of the fund. The party claiming the fund should commence his proceedings before the treasurer has paid it out in accordance with the direction in the report of the commissioners. Where a party stands by, and sees the right of way of a railway through the county condemned when he ought to know that it will affect lands that he has some interest in, either legal or equitable, until the commissioners have completed their work, and filed their report, and the company made its deposit in accordance with such report, and the treasurer has paid out the money deposited to the parties whom the commissioners have found to be the owners, and awarded the compensation to them, he will not be heard to complain of the payment by the treasurer of the money to the wrong party. Equity requires a party, when proceedings are being had by those authorized to act, whose acts may affect his right, to make his claim known, if he has any; and, if he does not speak when he should speak to protect his own right, he will not be heard when he does speak. The defendant having paid out the money deposited by the railway company as the appraised value of the mortgaged premises to the party designated in the report of the commissioners as the owner of the lot and the person entitled to the value of the same, and the plaintiff not having made any claim, during the condemnation or before, by setting up his equities to the fund awarded or to be awarded, nor presenting any claim to the fund in the hands of the defendant, until after it has been paid out by the treasurer, he cannot recover from the treasurer and his sureties the amount due him on his note and mortgage; and the demurrer to the petition was properly sustained. The judgment of

the court in sustaining the demurrer to the plaintiff's petition is affirmed. All the judges concurring.

(5 Wyo. 430)

SCHENCK v. UNION PAC. RY. CO. et al.
(Supreme Court of Wyoming. June 25, 1895.)

APPEAL—RESERVATION OF QUESTION BY DISTRICT COURT—PLEADING—STOCK KILLED ON TRACK—CONSTITUTIONAL LAW.

1. The reservation of a question by the district court for the decision of the supreme court may be made before judgment.

2. Issue need not be joined, in pleading on the constitutionality of a statute, to raise the question of its constitutionality.

3. A railroad company is not liable for the killing of stock by its trains unless guilty of negligence in such killing.

4. A statute making a railway company liable for stock killed by its trains in the absence of negligence is unconstitutional.

Reserved case from district court, Albany county; J. W. Blake, Judge.

Action by John H. Schenck against the Union Pacific Railway Company and others. Heard on certified questions.

W. H. Fishback, for plaintiff. Lacey & Van Devanter, for defendants.

CONAWAY, J. This is an action for damages for the killing of a cow by the locomotives and cars of defendants. The petition charges that "the said defendants, by their agents and servants, not regarding their duty in that respect, so carelessly and negligently ran and managed said locomotives and cars that the same ran against and over said cow of the plaintiff, and killed the same, to his great damage," etc. A jury was waived by the parties, and a trial had by the court. The court reserves two important and difficult questions arising in the cause for decision by this court.

There is a motion by plaintiff to withdraw the papers in this cause from the files of this court, because there was no judgment rendered in the district court on the evidence and the findings of that court, and the pleadings "do not join issue on the constitutionality of the statute of Wyoming reserved and certified by the court," and final judgment cannot be given until a new trial is had in the district court. This motion is overruled. The reservation of important and difficult questions by the district courts for decision by this court is not premature on account of the reservation being made before judgment. Neither is it necessary that any issue be joined in the pleadings on the constitutionality of a statute, in order to raise the question of its constitutionality.

The questions reserved for decision are: "First. Are the defendants, or either of them, liable for the killing of said cow, without reference to the question of negligence? Second. Is the statute of Wyoming in relation to the killing of live stock by engines and cars

unconstitutional to the extent that it renders the railway company operating such engines and cars liable for stock killed by the same in the absence of negligence?"

To the first question we answer no; and to the second, such statutes are unconstitutional to the extent specified. The principles upon which such statutes are held to be unconstitutional have been so often discussed that a new consideration of them in this case would be unprofitable and tedious. The following are some of the authorities: *Railway Co. v. Lackey*, 78 Ill. 55; *Jensen v. Railway Co.* (Utah) 21 Pac. 994; *Railway Co. v. Outcalt* (Colo. App.) 31 Pac. 177; *Parsons v. Russell*, 11 Mich. 113; *Taylor v. Porter*, 4 Hill, 140; *Ziegler v. Railroad Co.*, 58 Ala. 595; *Railway Co. v. Smalley* (Wash.) 23 Pac. 1008; *Railroad Co. v. Baty*, 6 Neb. 37.

GROESBECK, C. J., and POTTER, J., concur.

(6 Colo. A. 432)

DENVER & R. G. R. CO. v. ROBINSON.

(Court of Appeals of Colorado. June 10, 1895.)

ACTION AGAINST RAILWAY COMPANY—INJURY TO LIVE STOCK—FENCES ON RIGHT OF WAY—NEGLIGENCE OF ENGINEER—EVIDENCE.

1. In an action against a railway company for injuries to a mule on its right of way, it appeared that defendant's right of way was fenced for about 800 feet, the fences being about 130 feet apart near plaintiff's pasture, and terminating at a bridge where they were about 100 feet apart, the end towards the pasture being open, and that the mule was killed on the track near the bridge. *Held*, that plaintiff, to recover on the ground that the right of way was negligently fenced, must prove that the fences were constructed or controlled by the railway company.

2. In such a case reference to such fences by witnesses as the "railroad fence" is insufficient to prove that the fence was owned by the railroad, especially where it appears that defendant's right of way was only 100 feet wide.

3. The engineer on the train testified that he could, by the aid of his headlight, see about 400 feet in front of the train; that he might have stopped the train "within five or six hundred feet"; that he did not see the mule until he was within 50 feet of it, it being at the time on the track with its legs through the ties of the bridge; and that he stopped the train as soon as he struck the mule. *Held*, that the question whether defendant was negligent in not having seen and stopped the train in time to avoid injury to the mule was for the jury.

4. There being no evidence that defendant constructed or owned the fence, it was reversible error to instruct that it was defendant's duty, in case it fenced its track, to do it in such a manner as not to increase the hazard to live stock, as this impliedly assumed that there was evidence that the fence was constructed by defendant.

5. By introducing evidence after the overruling of a motion for a nonsuit, defendant waives error therein.

Appeal from county court, El Paso county.

Action by R. G. Robinson against the Denver & Rio Grande Railroad Company. There

was a judgment for plaintiff, and defendant appeals. Reversed.

Wolcott & Valle and William W. Field, for appellant. Patrick & Essex, for appellee.

THOMSON, J. This action was brought by R. G. Robinson against the Denver & Rio Grande Railroad Company to recover the value of a mule killed by a locomotive engine managed and operated by the defendant. The plaintiff had judgment, from which the defendant appeals. The plaintiff was the lessee in possession of a ranch or farm in El Paso county, about 200 acres of which was a pasture field, surrounded by a fence. The track of the railroad company ran through this field. Its right of way through the pasture was not fenced; but from the point where the track left the field, going east, there was a fence on each side of it for a distance of about 800 feet to a bridge, across which the track was laid. Where the two fences commenced, they were about 180 feet apart; but they converged, until, at the bridge, the interval was only about 100 feet. There was thus inclosed a piece of ground shaped like a funnel. This inclosure contained two side tracks besides the main track. At the narrow end, the fences joined upon the bridge. At the other end, where the track left the field, there had at one time been cattle guards; but they were removed before the plaintiff leased the ranch, and the opening from the plaintiff's pasture into the funnel-shaped inclosure afterwards remained unobstructed. The plaintiff testified that he turned two mules, of which he was the owner, into his pasture field, in the evening, between sundown and dark. During the night, one of the mules was killed. He found it the next morning on the further side of the bridge, torn to pieces. He found blood, hair, and pieces of flesh upon the bridge, and mule tracks along the railroad track, going towards the bridge, and close to it. The other testimony for the plaintiff was, as far as it went, simply corroborative of his own. When the plaintiff rested, the defendant asked a judgment of nonsuit, which was denied.

We are unable to find any evidence in behalf of the plaintiff at the close of his case which would authorize a verdict in his favor. Assuming that, from the circumstances in evidence, it might be inferred that the animal was killed by a locomotive of the defendant, this is the utmost extent to which the evidence goes. But this is not enough. The fact alone that the defendant killed the mule fixes no liability upon it. The damage must have occurred through its negligence, or that of persons in its employ. There is no presumption of negligence; its existence must appear by proof; and, until it does so appear, a party whose case is based upon it is without a cause of action. The plaintiff had no witness to the fact of killing the

mule, and therefore did not produce evidence upon which negligence in the persons operating the engine could be predicated. Counsel do not claim that there was any proof of this kind, but find negligence in the character and condition of the inclosure. The argument is substantially as follows: The company was under no legal obligation to fence its right of way, but, if it elected to do so, it must not by its act increase the danger to animals straying upon its grounds. After it had made the funnel-shaped inclosure, it was its duty to maintain cattle guards on the west end; and the removal of the guards originally there, leaving the fences still standing, and the entrance to the inclosure open, was negligence for which it is answerable in this action. If this argument did not assume what it was necessary to prove, we should admit its force. There was at that time no law requiring the company to fence its right of way; but, if it was responsible for the maintenance of this inclosure, it was its duty to take proper precautions to prevent cattle from going within it. Left in the condition it was in, it was, as counsel characterize it, a trap, from which cattle within it, when a train entered it from the west, had little chance of escape. An animal upon the track, frightened by an approaching train, and seeing a fence on either side, would naturally seek an outlet over the bridge, where it would be caught in the open spaces between the ties, and must inevitably be run upon if the train proceeded. In this state an owner of cattle may permit them to run at large; and surely, if a railroad company sees fit unnecessarily to fence its right of way, and in doing this makes an inclosure so contrived that there is easy access to it by cattle at one point, and no escape at any other, it cannot be acquitted of blame when an accident occurs as the direct consequence of its act.

But there is no evidence that the defendant constructed or maintained or had any control of the fences in question. Some of the witnesses, in speaking of them, used the expression "railroad fence"; and counsel seem to think that an inference ought therefore to be indulged in that the fences belonged to the railroad company. But the expression had no special meaning beyond the identification of the particular fence of which the witness was speaking. The plaintiff used the term to distinguish the fence he referred to from the "pasture fence"; and there is nothing to indicate that any witness intended to be understood as expressing an opinion concerning the ownership of the railroad fence. But it is not very material what the witnesses may have intended. An expression of that kind is not the statement of a fact. No witness stated when or by whom the fences were built, who kept them in repair, or who exercised control over them. From the evidence, it is just as probable that they were built by the owner of

the land for his own convenience, as that they were built by the railroad company. Indeed, from a statement of plaintiff, it might be inferred that they were not constructed by the company. He stated that the width of the right of way was about 100 feet. If he stated the width correctly, then, except where the fences joined upon the bridge, they must have been off the right of way, upon ground to which the company had no title, upon which it had no right to place a fence, and from which it had no right to remove one. There is an equal absence of evidence concerning the cattle guards. By whom they were constructed or removed we have no intimation. The railroad company must in some way appear to be responsible for the existence of the fences before it can be held responsible for the consequences of their existence. The defendant was entitled to the nonsuit asked; and, if it had quit the case at that point, there would be little trouble in disposing of it.

But the defendant waived the error by the defense which it made. It placed upon the witness stand John R. Shanley, who testified that he was the engineer in charge of the engine that killed the plaintiff's mule. The accident occurred about 1 o'clock in the morning. It was very dark. There were about 20 loaded cars attached to the engine. The mule was on the bridge. Its belly was on the ties, and it looked as though its legs were down between them. The train was going at the rate of 18 or 20 miles an hour. The grade was about level. There was a good headlight upon the engine. It was the duty of the witness to keep his eyes upon the track ahead of him, and watch it closely all the time. He could see by his headlight for the distance of about two telegraph poles. He thought the poles were about 200 feet apart. He did not see the mule until he was within about 50 feet of it. He did all he could to stop the train by the time he reached the animal, and, as soon as he struck it, he did bring it to a full stop. He was asked the following question, "State what distance, then, it would have been possible to stop that train in, loaded as it was, and on that grade?" to which he answered, "You might have stopped it within five or six hundred feet." We think the testimony of this witness warranted the submission of the question of negligence to the jury. They had the right to find that on that night, with the headlight which he had, he could see the track ahead of him for a distance of 400 feet, and that he ought to have seen this mule at that distance; that he ran the train at full speed for a distance of 350 feet from the time when he ought to have observed the mule to the time when he did observe it; and they had the right also to infer that, if he had seen the mule when he ought to have seen it, he could have stopped the train before striking it. The question we have quoted was evidently asked with a view to ascertaining within what distance that

train could possibly have been brought to a halt at that place. He did not answer the question. He did not give the limits within which it was possible to stop the train. He only said that it might have been stopped within 500 or 600 feet. The jury could therefore infer that it might have been stopped within 500 feet; but how far within 500 feet? This was left indefinite. The distance at which the mule could have been seen was within 500 feet. Furthermore, if with only 50 feet of effort, the engineer was able to bring the train to a complete halt immediately upon coming in contact with the animal, might he not, by the exercise of equal diligence, while running the preceding 350 feet, have stopped it before reaching that point? All these matters were proper subjects of consideration by the jury in determining whether there was negligence or not; and if the question had been submitted to them unembarrassed by assumed conditions, foreign to the case as made by the evidence, their verdict would be permitted to stand.

Defendant's counsel construe Shanley's testimony upon the subject of stopping the train as meaning that the train could not be stopped in less than 600 feet. This was not what the witness said; but, if such was the case, with the train under full headway until the mule could be seen, it was, of course, impossible to avoid the disaster. The mule could not be seen until it was too late to avert a collision. If we concede to counsel the existence of this state of fact, there is a deduction to be made from it which is not favorable to the defendant. Here was a place of known danger. What happened upon this occasion was liable to occur at any time. If, when an object upon the bridge could be first seen, it would be too late to avoid striking it, common prudence would require a sufficient preceding diminution of the speed of the train to enable the engineer to stop it in time, if, upon coming in sight of the locality, it should be found that the necessity existed for so doing.

We should affirm this judgment were it not for one instruction which the court gave the jury. This is as follows: "You are instructed that in this state the owners of animals may permit them to run at large, and need not keep them within any inclosure; and you are further instructed that the railroad company is under no obligation to fence its track, but if it do fence its track, in whole or in part, it must exercise care in so doing, to such an extent as not to increase the hazard to live stock which may be pasturing and ranging upon lands near by and adjacent to its track." This instruction announces a naked legal proposition, and is objectionable for that reason; but it is more objectionable for the implication which it conveys. To say that it impliedly assumes that the railroad company built these fences would not do violence to its language; but giving it the most

liberal construction it will bear, it is based upon an assumption that there was evidence from which the jury might find that such was the fact. There was no evidence whatever on the subject. The case to which the legal proposition embraced in the instruction might apply was purely hypothetical. If the jury considered the instruction at all, it must have created in their minds a false impression in regard to the facts or the law to be applied to the facts. It would necessarily lead them to believe that, in the opinion of the court, there was proof of some kind that the company made the fences, or that, from some fact or facts in evidence, they were authorized to presume that it did so. The instruction could have no effect except to confuse and mislead the jury; and, for the error in giving it, the judgment must be reversed. Reversed.

(6 Colo. App. 377)

CLEMES v. FOX et al.

(Court of Appeals of Colorado. June 10, 1895.)

ADMINISTRATION OF DECEDENT'S ESTATE—ALLOWANCE OF CLAIMS—RIGHT OF APPEAL—FINAL JUDGMENT.

1. Gen. St. 1883, § 499, provides for appeals from the county to the district court from all final judgments, where the case is tried *de novo*. Section 508, as amended by Sess. Laws 1891, p. 108, gives the parties a right to a review by the district court of all decisions of the county court on questions of law or fact relating to probate matters; the district court having jurisdiction in such cases only to reverse or affirm the order. By the Code (the act of 1891) the appellate jurisdiction of the supreme court is limited to the review of final judgments. *Held*, that the decision of the district court on appeal in probate proceedings from an interlocutory order is not so conclusive as to prevent the parties on a final hearing from questioning the rightfulness of the final judgment which the county court may enter.

2. The county court, on the administrator's application, made an order fixing the amount of the widow's allowance, and also an order allowing the undertaker's bill, but subsequently vacated such orders, and when the administrator filed a periodical report, in which the items consisting of the widow's allowance and the undertaker's bill appeared as credits, such credits were stricken from the report, thus leaving them for final determination. *Held*, that the orders striking the items from the report were not "final judgments" which the administrator could have reviewed by the supreme court, by writ of error or appeal.

3. An order disallowing a claim by an administrator for money paid for a burial lot for decedent, on objection of decedent's creditors, is a "final judgment" which may be reviewed in the supreme court.

4. When decedent's estate is insolvent, the assets being about \$5,000, it is proper to disallow the administrator a credit for \$1,300 expended in the purchase of a burial lot, an allowance of \$240 for the purpose being ample.

Error to district court, Arapahoe county.

Error by James H. Clemes, administrator, against Emeline B. Fox and others, to review orders disallowing him certain credits. Affirmed.

R. H. Gilmore, for plaintiff in error. Robert W. Bonyng, for defendants in error.

BISSELL, J. While the matter involved in this suit is of slight moment either to the administrator or the creditors of the estate, who are the parties to the litigation, the matters to be considered are of considerable perplexity and much consequence to practitioners. It is the outgrowth of the administration of the estate of a decedent. The plaintiff in error, Clemes, was appointed administrator of the estate of Clark Lipe. We are not concerned with the circumstances of his appointment, or with anything except certain steps which he took in winding up the affairs, and with the various orders of the county court which were made during the progress of the administration. The dates of the various orders will not always be given, since our conclusions in no manner rest on the time of the adjudication. An application was made for a widow's allowance, and the county court made an order fixing the amount, which apparently the administrator subsequently paid to the widow. On the administrator's application the court likewise made an order allowing the undertaker's bill in the fixed sum of \$675. The administrator likewise petitioned the court for authority to buy a cemetery lot. On this petition the court made an order granting the petition. What that petition was—its contents or its purport—is not set out in the present record. All we have is the order granting the application of the administrator. The administrator at one period of the proceedings filed an account showing payment to the cemetery company of \$1,350; to Rogers, the undertaker, of \$675.40; and the widow's special allowance of \$2,745.73. According to the vouchers, all these payments were made in September and October, 1891. Subsequently the administrator filed what is called in the argument a final report, but which cannot in any way be treated as such, since he did not proceed according to the statute to procure a complete adjustment of his accounts. Speaking generally, the funds which came into his hands amounted to a little over \$5,400. Parties who will be termed the "Fox claimants" afterwards filed in the county court a claim against the estate amounting to nearly \$5,000. It was allowed, and became an established debt. The estate was insolvent. There were not enough funds to pay the claims filed and the widow's allowance. After these various orders had been made, the Fox creditors filed objections to the allowances, and applied to the court to set them aside. Acting on this application, the county court vacated the order which allowed the cemetery bill, the undertaker's claim, and the widow's allowance. These three items do not appear to stand on the same basis. The entry respecting the undertaker's bill and the widow's allowance was a specific vacation of the orders which permitted the payment, and the matters apparently stood for final determination. From these orders the undertaker and the widow prayed an appeal to the district court. Not

ther of these appeals, however, was perfected, nor did the administrator take any action in the premises. Under these circumstances the matters stood in the county court as pending on the application of the administrator and of the widow, in the one case for leave to pay the undertaker's bill or to approve his voucher therefor, and in the other for an allowance under the statute. Just what action was taken with reference to the cemetery lot cannot be gathered from the papers. All we know is this: In 1893 the administrator filed a report in which these three items again appeared as credits in his favor. Thereupon the court made an order that the report be disallowed as to these three items. On what theory this particular kind of an order was entered we cannot determine. Evidently the matter of the undertaker's bill and the widow's allowance was open for ultimate consideration. How the matter of the cemetery lot was revived, and whether the order made in September, 1893, was the only one concerning its allowance, or disallowance, we are not able to settle. At all events, from this last order the administrator perfected an appeal to the district court, where the case was heard. The district court took evidence, and finally rendered a judgment wherein it is recited that the cause came on to be heard on the report asking for its approval, and the court found as a matter of fact that no appeal had been taken by anybody from the orders which the county court made with respect to the undertaker's bill and the widow's allowance. It therefor disallowed the charge in this report as to those two items. As to the cemetery lot, the court found the county court had no authority to make any order in the premises, but determined what would be the proper credit, and allowed \$240. In this particular the order of the county court was modified. A branch of this same controversy was recently decided in the supreme court at the April term, 1895, under the title of *Lipe v. Fox*, 40 Pac. 353. A decision was rendered respecting the subject-matter of that litigation, which was the widow's allowance. This decision will be again referred to.

The chief difficulty we have springs from the peculiar legislation regulating the winding up of the estates of decedents, and the statutes which provide for appeals from the county court in such and other cases. By section 499 of the General Statutes of 1883, and section 508 of the same statute as modified by the act of 1891 (Sess. Laws 1891, p. 108), appeals from the county court are provided for and regulated. Under the first section appeals can be taken to the district court from all final judgments of the county court. A subsequent section gives the parties the right to a trial de novo when any such appeal has been regularly perfected. The act of 1891 gives parties a right to a review of all decisions of the county court on questions of law and fact relating to probate matters.

The Code and the act of 1891, which give appellate jurisdiction to the supreme court and the court of appeals, limit the right to an appeal or a writ of error to those cases in which a final judgment shall have been rendered. The confusion comes from these three several provisions. Where a party attempts to have a matter reviewed in this or in the supreme court, he must be able to produce a final judgment as that term has been defined in the various cases. It is likewise true such a judgment must have been rendered to warrant an appeal to the district court unless what he attempts to review has been done in some probate matter. If the county court has rendered any decision on a matter of fact or a question of law in the probate of an estate the aggrieved party may have that finding of fact or legal determination reviewed in the district court, regardless of the finality of the determination. While this is true, it still remains unquestionable that there can be no review of any judgment of the district court entered on such an appeal unless this judgment is final under the adjudications. In other words, the party may have a right of review in the district court of some determinations by the county court which cannot be brought to the appellate courts of the state for final adjudication. This is where the trouble comes. Acting on this hypothesis, the supreme court, in the case above referred to, held the widow disentitled to a review of the order of the county court setting aside the previous order granting her an allowance. The court held the matter analogous to the setting aside of a verdict or judgment and the grant of a new trial. It was adjudged necessary to await an ultimate determination of this question before the case could be brought up. Under the act of 1891 the widow could have appealed from the order which set aside the allowance. Manifestly such a judgment of the district court would not, within the general understanding of the term, have been a final judgment, and therefore reviewable in the appellate tribunals. On the other hand, if an alleged creditor had presented a claim against the estate which the administrator had refused to allow, and on a hearing in the county court that court had adjudged his claim invalid, and rendered judgment against him, as it might do under the probate system, the alleged creditor could have taken an appeal to the district court, and, on a final adjudication there, could have taken the controversy to one of the appellate tribunals. These two cases—the one an actual one, and the other conceived under the general practice—illustrate the difference in the character of the appeals which may be taken from, and in the form and effect of the judgments which may be rendered by, the district court. There is another wide difference based on the statute regulating these matters. Wherever the judgment is a final one under that provision of the act permitting appeals in such cases,

the district court tries the case de novo, and renders such judgment as to it seems proper. Under the act of 1891, where an appeal is prosecuted under it, and in cases where no final judgments have been rendered by the lower tribunal, the district court is confined to a simple review of the action of the lower court, and may affirm or reverse it, as the case may be, and send the matter back to the county court for further proceedings in conformity with that judgment. Since this is true, it must follow that if the appeal be taken from a judgment not final, and be prosecuted under the act of 1891, while the judgments of the district court are conclusive upon the county court, and must control its subsequent action in the premises, yet, if afterwards a final judgment be rendered by the county court in accordance with the directions it has received, and its ultimate judgment shall come up for review either in the district court or in the appellate tribunals, the antecedent judgment cannot be taken to be in the true sense *res adjudicata*, and therefore to conclude the parties from raising, on a final hearing, any proper question as to the legality or rightfulness of the final judgment which the county court may enter. Any other conclusion respecting the nature of those judgments would lead to endless confusion. When a party takes an appeal to the district court, as he may rightfully do, from the interlocutory order of the county court, and that tribunal ultimately renders a judgment in accordance with that order as modified, reversed, or affirmed, and the case comes up by appeal, and it is demonstrated, as it might possibly be, that both courts were in error with respect to this matter, the subject should be open to review in the appellate tribunals. If, on the other hand, the appeal is taken from a final judgment which is affirmed in the district court, the matter must then come up for review, subject to whatever limitations the general statutes regulating the right of appeals may contain. Very strong support for this construction is found in the rule which prevails in most probate jurisdictions with reference to an account not final. Such accounts are not conclusive when the representative legatees or creditors seek a final settlement. Schouler, Ex'rs, § 526.

It is almost universally true that periodical accounts may be passed on and allowed, but still remain open to subsequent consideration. This position is supported by the terms of the chapter on wills. Section 3620, Gen. St. 1883, provides that upon each and every settlement of the accounts of an administrator the court shall ascertain the whole amount that has come to his hands, and then provide for the distribution of the funds and make dividends to the creditors. The difference between a final and a periodical account is likewise recognized in the sections which determine what the administrator must do if he desires to obtain a final discharge from his administration. It will

be remembered there was no adjudication by the county court in September, 1893, with respect to two of the items in dispute. Those had been previously disposed of by orders which remained wholly unreversed and unmodified. By this we mean there was no such thing as a final judgment entered in respect to these matters. In obedience to the mandate of the court the administrator filed a report, and these items were stricken therefrom. It cannot be contended that this amounted to a final judgment respecting those matters, or that the court at that time proceeded to adjudicate upon their validity or their sufficiency. The court evidently assumed that its antecedent action disentitled the administrator to put these items on the credit side of his account. All the orders of allowance had been set aside, and these matters stood for ultimate determination. We do not deny to the court jurisdiction at that time, had it seen fit to act upon and consider the legitimacy of these credits, to render a final judgment respecting them, for or against the creditors or the administrator, as the case might be. It, however, undertook to do no such thing; it simply made an interlocutory order striking these items out of the account. The administrator took an appeal to the district court, as he might do under the act of 1891, and then that court exercised its jurisdiction in passing on these questions. Its only right, as we have construed this statute, was to review the action of the county court, and if that court possessed the power to strike the items from the account it could affirm its action. If, on the other hand, it was without the right to eliminate the items from the report, the district court could set aside the order which had been made. We take it the only right which the district court had under those circumstances was to take the record and the evidence and proceedings contained in it, and thereon either affirm or reverse the action of the court. This is practically all it did about these two items. We quite agree with the district court in its judgment that the matters of the undertaker's bill and the widow's allowance were not before it for consideration in the general sense, because nobody had taken an appeal to that court from the order setting them aside. Some of these matters are, perhaps, in a measure foreign to what is essential to our determination. The judgment of the district court, in so far as it affirms the proceedings below, is not a final one, and therefore could not have been brought to this court on writ of error or by appeal. We have reached a conclusion which is somewhat analogous to the result reached by the supreme court in the other branch of the litigation. The practice, however, seems to be very much at sea, and to be little understood by the profession. The acts have never been construed by either of the appellate courts. It has therefore seemed wise and necessary to consider the statutes in de-

termining the right to maintain this writ. It likewise seemed essential to carefully distinguish between the classes of cases presented by final judgments and those which are presented by interlocutory orders which may be entered by the county court, and to clearly distinguish between the two. In the one the judgment might be *res adjudicata* and conclude the parties, and in the other no such legal result should attach to them. This is particularly true in the present case, because, at some time or another in the contest between the administrator and the Fox creditors, there must be an ultimate adjudication as to the amount of money which the administrator has which is properly applicable to the payment of the Fox debt. When that result shall be attained, and a judgment rendered directing the administrator to pay over the money, it will undoubtedly be entered after a full consideration of all the various orders made by the county court in the progress of the administration, and of the regularity, validity, and legality of the acts of the administrator in making the several payments. When the matter shall then be brought up by writ of error or appeal, the whole matter will come up for consideration, unaffected by the antecedent judgment of the district court.

While, therefore, we conclude that no writ of error would lie to review so much of the judgment of the district court as affirms the order to strike from the report the items involved in the antecedent discussion, had such been its only subject matter, a wholly different question is of necessity involved in the consideration of the other part of the judgment which was rendered after a trial and hearing. There is very much question in the books as to what constitutes a final judgment. The principal criterion by which that matter has always been resolved respects the conclusion of the controversy as between two parties to the record who are the parties before the court. In the present case the county court made an order striking the credit of \$1,350, expended for a burial lot, from the report. With respect to the other two items, to wit, the undertaker's bill and the widow's allowance, they were not before the county court when the order of September 5, 1893, was made. These matters had been antecedently disposed of—First, by their allowance; and, second, by an order setting aside the allowance and leaving the matter open for consideration and judgment. The order striking these two items therefor from the report of the administrator must be taken simply as an enforcement of what the court had antecedently done. When the appeal was taken to the district court, it simply brought up these two matters under the act of 1891. According to the disclosures of the record, the administrator should not have put those items into his statement, because they were pending in the court for consideration, and had never been adjudged legitimate cred-

its by that tribunal under any order which then stood. A very different conclusion must be reached respecting the other item. The administrator originally petitioned the county court for leave to purchase such a lot. The court granted the petition. Whether that order was broad enough to permit the expenditure of this amount of money we are unable to determine. At all events, the lot was purchased and the amount was put into the account which the administrator filed. In September, 1893, this matter for the first time came before the county court for consideration. On objections filed by the creditors this item was stricken out and disallowed. The order must be taken to be a final judgment, and conclusive between the administrator and the claimant. It seems to come according to its effect, although possibly not by reason of its exact and appropriate terms, entirely within a well-considered class of cases which hold conclusions of this description, which in their nature and their substance are final, to be final judgments, although they do not come technically within the general definition. *Ex parte Spencer*, 95 N. C. 271; *Hemphill v. Collins*, 117 Ill. 396, 7 N. E. 496; *Trustees v. Greenough*, 105 U. S. 527; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638. There are many decisions of a similar nature, but these serve to illustrate the line on which the courts have proceeded. The question underlying all of the cases which consider the subject of the finality of the judgment is, did that which the court entered determine a matter disputed between the parties so that it is no longer open to contention? We must conclude the order of the county court disallowing this item did, as between the creditors and the administrator, directly decide the legitimacy of this expenditure and the legality of the charge. When the appeal was taken to the district court as to that portion of the order it must be accepted as an appeal from a final judgment which gave to the district court the right to try it *de novo*, and imparted to whatever judgment it rendered the character of finality which warrants its review in this court.

Under these circumstances we must consider whether the judgment accorded with the law. The right to purchase a lot in which to bury a deceased person rests on very similar principles to those which control the administrator's right to pay the funeral charges and the expenses which are immediately attendant upon the death and burial. *Schouler, Ex'rs*, § 422. While the administrator has the undoubted right to buy a place to bury the dead in, due regard must always be had to the situation of the estate, to the question of its solvency or insolvency, and to the circumstances attending the expenditure. The difficulty under which the administrator always labors is easily recognized. The stricken relatives are always clamorous for what they consider a fitting place in which to lay

the dead, while the administrator is largely controlled by the financial considerations which must govern his action. The amount which he undertook originally to expend was manifestly ill conceived and unjustifiable. The estate was insolvent. The administrator undertook to expend nearly 25 per cent. of all the money which came into his hands in the purchase of a burial lot. This he had no right to do, and on a full consideration of the matter, and the hearing of evidence respecting it, the district court concluded \$240 to be a legitimate sum for this purpose. We regard the allowance as ample and liberal, and are not inclined to disagree with the district court in the matter.

This judgment of the district court will accordingly be affirmed, with the express statement that this decision only extends to the one item of the cemetery lot, and is not an adjudication on the subject of the widow's allowance or the undertaker's bill. The judgment will accordingly be affirmed. Affirmed.

(6 Colo. App. 362)

JOHNSON v. BENNETT et al.

(Court of Appeals of Colorado. June 10, 1895.)

MECHANIC'S LIEN—PROPERTY SUBJECT—ADJOINING OWNERS—ENFORCEMENT OF LIEN—PARTIES.

1. Under Mills' Ann. St. § 2867, giving a lien to one who does work by contract with the "owner of any land, his agent or trustee," and restricting the lien to the land of the contracting owner, or his interest therein at the time the contract is made, and to work done "upon such land," the owner of one of several adjoining lots cannot, in the absence of any agency, so contract as to charge the other lots with a lien, nor can he charge his own land with a lien for work done on the adjoining lots.

2. In a suit to enforce a mechanic's lien, all persons against whom priority of lien is claimed must be made parties.

Appeal from district court, Pueblo county.

Action by J. Will Johnson against J. H. Bennett and others to quiet title. From the judgment, plaintiff appeals. Reversed.

Previous to July 15, 1891, Nettie Earhart was the owner of three lots in block 14 of Craig's addition to the city of Pueblo. As originally surveyed and platted, the three lots fronted on Fourteenth street. She had them resurveyed and divided into four lots, the fronts being on Conley street. The north lot, lying on Fourteenth street, and fronting on Conley street, she sold to Jacob S. Johnston; the next, adjoining it on the south, to Courts; the next, to Joseph W. Johnston; and the fourth, to Stewart. Conveyances were made to each of the respective parties on July 15, 1891. On the next day, July 16th, and on different dates up to and including July 27th, each of the purchasers executed to one Ferris, trustee, a deed of trust of the parcel by him purchased, to secure the payment of \$2,000. By the agreement with the parties loaning the money, four houses, alike in size and construction,

were to be immediately built, one upon each parcel. The work of building was immediately commenced. On July 16th Bennett & Co., appellees, contracted with Joseph W. Johnston, alone, to do the plumbing upon the four houses, under which appellees furnished labor and material to the amount of \$814; the work having been commenced on July 16th by excavating and putting in a supply pipe diagonally across Fourteenth and Conley streets, at their intersection, and continued on its course until it intersected the east line of the Courts' lot, near the center on the street; then running west some 50 feet to nearly the middle of the lot, where a yard hydrant was put in on the Courts' lot. This was completed on the 17th of July. About six weeks then elapsed before further work was done. On September 17th Joseph W. Johnston became the owner of the Jacob S. Johnston lot; on September 19th, of the Stewart lot; and on February 5th, of the Courts lot. There is no allegation of the date the contract was completed, nor any evidence of the fact; but on the 18th day of December, 1891, appellees filed a lien upon the property for the sum of \$814. So we infer that the contract was completed before that time. A decree of foreclosure was obtained in the lien suit, and on March 25, 1892, the property be sold under such decree, and bought by appellees for the sum of \$864.21. On May 14, 1892, Edward Ferris, trustee, sold each and all of the parcels or lots under the respective trust deeds, and the property was purchased by appellant. At the time of the institution of this suit he had sold and conveyed the north parcel, and claimed the title to the other three. This suit was brought by appellant to quiet the title to the property, alleging that the title of appellees was invalid; (1) that the houses were separate and distinct, built by four separate individual owners, on four separate and distinct parcels of land; that the contract was made by one individual owner, and the proceeding to enforce the liens against the four different properties was only instituted and prosecuted against the contracting owner, and decree taken against all the properties jointly; (2) "that the trust deeds under which appellant acquired title were prior in point of time, and superior to the mechanic's lien;" (3) that the lien was barred by failure of appellees to bring suit within the six months prescribed by law. Defendants answered, admitting the facts as above stated, but alleged that all the property was bought and paid for by Joseph W. Johnston; that he was the equitable owner, and that the conveyances were made to the others (naming them) at the request of Joseph W. Johnston, and that they had no interest, except the naked legal title; that the lots were in fact bought and paid for by Johnston. A trial was had to the court. The part of the finding necessary to be reviewed, and the judgment of the court, was

as follows: "That said new lots were sold to and paid for by the four respective parties to whom they were conveyed by said Earhart out of the proceeds of their respective loans; that the contract for plumbing was entered into by Bennett & Co. and Joseph W. Johnston, acting for himself and the other respective owners, and that the first work was done under said contract on July 16, 1891; that a lien was subsequently filed for said plumbing on lots 1, 2, and 3, block 14, Craig's addition, in which Joseph W. Johnston is named as the sole owner; that suit was subsequently brought for the foreclosure of said lien, in which Joseph W. Johnston is made sole defendant; that a decree was entered by default in favor of Bennett & Co. for \$837.50 and costs, and said property afterwards sold by the sheriff for \$864.21, and was bid in by J. H. Bennett. Wherefore, it is adjudged by the court that J. Will Johnson is the owner of the south half of the north half and the south half of the south half of said lots 1, 2, and 3; that lien of Bennett & Co. as to the north half of the south half of said lots (the new lot conveyed by Earhart to Joseph W. Johnston) is prior and superior to the title of plaintiff, and that plaintiff is entitled to the right of redemption from said lien, and sale thereunder, and that he pay into court, for the use of J. H. Bennett, the sum of \$837.30, with interest and costs, within 90 days, and, in default thereof, title be quieted in Bennett; that costs be paid, one-fourth by plaintiff, and three-fourths by defendants."

B. B. Hubbell, for appellant. L. A. Crane, for appellees.

REED, P. J. The court was correct in finding that the lots were sold to, and paid for by, the four respective owners. It is established by evidence that the four parties contracted with appellant and Ferris, trustee, at the time of making the loans, that they would each erect a house; that the loans by each of \$2,000 were made individually, and separate notes and deeds of trust given; that, out of the money so borrowed, each paid \$850 for his parcel of land. The finding that the contract for the plumbing was made by Joseph W. Johnston, alone, with appellees, was also correct; but the further finding that Johnston acted "for himself and the other respective owners" is not sustained by any evidence whatever, and can only be inferred from the apparent acquiescence of the other parties in permitting the work to be done. In order to make a contract upon which a lien upon the realty can be maintained, it is necessary that there should be a contract, and that the contract be made with the "owner of any land, his agent or trustee." Mills' Ann. St. § 2867. At the time of making the contract, Joseph W. Johnston was only the owner of one of the four different parcels. In order to sustain

the lien, it must have been shown that he was the agent of the other three. There was no such evidence, nor any attempt to prove agency,—hence Johnston could not contract on behalf of the other three in such manner as to create a lien against their property. This was recognized by the court, and, to avoid the effect, the parcel of land owned by Johnston alone was charged with the cost of the entire plumbing of the four different houses. This finding was erroneous. By the statute (Mills' Ann. St. § 2867) the lien is restricted to the land of the contracting owner, or his interest in it, at the time of making the contract, and is further restricted to the work done "upon such land." The different parcels of land were held in severalty by the respective owners at the time of making the contract, and although, by acquiescence, and receiving the benefit of the work, the other owners might have adopted the agency to such an extent as to render themselves liable to Johnston for their respective shares, and the Johnston contract may have been such as to charge him in a suit against him by appellees for the work done upon the other properties, the remedy by lien being purely statutory, and to be strictly construed, Johnston was powerless to charge lands of which he was not the owner, and in which he had no legal interest, with a lien. He was also equally powerless to charge his individual property with a lien for construction, improvement, and betterment of land belonging to others. The lien is created by statute, and cannot be restricted or extended by the acts of contracting parties. See *Mellor v. Valentine*, 3 Colo. 258; *Tabor v. Armstrong*, 9 Colo. 287, 12 Pac. 157; *Folsom v. Cragen*, 11 Colo. 208, 17 Pac. 515; *Burkhart v. Reisl*, 24 Ill. 531; *Hill v. Bishop*, 25 Ill. 350; *Paulsen v. Manske*, 126 Ill. 75, 18 N. E. 275; *Phil. Mech. Liens*, c. 2, and cases cited in notes. The equitable ownership of the property in Johnston at the time of the making of the contract was not established by the evidence. Consequently, we are not required to decide what the effect would have been if it had been established. The fact that Johnston afterwards became the owner of all the different parcels is unimportant, as the statute fixes the status as of the date of the contract.

Counsel for appellees contends in argument (1) that the equitable owner of land may make a contract upon which a lien may be predicated; (2) that where one makes the contract for himself and others for the construction of buildings, where authorized by the others, the property of such others is chargeable with the lien, and that if such owners, without objection, permit the improvement, "a mechanic's lien is created upon the buildings and land upon which they are situated." And several authorities are cited supposed to sustain the contention. If such position is correct, it is fatal to the judgment in this case, as it would establish several and distinct liens upon the different parcels, while in the judgment the

entire bills for construction on the different parcels were charged upon the individual property of the contracting party. The proceedings to enforce the liens, as shown, should have been distinct and separate suits against each of the four owners, and each suit should have made appellant and the trustee, Ferris, parties. They, claiming title by virtue of deeds of trust, were indispensable. The statute expressly provides: "No lien claimed by virtue of this act shall hold the property longer than six months after filing the statement firstly described in section ten, unless an action be commenced within that time to enforce the same." Mills' Ann. St. § 2887. That the suit must embrace all persons against whom priority of lien is claimed, see *Dumphy v. Riddle*, 86 Ill. 22; *Crowl v. Nagle*, Id. 437; *McGraw v. Bayard*, 96 Ill. 146. To establish a lien as superior to an incumbrance, the cestui que trust and the trustee must be made parties within six months. *Lamb v. Campbell*, 19 Ill. App. 272; *Clark v. Manning*, 95 Ill. 580. Under the statutes and the decisions, the questions for determination in this suit should have been determined in the suit to enforce the lien, the right of which was dependent upon the respective rights of parties and the question of priority. It follows that the finding and judgment in this case must be reversed. Reversed.

(6 Colo. App. 438)

CHAPMAN et al. v. SARGENT.

(Court of Appeals of Colorado. June 10, 1895.)

CHattel Mortgage—Validity—Delivery—Retention of Possession—Instructions—Rights of Creditors.

1. On an issue as to the title to certain goods claimed by plaintiffs under a chattel mortgage, and by defendant through a sale from the mortgagor before the execution of the mortgage, an instruction that the mortgage was governed by the statute of frauds was error, as there was no sale of the goods to the mortgagee requiring him to take immediate possession.

2. Plaintiff claimed title to certain goods under a chattel mortgage, which defendant claimed through a sale from the mortgagor before the execution of the mortgage. *Held*, that an instruction that, "if the mortgage was understood by the parties to have been sufficiently delivered to have become irrevocable, then the failure to deliver the goods at the time would of necessity render the transaction fraudulent and void," was error, as it was on a matter not involved, and it left to the jury to decide whether there was a sufficient delivery of the instrument.

3. The validity of a chattel mortgage is not affected by erasures made before delivery.

4. A mortgage on a stock of goods reserving the power of disposition to the mortgagor is invalid.

5. If a chattel mortgage is otherwise legal, taking possession by the mortgagee will cure any minor defects, and make his rights superior to the subsequent levy of creditors.

6. The fact that a debtor agrees to give a creditor a chattel mortgage, and, before the instrument is delivered, turns over part of the goods to another creditor, does not show the mortgage to have been given in fraud of creditors.

Appeal from district court, La Plata county. Replevin by W. C. Chapman and another against D. C. Sargent. From a judgment for defendant, plaintiffs appeal. Reversed.

Russell & Ritter and C. E. & F. Herrington, for appellants. Miller & Reese, for appellee.

BISSELL, J. The Strater-Thorp Drug Company carried on a wholesale drug and supply business, and had several stores in different localities. One was located at Durango, and this suit is about a portion of the stock contained in that store. The court is considerably embarrassed in making a statement of facts, because it may appear to be a departure from the usual rule to accept the verdict of a jury as conclusive on all disputed questions. No such purpose is entertained, nor, so far as we can see, shall we depart from it. The trouble proceeds from the circumstance that the jury were instructed on several hypotheses, and the general verdict which was rendered did not of necessity specifically settle some questions either one way or the other. The only matters about which there could be any sort of question relate to the time of the delivery of the mortgage and to the circumstances of the transaction which the defendants claim to have been fraudulent. It is wholly unnecessary to state the contents of the record bearing on the question of the fraudulent character of the mortgage under which the plaintiffs claim. There is not a particle of testimony which would justify the jury in finding any fraud in the acts of the parties, and there is nothing from which the inference can be legitimately or legally drawn. There is no intention to conclude the question on the subsequent trial, if the parties conceive they are able to produce testimony tending to support this issue. It appears the drug company was largely indebted to the Colorado State Bank of Durango. The indebtedness was evidenced by several promissory notes. The drug company was the maker of some, and the guarantor of others. When the bank became doubtful of the solvency of the company, and insisted on a settlement, the notes were transferred to the appellants Chapman and Kirkpatrick, to make a settlement with the company on certain agreed lines. The appellants had no interest whatever in the notes, otherwise than as representatives of the bank, in which they were stockholders, and they held the naked legal title for the purpose of obtaining security and enforcing the payment of the loans. How long the negotiations had been carried on is uncertain. In a measure, they culminated on Saturday, the 8th of July, 1893, when it was stipulated that the drug company should give chattel mortgages on the stocks of goods in the three stores at Durango, Rico, and Silverton. In execution of the agreement, the chattel mortgages were prepared and signed on Saturday

evening, sometime between 7 and half past 10 o'clock. While the parties had substantially agreed on the terms of the instruments, they were to be submitted to a lawyer, whose approval or acceptance seems to have been necessary to the conclusion of the arrangement. The mortgages were signed in the bank, taken out by the mortgagors and delivered to a notary, who took the acknowledgment, and carried them to his office to affix his seal. On the following day the mortgages were turned over to the attorney, Mr. Carpenter, who passed on their legal sufficiency, and approved them in form and terms. The record is not specific as to the exact time of the delivery of all the mortgages. We are not concerned, however, with any but the one which was on the stock in the Durango store. Concerning the delivery of this security there is neither doubt nor question. It was delivered to Kirkpatrick on Monday, within a very few minutes of the time it was filed for record, which was 1 o'clock and 15 minutes of the day. Of this matter there is no question, and about it there can be no dispute. Nobody testified it was delivered before that time. Nobody gave evidence about its delivery, except Kirkpatrick, who testified he got it within a few minutes of the time it was filed for record. The mortgagees took possession of the store and the stock when this mortgage was first given to them. The whole difficulty proceeds from the circumstance that the mortgages were all signed on Saturday evening, and turned over to the notary at that time, to take the acknowledgments, evidently by one of the persons interested in the drug company. It is argued on inference that the mortgages themselves were delivered on that evening, and consequently the mortgagees were without right, because they failed to take possession of the stock until the ensuing Monday at noon. This will be discussed later on. At the time the parties were negotiating for the settlement, a representative of McPhee & McGinly was in Durango, to collect a part of the debt which the company owed that firm. It was then agreed between these parties that the drug company should turn over to the agent about \$1,000 worth of goods, to be applied on the debt, and the balance of the claim, which was between thirteen and fourteen hundred dollars, should be carried a while longer. In pursuance of this arrangement, on Sunday and Monday mornings the goods were picked out and laid aside, and turned over to McPhee & McGinly's agent. When he went back after dinner, he discovered the store was in possession of the mortgagees, and subsequently, about the 20th of July, the firm commenced suit, and took the goods, which the appellants replevied in the present action.

The chief difficulty found in the case springs from the circumstance that the court instructed the jury respecting divers matters which were not involved in the litigation. The court gave some 25 or 30 instruc-

tions, and some of them must have misled the jury. Quite a number were inapplicable to the facts as proven, and there was nothing in the evidence which justified any statement of the law embraced in them. The volume and number precludes a specific review of what the court gave and what it refused, and we content ourselves with a general statement of the difficulties. The jury were told that the case was controlled by the statute of frauds and perjuries, and the general legislation on that subject. In fact, this had nothing whatever to do with it. There was no question of sale and delivery of possession, which are the important considerations under that act. The plaintiffs alleged, and the defendant admitted, possession of the goods under a chattel mortgage executed by the drug company prior to the time they took them. This allegation was sustained by the proof, as well as established by the admission. The drug company did not undertake to sell their goods or their stock to Chapman & Kirkpatrick in satisfaction of the notes, but did execute a statutory security for the purpose of protecting the debt. The instrument provided, as might lawfully be done under our statute, that the mortgagor should keep possession, according to the usual form of such instruments in this state. Most of these mortgages which reserve to the mortgagor the right to keep possession also permit him to use and enjoy the mortgaged property until default, or until the mortgagee exercises his right to take possession of the chattels. The instrument which the drug company executed was changed in this respect, and the words "use and enjoy" were erased. The mortgagor therefore had the naked right of possession until such a time as the mortgagees might, under the provisions of the instrument, take the chattels into their custody. This indicates the difficulty. The appellants had a perfectly valid statutory security, under which they had a right to assume possession on a breach, and at the time they did; and there was no question respecting the immediate delivery of the property, which is an important consideration in the case of a sale of chattels and a conflict between the vendee and the creditor.

The jury were quite elaborately instructed respecting the force and effect and the interpretation of the word "immediate" in the statute of frauds, and as to the purpose of the parties in the delivery of the instrument. The jury were told, "if they believed from the evidence it was understood by the parties or their agents to have been sufficiently delivered to have become irrevocable on the evening of Saturday," then the failure to deliver the goods at the time would of necessity render the transaction fraudulent and void. Just what the jury may have concluded under this instruction cannot be determined. The instruction was objectionable, not only because it was given on a

matter not involved, but also because the jury were left to determine what the law was on the subject, and were at liberty to find, according to their own notions, whether the transaction on Saturday evening amounted to a sufficient delivery of the instrument as between the parties. This of itself was error; and, had any instruction whatever on the subject been warranted, the court was bound to tell the jury what facts, if found, would in law constitute an irrevocable and binding delivery of the instrument. The analysis need not be further pursued, because there was nothing in the case to warrant any instruction on this subject.

There was some question made on the trial respecting the erasure of the words "use and enjoy." We can see no substantial difficulty in the premises. The plaintiffs were possibly bound to explain the erasure, and the jury would be judges of the question of fact as to the existence or nonexistence of these words in the mortgage when it was delivered to the mortgagees. If the jury found, as a matter of fact, the words were erased before the delivery, the instrument would then stand as a valid security.

The defendants made a vigorous effort to bring the case within the scope of the decisions in this state which hold a mortgage on the stock of goods reserving the power of disposition to the mortgagor to be invalid. There is no question concerning this law. An invalid mortgage of this description cannot be made good, even by the seizure of the goods prior to the levy of a writ, at the instance of a creditor. In other words, it is the law of this jurisdiction that such a mortgage is invalid, and cannot be aided by the acquisition of possession prior to the creditor's attempt to levy his process on the goods. The present case is not brought within the limits of that doctrine. The jury were told the mortgage was valid in law; and, if that were true, the time when possession was taken under the proof was an entirely unimportant consideration. We quite agree with the court. The only trouble is the jury rendered a verdict for the defendants, and it might possibly include the negative of the proposition that the words "use and enjoy" were erased before delivery. We do not feel at liberty to so assume, because there is no evidence in the record to warrant it. We are met, then, with this very simple condition. The drug company executed a chattel mortgage on their stock to secure the debts which they owed certain creditors. The instrument did not violate any of the statutory requirements, and the mortgagor might keep the property until, by reason of some breach, or the exercise of a right given by the instrument, the mortgagees took the chattels.

If the mortgage was otherwise legal, the possession which was taken on Monday noon would cure any minor defects, and made the rights and equities of the mortgagees superior to anything which was acquired by the subsequent levy of McPhee & McGlinitz, who were general creditors. Jones, Chat. Mortg. § 178; 1 Cobbey, Chat. Mortg. § 498. There is nothing in the present record which necessitates the application of this well-recognized doctrine. The validity of the mortgage was not at all affected by the delivery of some of the goods to McPhee & McGlinitz in part satisfaction of their claim. There are two answers to the objection, either one of which entirely disposes of any difficulty in the matter. Since the mortgage was not delivered until Monday noon, the mortgagor had a perfect right in the meantime to dispose of any property in the store, either in payment of debts or by way of securing any outstanding obligations. The present suit does not raise any such question. Chapman and Kirkpatrick are not attempting to recover from McPhee & McGlinitz the goods which were delivered to them by the drug company in part satisfaction of their debt, neither are they contending the mortgage to have been an executed security at the time the goods were turned over. The defendants tendered an issue based on the alleged fraudulent character of the transaction, and alleged an attempt on the part of the drug company, participated in by Chapman and Kirkpatrick, to hinder, delay, and defraud their creditors. The court recognized the issue, conceded there was evidence tending to support it, and quite elaborately instructed the jury respecting this matter. The instructions were not warranted by the evidence. No testimony was offered which even remotely tended to show any fraudulent purpose on the part either of the drug company or the mortgagees, Chapman and Kirkpatrick. It was a simple transaction of a mortgage to secure an existing debt. The proof in no manner tended to establish a fraudulent intent on the part of either, except in so far as it might possibly be inferred that such an intent did exist, because the parties agreed on the one side to give, and on the other to take, a mortgage to secure an outstanding indebtedness. This in no wise brings the case at all within the purview of those decisions which the court evidently followed in instructing the jury. Unless there should be some very great change in the evidence on the succeeding trial, these matters should be left wholly out of consideration. The court erred in its instructions to the jury, and because of the errors which it committed in this direction the case must be reversed and remanded. Reversed.

(6 Colo. App. 357)

GROVE et al. v. FOUTCH.

(Court of Appeals of Colorado. June 10, 1895.)

ATTACHMENT PROCEEDING — PETITION IN INTERVENTION—TIME FOR APPEAL—STIPULATION OF COUNSEL.

1. Under Civ. Code, § 22, declaring that an intervention takes place where a third person is permitted to become a party to an action between other parties, such permission is presumed where nothing to the contrary appears.

2. A petition of intervention, in an attachment action, which alleges that the intervener claimed all the goods and chattels attached by the sheriff, sufficiently describes the property.

3. Objection to an insufficient description of the property in a petition in intervention should be taken by demurrer or motion.

4. The sufficiency of the evidence to sustain the judgment cannot be reviewed where no exception was taken to the judgment.

5. A stipulation of counsel purporting to extend the time for perfecting an appeal will not have that effect, per se, as Mills' Ann. St. § 1086, declares that no appeal shall be allowed where the appeal is not made within 10 days after judgment, unless the court extends the time for good cause shown.

Error to district court, Mineral county.

Action in attachment commenced in the county court by Oliver P. Grove and another against E. L. Foutch and another. John Foutch intervened, claiming to be the owner of the goods. From a judgment for intervener, plaintiffs appealed to the district court, where the appeal was dismissed, and plaintiffs bring error. Affirmed.

A. L. Moses, J. D. Pilcher, and C. M. Corlett, for plaintiffs in error. C. H. Pierce, for defendant in error.

REED, J. Plaintiffs in error, as plaintiffs below, brought suit by attachment in the county court of Mineral county against Elsbury and E. L. Foutch, partners, and the goods in controversy were levied upon under the writ, and possession taken by the sheriff, on the 17th day of July, 1893. On July 30th John Foutch intervened, claiming to be the owner of the goods. Plaintiffs traversed the allegations of the petition, and justified under the attachment. Subsequently, a trial was had to the court without a jury, resulting in a finding and judgment for the intervener for the possession of the goods and \$48.60 damages and costs. A motion for a new trial was made and overruled; an appeal prayed and granted to the district court on the 12th day of October, 1893. On October 18th the following stipulation, executed by the respective attorneys, was filed: "It is hereby stipulated and agreed, in the above-entitled matter, that the plaintiffs may have until October 25th, 1893, in which to file an appeal bond, and perfect their appeal to the district court." On the 23d of October the appeal bond was approved, and filed in the county court. Before the matter was reached in the district court the appellee filed a motion to dismiss the appeal. The motion was withdrawn February 6, 1894. The motion does not appear in the record. The char-

acter of it, and on what based, is therefore unknown. On the 7th day of February the appellee filed a second motion to dismiss the appeal, as follows: "For cause, this intervener says that the above-named plaintiffs, the appellants herein, have failed and neglected, and did fail and neglect, for the period of thirty days after the approval of the appeal bond in the county court, to file, or cause to be filed, in this court a transcript of the proceedings, together with the necessary papers in this said cause, attached thereto, and duly authenticated; that such failure on the part of said appellants is a violation of rule 14, of this court." 33 Pac. vi. On the next day (February 9th) the motion was overruled, and on the same day appellee filed his third and last motion to dismiss the appeal, the grounds being "that this appeal was not taken according to law, and that this, the appeal bond herein, was not filed by appellants, nor approved by the county judge, within ten days after judgment herein was rendered; that the time in which said appeal might be perfected, and said bond might be filed and approved, was not extended by order of said county court." This motion was sustained, and the appeal dismissed on the 27th day of February. On the 8th day of March, plaintiffs filed a motion to reinstate the case in the district court, assigning the following reasons: "First. The court erred in dismissing said appeal when there was a stipulation on file between counsel for appellees and appellants allowing counsel for appellants to file their appeal bond after the expiration of the ten days. Second. Because, as shown by the affidavit of Albert L. Moses, hereto attached, counsel for appellees gained an inequitable and unjust advantage over counsel for appellants by reason of the facts set forth in the attached affidavit, and because the order of court dismissing the appeal, if allowed to stand, would be an encouragement to attorneys to disregard their agreements and stipulations, will destroy the confidence of the bar, and will, in very many cases, work great and unnecessary hardships upon litigants, and cause large expenditures of money which are wholly unnecessary." On the 23d day of March the motion was overruled.

The case comes here by writ of error to the district court. There are 11 errors assigned, of which 7 are those alleged to have been committed in the county court. It is a novel proceeding, for which I can find no precedent, where an appellate court is required to review the adjudications and judgments of two courts at the same time, on the same writ of error; but we will attempt to do it, and, in such attempt, will take up the last assignment first. It is "that neither the county court nor the said district court had any jurisdiction whatever to make any order or render any judgment whatever in favor of defendant in error, and against the plaintiff in error." Counsel contend that neither court had jurisdiction, because it does not appear that the

Intervener obtained permission of the court to intervene. In section 22 of the Civil Code it is said, "An intervention takes place where a third person is permitted to become a party to an action between other parties." I can find no statute designating the manner in which permission must be obtained. In this case no objection appears to have been made either to the intervention or the petition. Jurisdiction does not, in such cases, depend upon the record of the permission. The permission is presumed, where nothing to the contrary appears, and the court has assumed jurisdiction. This would certainly be the case when it occurred without objection, and no exception was taken. It is not within the purview or the intention of section 55, Civil Code. The jurisdiction there referred to is as to the subject-matter of the controversy. In this case the allegations of the petition appear to be sufficient to confer jurisdiction, and, in the language of the Code, "sufficient to constitute a cause of action."

It is also contended that the petition was fatally defective in not specifically designating and itemizing the goods claimed, in the body of the petition, but doing it by a schedule attached to the petition. It is true that the attached schedule is not regarded as a part of the pleading, but is only used as a matter of convenience, and that the sufficiency of the pleading depends upon the allegations contained. In the petition occurs the following: "That the said merchandise to which reference is made in this petition of intervention included all the goods and chattels returned by the sheriff in his pretended writ of attachment herein." A description of the property need only be to establish its identity. This appears to have been done by the paragraph cited. If not sufficient, the objection should have been taken by demurrer or motion.

The other supposed errors occurring in the county court can be very briefly disposed of. They are general in effect,—that the court erred in rendering judgment for the intervener instead of plaintiffs. (1) There was no objection to the judgment, nor exception taken. (2) There is no bill of exceptions from that court; consequently, nothing that we can review, or upon which we can base a guess as to who was the owner of the property in question. The presumption of law is that proceedings are regular, and judgments warranted, and such presumption must prevail, unless the contrary is shown.

The supposed error in the district court consisted in dismissing the plaintiffs' appeal, and disregarding the stipulation of counsel. That the appeal was not perfected within the time allowed by statute is conceded. By section 1086, Mills' Ann. St., it is provided: "No appeal shall be allowed, in any case, unless the following requisites be complied with; First—The appeal must be made within ten days after the judgment * * * pro-

vided, however, That the county court may, at any time within the period above limited, upon good cause shown, extend the time for an appeal." No application for an extension of time was made or cause shown, which were prerequisites. Without such application and action, the court was powerless to act. Its action could only be invoked by compliance with the statute, which controlled the court as absolutely as it did counsel. The application and cause for the extension must have been of record, and, if granted, an order entered of record, extending the time. No such action having been taken, nor the time extended, the district court had no discretion in the matter, and could only dismiss the appeal. The error appears to have been that of counsel, in failing to recognize the court as an important factor in the proceeding.

The motion of plaintiffs' counsel, supported by affidavit, asking the district court for a rehearing on the motion to dismiss the appeal, is more in the domain of ethics than law, but contained a strong argument for the enforcement of professional contracts, which, no doubt, appealed strongly to the moral sense of the court, and he probably had no desire to encourage attorneys to disregard their agreements and stipulations. But the question was one of law, not of morals; hence the court, being as powerless to give relief asked by the motion, in the interests of morality and public policy, as to override and abrogate the statute, was compelled to deny it. Courts can only take cognizance of professional bad faith when the subject is brought to the attention of the court in some manner authorized by law or practice. The judgment of the district court dismissing the appeal will be affirmed. Affirmed.

(6 Colo. A. 334)

OMAHA & GRANT SMELTING & REFINING CO. v. RUCKER.

(Court of Appeals of Colorado. June 10, 1895.)

EVIDENCE OF PARTNERSHIP.

1. On an issue of partnership, a witness cannot testify that he and defendant were partners, but must state the facts from which the legal conclusion is to be drawn.

2. Defendant was an attorney at law and agreed to render all the legal services necessary to protect W. in the enjoyment of certain mines, the lease of which defendant was active in procuring, and was to receive therefor part of the net profits. W. had the exclusive management and control of the mines. *Held*, that the agreement did not make a partnership *inter se*, nor, in the absence of the estoppel, as to third persons.

Error to district court, Arapahoe county.

Action by the Omaha & Grant Smelting & Refining Company against A. W. Rucker to recover back money paid to defendant. From a judgment for defendant, plaintiff brings error. Affirmed.

Thomas, Bryant & Lee, for plaintiff in error. A. W. Rucker, S. D. Walling, and H. B. Johnson, for defendant in error.

REED, P. J. On the former hearing of this case, judgment of the district court was reversed.¹ On reargument it is found that the court was misled, and the former decision not warranted. The former finding of the court must be set aside, and the judgment of the district court affirmed.

Plaintiff brought suit against Stanley G. Wight, Rucker, the defendant, and others, to recover money paid by the plaintiff for ores bought, as alleged, from the defendant. The title to such ores was found to be in other parties, and plaintiff was compelled to, and did, pay for the ore to the owner. See *Refining Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925. This action was brought to recover from the defendant the money paid by the plaintiff as the result of that adjudication. The judgment of the district court was a nonsuit. The record of the case is very voluminous, and the printed abstract is over 100 pages. If the abstract had fairly presented the case, we should have no occasion to reverse the former decision. In arriving at it, we relied upon the abstract. On examining the record, we find it misleading and partisan. It recites rulings and exceptions that cannot be found in the transcript of the record. In many instances the testimony given is so stated in the abstract as to give it an importance, effect, and meaning not warranted when read in its proper connection in the bill of exceptions. A deposition of Stanley G. Wight, taken by the plaintiff, is partly set forth in the abstract, and the balance suppressed; while a second supposed deposition of the same witness, taken by the defendant subsequently, not read or in evidence, is set out at length. Such second deposition was important. This court, overlooking the fact stated in regard to it, supposed it to be legitimately in the abstract, and that it had been before the court as evidence. Such deposition greatly influenced and controlled the court in the conclusion to which it arrived. We cannot let this matter pass without a reproof, also, to the counsel of the defendant. The rules provide for a supplemental abstract by the other party, in case the one presented is not full and satisfactory. When no action is taken, or objection made, the court presumes the case presented by the abstract is the proper one. In this case the court was not only misled by the abstract, but also by the negligence, silence, and acquiescence of the defendant.

The fundamental and pivotal question in the case was whether the defendant Rucker was or was not a partner of Wight and others, so as to make him liable for their acts. The district court evidently found that he was not. This court, on the case presented by the abstract, found that he was. The question of partnership is the only one that will be discussed in this opinion. In the deposition of Wight taken by the plaintiff, which

was in evidence, certain answers to interrogatories were stricken out, notably as follows: "Q. If, in reply to the above interrogatory, you say the defendant Rucker was such attorney, please state who employed him, and in what capacity he was engaged. A. The interest of Rucker and myself in the expected returns from the working of the lease was a joint one. We were copartners by verbal agreement. Whatever legal proceedings he advised, I acquiesced in, and at no time during the pendency of the litigation did I make an objection to what he was doing in that direction." This portion of the answer was stricken out. The others stricken out were of the same character, and were properly stricken out. (1) They were in no way responsive to the questions asked. (2) They were voluntary statements of his conclusion that the facts by him before fully stated constituted a partnership,—his legal conclusion. Witnesses are only competent to state facts. The existence or nonexistence of a partnership is a legal deduction from the facts and premises. In *Dwinel v. Stone*, 30 Mo. 384, the court said: "By the application of these rules, it will not be difficult to determine whether a partnership proper is proved to have existed by the answers of the defendant. Whether one existed, or not, is an inference of the law from the facts, and his frequent statements that they were partners can have no effect." The answer of Wight, cited above as stricken out, is rather peculiar. He says that they were partners, and at the same time one partner was engaged in the practice of law, and one in mining. In which business the partnership existed, is not shown. Eliminating the inadmissible evidence, and that improperly in the abstract, and the conclusions of the witness and codefendant Wight, what remains is not complicated or contradictory. The facts established are: (1) By agreement with Wight, Rucker was to render all the legal services necessary to protect Wight in his possession and enjoyment of the property leased. (2) As consideration for such services, Rucker was to receive from Wight $\frac{9}{12}$ of the net proceeds of the ore extracted under the lease. That Rucker complied with his contract, and was also active and zealous in securing the lease upon the Vanderbilt property and the Big Chief shaft, through which the mining was prosecuted. (3) Wight had the exclusive management and control of the mining and disposition of the ore. He advanced the costs for litigation, sold the ore, received the proceeds, paid all the operating expenses of the business. Of the balance, or net proceeds, he paid Rucker $\frac{9}{12}$, and the other parties interested their respective shares. Do the facts thus established make Rucker a partner, and liable for the tort in the mining and selling of ore? Chancellor Kent defined "partnership" to be "a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them,

¹ Opinion withdrawn.

in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." 3 Kent, Comm. 23. Many other definitions have been given, but all amount to about the same thing. Whether an agreement creates a partnership or not depends upon the real intention of the parties to it. *Lindl. Partn.* § 10; *Mollwo, March & Co. v. Court of Wards, L. R. 4 P. C. 419*; *Pooley v. Driver, 5 Ch. Div. 400*; *Walker v. Hirsch, 27 Ch. Div. 460*; *Hedge's Appeal, 63 Pa. St. 273*; *Salter v. Ham, 31 N. Y. 321*; *Niehoff v. Dudley, 40 Ill. 406*. "A partnership *inter se* results from the intention of the parties, to be gathered from the contract, if there is one, or, if not, from their relation to and dealings with the property and each other." *Colly. Partn.* § 2; *Cutler v. Thomas, 25 Vt. 73*; *Phillips v. Phillips, 49 Ill. 437*; *Clark v. Reed, 11 Pick. 446*; *Hazard v. Hazard, 1 Story, 371, Fed. Cas. No. 6,279*. In order to constitute a partnership *inter se*, it is universally declared that there must be a community of interest,—a mutuality,—and it must be for the prosecution of the business in which the supposed partner is charged. It must be such a relation as makes each partner the agent of all in the management and prosecution of the business and control of the joint property.

In this case much stress is laid upon the fact that as far as the management of the business of mining was concerned, and the sale and disposition of the ore, and the general dealings, they were entirely under Wight, and in which Rucker did not participate. Too much prominence cannot be allowed to this fact. It can only be of importance as a fact from which inference could be drawn establishing or rebutting the presumption of partnership when the question arises between the supposed partnership and third parties. But as between the supposed partners it is unimportant. As to them it may be, and frequently is, a question of contract, and it is competent for them to so contract that one member of the firm shall transact all the active business of the firm with third parties. Yet this would not affect the relation of partnership. *Cox v. Hickman, 8 H. L. Cas. 268*; *Halstead v. Shepard, 23 Ala. 558*. It is well settled that a partnership quoad third parties may exist, and be enforced, contrary to the intent and contract of the parties, and when, *inter se*, no partnership existed. But this depends upon the law of estoppel, which is so well understood as to render the discussion of the facts creating it unnecessary. All the evidence in the case shows that the question was not involved. The contract provides that Wight should have sole and exclusive control of the business of mining, the disposition of the ore, the payment of all expenses, and the disbursement of the surplus, while Rucker was to control and manage the legal business. The testimony also shows that each kept within his own limits, not interfering nor being interfered with. There is no

evidence that Rucker, by acts or declarations, misled parties dealing with Wight in regard to his status, or that he ever claimed or asserted any partnership rights in such business. Without satisfactory proof of acts whereby parties were misled, and dealt to their injury, by reason of assumptions or representations, there could be no partnership, as to third parties, except by an actual partnership *inter se*. *Winship v. Bank, 5 Pet. 561*; *Armstrong v. Hussey, 12 Serg. & R. 315*; *Harvey v. Childs, 28 Ohio St. 319*; *Kilshaw v. Jukes, 3 Best & S. 847*; *Bullen v. Sharp, L. R. 1 C. P. 86*; *Colly. Partn.* § 5. It is elementary, and perhaps unnecessary to say, that without actual proof of partnership, either, as between the parties, by agreement, or by estoppel as to third parties, Rucker could not be held liable, as the liability must depend upon the partnership relation, and the agency of Wight resulting from the relation.

The only remaining question is whether the contract between Wight and Rucker, as established, made them partners, as between themselves? The facts being undisputed, it is purely a legal question, and by far the most important question involved. It is well settled that, as incidental to a partnership, and growing out of it, each party must have a specific lien on the partnership property for the debts of the firm, and for his own share after the debts are paid, and also for money advanced for the use of the firm, and, when the relation is such that these conditions are wanting, no partnership exists; and the existence or nonexistence of these conditions is a controlling test in determining the question of partnership. *Young v. Keighly, 15 Ves. 557*; *Crooker v. Crooker, 46 Me. 250*; *Wales v. Alden, 22 Pick. 245*; *Parker v. Parker, 65 Barb. 206*; *Black v. Bush, 7 B. Mon. 210*. Although, in order to constitute a partnership, there must be a community of interest, every community of interest does not create a partnership. *Domat, tit. 8, bk. 17*. "There must be a joint ownership of the partnership funds, or a joint right of control over them, and also an agreement to share the profits and losses arising therefrom." *Colly. Partn.* § 2, note; *Chase v. Barrett, 4 Paige, 148*; *Felichy v. Hamilton, 1 Wash. C. C. 491, Fed. Cas. No. 4,719*; *Berthold v. Goldsmith, 24 How. 536*; *Bowman v. Bailey, 10 Vt. 170*; *Wood v. Vallette, 7 Ohio St. 172*. "This community of profits is the test to determine whether the contract be one of partnership. And, to constitute it, a partner must not only share in the profits, but he must share in them as a principal, for it is a well-settled rule that a party who stipulates to receive a sum of money in proportion to a given quantum of the profits, as reward for his labor, is not chargeable as a partner." *Loomis v. Marshall, 12 Conn. 70*; *Leggett v. Hyde, 58 N. Y. 272*. "To constitute a community of profits in a partnership, a party must have a specific interest in the profits themselves, as profits, in contradistinction to a stipulated

portion of the profits as a compensation for his services or other benefit conferred." Colly. Partn. § 3, note. "A mere participation in profits does not make the parties partners quoad. There must also exist an interest in the profits, as such; that is, the person sought to be charged as a partner, by reason of his participation in the profits, must have an interest that can be enforced out of the profits themselves, rather than by an action at law for a sum to be measured by such proportional share of the profits. His interest must specifically attach to the profits, and if he had no such interest there is no partnership, in any sense." *Id.* In support of these propositions, authorities might be multiplied indefinitely. A few cases strictly analogous to the case under consideration, and holding that the existing facts did not constitute a partnership, may be cited to advantage. See *Loomis v. Marshall*, supra; *Amber v. Bradley*, 6 Vt. 119; *Miller v. Bartlet*, 15 Serg. & R. 137; *Perrine v. Hankinson*, 11 N. J. Law, 181; *Pillsbury v. Pillsbury*, 20 N. H. 90; *Coffin v. Jenkins*, 3 Story, 108, Fed. Cas. No. 2,948; *Blue v. Leathers*, 15 Ill. 31; *Holmes v. Railroad Co.*, 5 Gray, 58; *Lewis v. Greider*, 51 N. Y. 231; *Edwards v. Tracy*, 62 Pa. St. 374; *Lintner v. Milliken*, 47 Ill. 179. See, also, 1 *Lindl. Partn.* § 13, and note, where the proposition is clearly stated, and a large number of authorities cited. The irresistible conclusion is that the facts, as proved, did not constitute Rucker a partner, and that the judgment of nonsuit was proper, and must be affirmed. Affirmed.

THOMSON, J., concurs. BISSELL, J., did not sit in the case.

(6 Colo. App. 410)

PERSHING et al. v. WOLFE et al.

(Court of Appeals of Colorado. June 10, 1895.)

CANCELLATION OF TRUST DEED OF ADMINISTRATRIX—TENDER—FORECLOSURE—ATTORNEY'S FEES.

1. Under an order of court authorizing her to execute a trust deed on land, an administratrix executed a trust deed providing that on default the whole sum might be declared due, and a sale of the property made. The money obtained was used to liquidate a general claim allowed against the estate. *Held*, that a bill by one of the heirs to have the security and note declared void, for want of power in the administratrix to execute the same with power of sale, could not be maintained without an offer to return the money obtained.

2. Where an administratrix, under a decree of court, authorizing her to execute a trust deed on property, executes a trust deed with power of sale on default, and the amount so obtained is used to satisfy a claim allowed against the estate, the instrument may be foreclosed as a mortgage.

3. An order of court authorizing an administratrix to execute a trust deed on property does not authorize a stipulation therein for the payment of attorney's fees in case of foreclosure.

Appeal from district court, Arapahoe county.
Bill by Maude Melburn Wolfe and D. T.

Sanderson against Martha R. Pershing and others to have a note and a trust deed securing it executed to defendants by the administratrix of plaintiffs' intestate declared void. From a judgment for plaintiffs, defendants appeal. Reversed.

Bicksler, McLean & Pershing, W. Henry Smith, and David P. Howard, for appellants. Clay B. Whitford, H. A. Lindsley, and Sullivan & May, for appellees.

BISSELL, J. This litigation is an outgrowth of the administration on the estate of Lafayette A. Melburn. He died in 1890, leaving as his heirs the widow, Jane A., and three children, Clarence, Beatrice, and Maude. The children are minors, and presumably under the guardianship of their mother, Jane A., except Maude, who since the death has intermarried with Joseph Wolfe, and who prosecutes this suit in her own name, and by her husband as her next friend. The widow was appointed administratrix of the estate, which comprised a large amount of real and personal property, and, speaking generally, was valued at upward of \$300,000, of which about \$226,000 was realty. At Melburn's death he was carrying on a carriage business in the city of Denver, and had a large amount of stock incidental to the business. The personality was appraised and inventoried at about \$68,000. After the taking out of letters, the creditors filed claims in the county court under the statute, and about \$80,000 were duly allowed. A little more than half of this amount was secured by incumbrances on property. One of them, which had been adjudicated, was presented by the Commercial National Bank, and amounted to about \$24,000. This debt was secured by the pledge of various collaterals, consisting of notes, mortgages, and stock, but, at the time of the various transactions hereafter stated, it had not been paid. Some of the mortgages matured at early dates, and the administratrix had considerable difficulty in winding up the affairs without loss, meeting the maturing claims, and paying the various accumulations of interest. No fuller or more exact statement of the condition of affairs is essential. The widow continued as administratrix until October, 1893, when she resigned, and was succeeded by David T. Sanderson, who is joined with Maude as plaintiff. Before Mrs. Melburn's resignation, and on the 11th of July, 1891, she presented to the county court a petition setting up with much fullness and particularity the condition of the estate, both with respect to its assets and its debts, and stated facts whereon she based her claim of the necessity to borrow money on the real estate to take care of the pressing debts. She concluded her petition with a prayer for leave to incumber the realty for the purposes specified. All the proceedings in the county court are not before us. There is nothing in the record but the complaint, the answer of the defendants, and their

cross bill. On these pleadings, together with a demurrer to the answer and the cross complaint, the court entered judgment for the plaintiffs. The nature and effect of this judgment will be more fully stated further on. On the petition for leave to mortgage process was issued and served on all persons in interest, returnable at the September term. The parties appeared. A guardian ad litem was appointed for the minors, who took issue on the petition, and prayed proof in the usual fashion. The decree which was entered on the 27th of October recites the appearance, the taking of proof, and the finding of the court. Speaking generally, the decree provided that the administratrix could mortgage any or all of the real estate at a specified term and rate of interest, or might lease it on specified conditions, together with other powers, which are unimportant. There was a definite grant of authority to the administratrix to mortgage, on the conditions antecedently named, lots 1 to 10, inclusive, in block 24, McCullough's addition, for the sum of \$5,000. There was a limitation in the decree which restricted the general right theretofore granted, and subjected the administratrix to the necessity of reapplying to the court for the exercise of the power as to any other property than what was designated. For some reason, which is undisclosed, this decree seems not to have been entirely satisfactory; and the court took further action on subsequent dates, to wit, in November, on the 5th, 17th, and 21st. Each of these later decrees appears to have been entered as part and parcel of the original proceedings, but in some particulars the judgments varied from the first decree, though there was no change made in the specification of the property on which the security might be given. These subsequent entries, in place of directly conferring power to mortgage, gave the administratrix the right to execute either a mortgage or a trust deed on the property. In the exercise of this power, the administratrix negotiated a loan with Martha R. Pershing. On the 22d of November, 1892, she borrowed \$5,500, and gave a note promising five years from the date to pay the sum to Mrs. Pershing, with interest at 8 per cent., payable quarterly, according to 20 coupons which were attached. The note provided that, in case of a failure to pay the interest or any part of the sum payable by the terms of the obligation, the party, at her option, might declare the whole sum due. To secure this note, the administratrix executed a trust deed in the usual form common to this state, whereby she conveyed the described premises to James H. Pershing, as trustee, with authority to sell in case of default. This deed likewise contained a provision giving the option to the beneficiary to declare the whole sum due on a failure to pay the interest, or on breach of any of the other conditions contained in the deed. The trustee was likewise given the power to sell by giving four weeks' public notice by advertisement, making the

sale at the door of the courthouse. There was a default in the payment of some of the legitimate charges under the arrangement, and Mrs. Pershing exercised her right to declare the whole sum due, and, at her request, the trustee advertised the property for sale. Under the notice, the sale would have occurred on the 18th of September, 1893, less than a year from the date of the original transaction. Whereupon Maude, in her own name, and by her husband, as her next friend, and Sanderson, as administrator, filed a bill in the district court setting up these various matters, alleging the invalidity of the proceedings in the county court, and prayed a decree for a perpetual injunction to restrain Mrs. Pershing from the enforcement of her note or its security, that they might be declared void, and for general relief. The only persons made defendants in that bill were Mrs. Pershing and the trustee and his successor. The defendants answered, and filed a cross bill. No attempt will be made in this statement to separate and assign the matters of fact stated in those pleadings, for they were both demurred to, and on the demurrer the court rendered final judgment. The other important facts which will be assumed for the purposes of this decision, since they are conceded by the demurrer, are substantially the good faith of Mrs. Pershing in the transaction, the situation of the estate, and some other orders of the county court and the ultimate disposition of the money. The loans were made on the strength of the decrees of the county court, and the deed was accepted after it had been approved by the county judge. Prior to the attempt to exercise the power of sale, the owner of the note presented it to the county court for allowance as a claim against the estate, and it was duly allowed. The existence of the claim filed by the Commercial National Bank is conceded, and the money which was borrowed of Mrs. Pershing was applied to the liquidation pro tanto of this adjudicated claim, and to that extent reduced the debts which had been filed and allowed. Nothing further of radical consequence, or which would form a basis for the judgment which the court entered, is deducible from the pleadings. Thereon the court entered a judgment perpetually restraining the defendants from enforcing their security according to the prayer of the complaint. It is a little difficult to exactly apprehend the scope of the judgment. The plaintiffs prayed that the trust deed and note be adjudged void, and the defendants be restrained from enforcing the security. In his opinion, the judge who tried the case held the note not to be a legal claim, and the security to be invalid. Under some circumstances, we might be compelled to determine whether the actual judgment entered, since it is as to its terms only ascertainable on the inspection of the prayer of the complaint, went so far as to adjudge the note invalid, and to restrain its collection, either through the ordinary proceedings of the coun-

ty court or otherwise. Our conclusions render this unnecessary. We have stated all the facts essential to our conclusion.

The judgment cannot be upheld. There is not enough before us to permit the adjudication of every proposition which has been argued by counsel or which is presented by the record. It is likewise impossible for us to decide all the questions which are suggested by the proceedings in the county court. There is nothing in the record but the petition, and the several decrees, under some one of which the administratrix, in the execution of her supposed authority, executed the note and trust deed, and delivered them to Mrs. Pershing, who advanced the money. The three decrees entered in November may all be invalid, or they may be entirely legal. This we cannot decide without the record of that case before us, whereby we can ascertain the existence or the nonexistence of jurisdiction and power on the part of the county court to further adjudicate the matters presented by the petition beyond the original entry of the 27th of October, which is styled in the argument the "first decree." While we very readily appreciate the legal difficulties suggested by the procedure, and are quite unable to understand the court's action, the record lacks what is absolutely prerequisite to even a conjecture concerning it. The proceedings under the original petition appear to have been regular. The petition itself seems to be sufficiently full to warrant the court to take action under it; and while the decree of October 27th is open to grave criticism, because of the very extensive power which it undertook to grant, the specific right conferred is not objectionable. It undertook to give the administratrix power to borrow a sum of money on certain lots on definitely stated terms. With the wisdom of the decree or the justness of the procedure we are not concerned. The substantial variation between the first and subsequent decrees with reference to the character of the security will really be disposed of by our conclusions respecting it.

There is undoubtedly a very wide difference between the rights and obligations of the grantor, trustee, and cestui que trust in a trust deed and those of a mortgagor and a mortgagee under a mortgage. It is quite true the authorities generally place the two upon substantially the same basis, and hold the trust deed to be simply a mortgage, with a power of sale, and therefore the substantial legal equivalent of a mortgage containing a like power. *Jones, Mortg.* §§ 62, 1769; *Manufacturing Co. v. McAllister*, 6 Colo. 261; *Barth v. Deuel*, 11 Colo. 494, 19 Pac. 471. At the date of the giving of the deed, the chief difference in this state came from the right of redemption which inured to the defendants when a mortgage was foreclosed which contained no power of sale. The original decree contained no definite provision respecting this matter. Its legitimate construction would be to give the administratrix power to

mortgage generally. Under it, a mortgage with a power of sale could not be given. In this respect there is a wide difference between the original and the three subsequent decrees. To grant to the representative the power to execute a trust deed or a mortgage containing a power of sale would not be a wise or a prudent exercise of authority on the part of the county court, and in this particular the later decrees are open to criticism. The presence of this condition in the deed would not necessarily invalidate it. If the power to sell was eliminated from the trust deed, then, of necessity, foreclosure would be the only remedy whereby the security could be enforced. It would then be brought within the purview of the authority which adjudges the trust deed to be the legal equivalent of a mortgage, and would thereby secure to the estate the same legal right of redemption which it would have enjoyed under an exact and literal compliance with the terms of the original decree. Where an agent who has been authorized to execute a security has exceeded his authority with reference to its terms, the instrument has been adjudged valid, and the unauthorized condition rejected. *Jones, Mortg.* § 76; *Jesup v. Bank*, 14 Wis. 331.

Some importance seems to be attached to the proceeding by the holder of the note in presenting her claim to the county court for allowance. This ought not to affect her right to enforce the security if otherwise her privilege remains unimpaired. The presentation of the claim and its allowance simply determined its validity as a charge on the funds of the estate. We are not at all certain that this procedure was essential, though, had the note and mortgage been given by the decedent in his lifetime, it would have, under the statute, been a condition precedent to a suit for its enforcement. *Sess. Laws 1889*, p. 474.

We need not decide whether, under the present circumstances, a suit would lie without a compliance with this statute, which does not in terms refer to such securities because, by a wise provision, the holder presented the claim for allowance. This circumstance gives great weight to the appellant's contention that her claim is a just one. The note was and is a legitimate charge against the estate, which Mrs. Pershing should have a right to collect. There is thus left but one naked question,—whether she can enforce it otherwise than by sharing with the creditors in the ultimate distribution of the assets, or whether she may resort to her security to collect her money. Intimately associated with this question, and really as a preliminary to it, arises another, which respects the power of the plaintiffs to institute the present suit, with no other allegations than those contained in their complaint. It will be observed the suit was brought by one of the heirs and the administrator against the grantor, trustee, and cestui que trust to cancel the note and the security. The sole basis of the bill was the alleged invalidity of the secur-

ty, which, in turn, was established, if at all, by the demonstration of the invalidity of the decree of the county court under which they were executed. The plaintiffs did not aver any misuse or misapplication of the money, nor its diversion from the legitimate uses of the estate by the administrator. It was, in effect, conceded that the administrator borrowed the money, and used it to pay other debts. Under the allegations of the answer and the cross complaint, the plaintiffs admitted by their demurrer the legitimate application of the money to the reduction of a debt which the estate owed. The money was paid to the Commercial National Bank, and reduced its allowed claim to that extent. The plaintiffs did not offer to return the money, but sought a judgment declaring the note invalid and the security unenforceable. This very inequitable result should not be permitted except under the pressure of legal principles from which there is no escape. We find no such difficulty. Why the administrator was joined is not clear. There is nothing in the complaint which shows a cause of action in his favor with reference to this security or this loan. The estate is evidently solvent. There is enough property remaining to satisfy the claims of all creditors; and, so far as the administrator is concerned, he was and is unharmed by the proceeding. Further, he holds his present position as a successor in office to the original administratrix, Mrs. Melburn, and, on all recognized principles, leaving out of consideration any question of the misappropriation of funds, took the estate as he found it, and was bound by the proceeding of his predecessor so long as what she did neither diminished the personal estate, nor so far reduced the realty as to prevent the liquidation of all the legitimate debts which it owed. Neither was he a proper party to a bill of this description. This question, however, was not raised by either demurrer or answer, and his presence in the suit is not a matter of substantial objection. Whether one of the heirs could maintain such a suit without making the other heirs either plaintiffs or defendants might under some circumstances become a very important question. This difficulty is obviated by the cross complaint filed by the defendants, who have attempted to bring into the suit all the other heirs, that there may be a complete adjudication of the matter. This will obviate any difficulty respecting parties, and the subject will not again be referred to. All incidental matters are thus completely disposed of, and we can return to the discussion of the principal propositions. The nature of an estoppel does not preclude its application wherever it tends to work out an apparent equity, and to do justice between the parties. The infancy or the disability of the party against whom the doctrine is invoked furnishes no obstacle to its operation. It has been applied in many cases where at the time of the occurrence the person who is to be bound by the act was

then completely under some recognized disability. It has been applied in all classes of cases, but usually in those where money has been received from the sale of land or from some other source by one who was the custodian of the person under disability, and who applied the funds to the use and benefit of the infant. Wherever this has been done, even though the procedure was irregular and void, the infant has been estopped to assert its illegality, unless the purchaser can either be put in statu quo, or the infant has made some offer of restitution which, if accepted, would leave the other unharmed. *Com. v. Shuman*, 18 Pa. St. 343; *Robertson v. Bradford*, 73 Ala. 116; *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674; *Goodman v. Winter*, 64 Ala. 410.

It was no objection, then, to the application of the doctrine of estoppel, that Mrs. Wolfe was a minor at the time of the transaction, and as such, by her next friend, has brought this suit. With this difficulty removed, the balance of the way is entirely clear. Under our statutes, the heirs to real property take it, in a general sense, subject to the lien of the creditors for the payment of the debts which the decedent owed at the time of his death. These debts are in no strict sense liens on the property or charges against the estate. It descends to the heirs, however, subject to the right of the creditors to enforce their claims in the proper forum, by a sale of the realty whenever the personality is insufficient. In this general, though not technically accurate, sense, then, the heirs take the lands subject to these claims. Wherever property has descended subject to a definite lien, and the representative, without right, has borrowed money, and satisfied this claim, it has almost universally been adjudged that the heir could not recover from the purchaser without repaying the purchase price. An offer to do this must not only be alleged, but must be proven and kept good. Many of the cases have proceeded on the hypothesis that, under such circumstances, equity would not entertain a bill filed by the heir to recover the estate, unless the purchaser was subrogated to the rights of the original holder of the incumbrance, and could thereby secure the return of his money. The doctrine has been gradually extended, and the manifest equity has been so thoroughly recognized as to include within its scope those cases where the administrator has proceeded irregularly, and received money which has been applied to the satisfaction of legitimate claims against the estate. Under such circumstances, the heir has not been permitted to redeem except on payment of the sum borrowed, even though it has gone to satisfy some other debt. It has been held enough to show that the money has been legitimately applied to the liquidation of just claims with which the estate was chargeable. *Valle v. Fleming*, 29 Mo. 152; *Schaefer v. Causey*, 8 Mo. App. 142; *Jones v. Manly*, 58 Mo. 559; *In-*

urance Co. v. Aspinald, 48 Mich. 238, 12 N. W. 214; McGee v. Wallis, 57 Miss. 638; Heron v. Marshall, 5 Humph. 443; Penn v. Helsey, 19 Ill. 295; Jones v. French, 92 Ind. 138; Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875; Sharkey v. Bankston, 30 La. Ann. 891. The present case is on all fours with these decisions. The estate owed \$24,000 to the Commercial National Bank, which must be liquidated either out of the personalty or out of funds raised by the sale of the realty. The money which was borrowed from Mrs. Pershing was applied to the satisfaction of that debt. Both debts were allowed by the county court, and adjudged valid claims against the estate. It would be manifestly unjust to permit one of the heirs to obtain a judgment canceling the note or invalidating the security, and thereby to the extent of her interest in the property increase her share by the appropriation of Mrs. Pershing's money without returning it. There is no case which would adjudge the defendants disentitled to a subrogation if the money had been applied to the liquidation of an incumbrance then existing on this particular property. There is neither reason nor equity in a rule which would permit the heirs to enjoy the benefit of this money because it was applied to the payment of a general debt, and not a specific incumbrance. We, therefore, conclude Mrs. Wolfe could not maintain this bill in so far as it sought to cancel the note and the security without an offer to return the money.

There is no claim of a lack of power on the part of the county court to authorize the administrator to borrow money on the realty for the purposes for which this money was borrowed. It is contended the petition in some minor particulars was not in strict accord with the statutes, and therefore jurisdiction did not attach, and the administrator was without the legal right to borrow the money. We are not entirely clear as to the right of the plaintiff to attack the decree of the county court in this way. The orders and judgment of the county court in matters within their jurisdiction are generally conclusive, and are not ordinarily subject to collateral attack. *Bateman v. Reittler*, 19 Colo. 547, 36 Pac. 548. But this question, together with another which we are about to suggest, is left so much unsettled by the condition of the present record that we prefer not to express a conclusive opinion concerning it. The case must be reversed, and go back for a new trial. If the plaintiff can amend her bill and allege an offer, then, on the issues which will be raised, the proper proof can be presented, and on the whole record we can adjudge the question. If the plaintiff is unable to amend her bill, it must of necessity be dismissed, but with leave to make the offer, if she be so advised, and recommence her suit.

The remaining question is likewise of much

difficulty, and respects the right of the defendants to maintain their cross bill for a foreclosure of the trust deed. We must necessarily give expression to our general view of it without conclusively adjudicating the matter in all of its phases. If the original complaint be dismissed, the case will then stand on the cross bill and the answers which may be put in. Evidence will be introduced, and on the final hearing the record will present enough to enable any court to adjudge the questions which may be raised. We can only say the cross complaint presents enough to compel an answer. The heirs must all be brought in, and made parties, so that the whole matter may be determined in one suit. It would appear the proceedings of the county court on the original petition culminated in a decree entirely within its jurisdiction and power, under which the administrator could borrow money and execute a mortgage upon the particular property involved. If this be so, then the instrument which was executed could be taken to be a mortgage, which would give the plaintiffs in the cross bill the right to obtain a judgment of foreclosure, and enforce their claim by a sale of the property. The condition which differentiates the instrument from a mortgage would thus be eliminated, and the heirs would have the same right of redemption that would come had a mortgage been executed according to the terms of the original decree. The parties have come into equity, and, under the circumstances, we do not think them entitled to enforce their security under the power of sale, but they must be remitted to the rights which would accrue under foreclosure. There is another condition, with respect to attorney's fees, which must of necessity be disregarded, because there is nothing in any of the court's judgments which would authorize the inclusion of this onerous condition. We are not able to go further in adjudicating the rights of the parties, and can only in this general way point out the course which the appellees must pursue. We simply hold they are entitled to their money, and that the plaintiff may not maintain her suit without an offer to repay it. We do not directly nor conclusively adjudge the appellees entitled to foreclose. We simply say, as the case is now presented, it appears to us they have that right. The whole aspect of the case may be changed by the answers and by the proof which the parties may offer. We have only taken this course to save the estate further litigation and expense, if the thing be possible.

For the errors committed by the trial court in giving the plaintiffs judgment, and sustaining the demurrer to the answer and cross complaint, the judgment will be reversed, and the case remanded for further proceedings, in conformity with this opinion. Reversed.

(16 Mont. 343)

STATE v. PUGH.

(Supreme Court of Montana. June 26, 1895.)

HOMICIDE—DECLARATIONS—REVIEW ON APPEAL—
IMPEACHMENT OF WITNESS.

1. Where defendant, immediately after shooting deceased, fled, and was captured about a quarter of a mile away, his statement to the captors that deceased hit him before he shot, and the statement of deceased, a short time after the shooting, that defendant applied to him opprobrious epithets, and he struck him, are narrative, and not part of the *res gestae*.

2. A conviction for murder in the first degree will not be disturbed on appeal when the instructions were correct, and the evidence justified the verdict.

3. On a trial for murder it is not error to exclude evidence taken before the coroner, offered by defendant to impeach the state's witnesses, when such evidence was not identified in any way, nor presented to the witnesses sought to be impeached, to enable them to identify it, nor was it shown that, if admitted, it would have contradicted any witness in any material matter.

Appeal from district court, Jefferson county; Frank Showers, Judge.

Clay Pugh was convicted of murder, and appeals. Affirmed.

J. C. English and C. L. Campbell, for appellant. H. J. Haskell, for the State.

PEMBERTON, C. J. On the 14th day of April, 1895, the above-named defendant was convicted of the crime of murder in the first degree, in the district court of Jefferson county, and on the 18th day of said month was, by the court, sentenced to be hanged. From the judgment this appeal is prosecuted. The facts of the case, as far as it is necessary to treat them, are stated in the opinion.

On the 5th day of October, 1894, the defendant shot and killed C. W. West, in Silver Bow county. The case was thereafter transferred to the county of Jefferson, where it was tried, with the result above stated. The deceased was a railroad conductor, and at the time of the shooting was engaged in running a freight train on the Butte, Anaconda & Pacific Railroad, from Butte to Anaconda. The defendant and others had gotten on said train to ride to Anaconda, without authority, and against the consent of the deceased. The train was stopped, and the men put off. As the train started the defendant and others got on again. The train was again stopped by deceased, and defendant was ejected therefrom by him. Almost immediately after being ejected from the train the defendant fired two shots at the deceased, from a pistol, inflicting upon him two mortal wounds in the back. The defendant, immediately after firing the shots, ran from the place of the tragedy towards the foothills. He was immediately pursued by persons near by, and captured about a quarter of a mile away. To his captors he stated, in effect, that West hit him in the face, and then he shot him. The defendant sought to prove this statement was made by him, after his capture, to the witnesses. The court held

the testimony to be incompetent. The defendant assigns this ruling as error. We do not think, as claimed by counsel for defendant, that these statements were part of the *res gestae*. They were part of the defendant's narrative of the events of the tragedy that was passed and complete. Nor were they free from the suspicion that they were made with the design of having them constitute a part of the plan of defense. Whart. Cr. Ev. § 202; Territory v. Clayton, 8 Mont. 1, 19 Pac. 293. Even admitting the ruling complained of to have been wrong, still we think the defendant was not prejudiced. One of the witnesses who assisted in defendant's capture testified, without objection, to this statement of the defendant. The evidence went to the jury, and was not stricken out. The objection to this testimony was made when another witness was on the stand, and held to be inadmissible. So that the defendant got the benefit of this testimony, whatever the benefit may have been.

The defendant also assigns as error the action of the court in excluding evidence of a statement made by deceased, a short time after the shooting, to the effect that defendant applied to him opprobrious epithets, and he struck him. We think this evidence comes within the same rule, and was subject to the same objection, stated above. But in this case one or more witnesses did testify to this statement of the deceased, and the evidence went to the jury, for what it was worth, without objection. Other witnesses were not permitted to testify to the same fact when objection was made. It does not appear from the record just what time had elapsed after the tragedy before the making of either of the above statements by the respective parties sought to be introduced in evidence, but it is clear that they were made after the tragedy was over and complete, and that they were narrations of events that had passed. We think, therefore, it cannot be claimed that such statements constituted any part of the *res gestae*.

The defendant contends that the evidence is not sufficient to sustain the verdict, because, he says, it does not show premeditation or deliberation. Witness Pinney, who was the front brakeman on the train at the time of the homicide, after testifying to the attempt of the deceased to get the defendant off the car, and after testifying that it was his duty, as such brakeman, to pay strict attention to the deceased, and that he was doing so, in order to repeat whatever signals he might give to the engineer, swears: "The party that the conductor was putting off got off on this southwest corner of the car, and Conductor West was standing over on the northwest corner of the car, with his hand up in about that position (illustrating); and as he had his hand up, giving the signal, I repeated the signal to the engineer, and before I had time to get my hand down there was a shot fired. I could not see the shot myself,

but I could see the smoke and hear the report. As the shot was fired he seemed to wheel to the right, and as he was wheeling and falling the second shot was fired. I saw the smoke, and it came from the south of Conductor West. It seemed to come up over the car. Apparently, it would be about a foot or a foot and a half or two feet from the platform, from behind where West stood,—not exactly right behind, but a kind of sideways, and behind him, too, partly.” Witness Vardell, who was the rear brakeman on the train at the time of the shooting, and who saw the entire transaction between the parties, testifies: “Conductor West gave a signal with his right hand to go ahead, and I saw the shot fired, and Conductor West turn a little bit sidewise, and fall on his hands. I was behind him, and I seen it from behind. Mr. West was facing towards the engine, and I was facing the engine; West had his back to me, and the smoke came from that corner (indicating). I saw him fall, and he was trying to help himself on the corner of the car, and the second shot was fired, and that came from the same direction as the first; and then I seen a man run from where the shot was fired.” Witness Odgers, a miner working near the place of the tragedy, testifies as follows as to the shooting: “The man on the platform was sitting when I saw him first, and Mr. West was going towards him, simply walking. Mr. West did not appear to be doing anything with his hands, at all, but the minute he got close enough to the platform he got down to the platform; and the man that was sitting on the front of the platform slid off the platform, and got onto the ground. Mr. West did not knock him off, nor kick him off, nor did he use any force whatsoever to get him off; and, a moment or two after,—I could not tell to a few seconds,—I heard the report of a gun, and saw smoke. I saw that smoke coming from the south side of the track,—the opposite side to me. It came from the side that the man got off. That man was Clay Pugh, the defendant in court here. And then I saw C. W. West climbing or falling across the car, to the opposite side, and he fell on the ground on the north side of the car. I saw him fall on the ground after the second shot. There was no time to spare between the shots. I could not see the man when he fired the shots. There could not be much of a flash, but I saw the smoke before it spread any. Judging from the smoke, the shots come from the track down between the cars.” The testimony of the engineer and fireman of the train, and other witnesses, is to the same effect, as to what occurred between the parties at the time of the shooting. The defendant’s testimony as to what occurred at the time of the shooting, and the reason why he shot, is as follows: “As I was raising up, I saw the train was stopped, and I jumped off, and I started back. I had taken a step or so back, and he said, ‘Damn you! I will fix you.’ I turned around,

and he threw his right hand to his hip pocket, and I drew my revolver, and shot twice. I shot because I thought he intended to shoot me.” The testimony of defendant is not corroborated by any witness in these particulars. And it will be noticed that the defendant does not claim that he fired the fatal shots in the heat of passion, aroused by blows or other mistreatment inflicted upon him by the deceased. His claim is that he shot twice because he thought deceased intended to shoot him. It is not contended that the court did not fully and fairly instruct the jury as to the law of the case, and that, before they could find the defendant guilty of murder in the first degree, they must believe from the evidence, beyond a reasonable doubt, that the killing was deliberate and premeditated. It was a matter for the jury to determine, under all the evidence, the degree of crime the defendant was guilty of, if any, under the instructions of the court defining the different degrees of homicide. If the defendant formed in his mind the purpose to kill, any conceivable length of time before the killing, however short, and acted upon that purpose, then such killing was deliberate. This was an issue for the jury. We think there was ample evidence to justify the verdict.

The defendant assigns as error the action of the court in excluding from the jury the evidence taken before the coroner. This evidence was offered for the purpose of impeachment of the testimony of a number of the witnesses for the state. The evidence offered was in no way identified as the evidence of the witnesses given before the coroner. The defendant did not present this evidence to the witnesses sought to be impeached, to enable them to say whether it was their testimony given before the coroner. No one else testified that the evidence offered was the evidence of the witnesses given by them before the coroner. There was not even a certificate of the coroner to that effect. Nor has it been shown that, if the evidence offered had been admitted, it would have contradicted any witness as to any material matter in the case. We think the evidence was properly excluded.

After a careful consideration of the errors assigned, and of the entire record of the case, we are unable to discover any grounds for disturbing the result of the trial of this cause. The case seems to have been fairly tried upon the evidence and the law, and we are not prepared to say that the proper result has not been reached. It appearing that the defendant has been granted a respite by the governor until the 1st day of July, 1895, pending the presentation and decision of this appeal, it is therefore ordered that the judgment of the court below be executed on that day, in accordance with the provisions of section 377 of the criminal practice act. Remittitur forthwith.

DE WITT and HUNT, JJ., concur.

(16 Mont. 335)

HOLLENBACK v. DINGWELL et al.

(Supreme Court of Montana. July 1, 1895.)

BREAKING OF DAM — CONTRIBUTORY NEGLIGENCE.

The fact that one knew of the dangerous condition of a dam, and failed to institute a special proceeding provided by Act Feb. 16, 1877, giving persons living on a stream below a dam, who deem the same insecure, the right to institute a proceeding to have the dam declared dangerous, will not bar an action by him for damages caused by a subsequent breaking of the dam.

Appeal from district court, Deer Lodge county; Frank Woody, Judge.

Action by Godfrey Hollenback against Duncan Dingwell and others for damages caused by the breaking of a dam. From a judgment for plaintiff, defendants appeal. Affirmed.

Cullen & Toole and Cole & Whitehill, for appellants. Rodgers & Rodgers and W. H. Trippet, for respondent.

HUNT, J. The plaintiff, a ranchman living on Griff creek, sues the defendants for negligently constructing and maintaining a dam used to store quantities of water at the outlet of Griff Lake, about $4\frac{1}{2}$ miles above plaintiff's ranch. In June, 1892, the dam broke away, and the body of water behind it ran down upon plaintiff's farm, washing away the soil, destroying the buildings, tearing up his fences and crops, and generally doing him great damage. The jury awarded the plaintiff damages in the sum of \$1,200. The defendants moved for a new trial, and appeal from the order denying said motion.

The defendants do not contend in this court that the plaintiff was not injured by the breaking away of the dam, nor is there any question raised of the justness of the amount awarded, provided the plaintiff could recover at all, so that we need only consider the single point presented,—whether the verdict of the jury is against the law.

The court, after charging the jury upon the law of negligence, and as to the measure of care necessary to be exercised on the part of defendants, instructed as follows: "The jury are instructed that the plaintiff had a right, without incurring liability for trespass, under the laws of the state of Montana, to have said dam examined and declared a nuisance, and to have had the same abated, without costs to him, if the same was dangerous to life or property by reason of its negligent construction, or any other defect therein, whereby the same was unsafe or dangerous to life or property situate or being upon the stream below it. And if you believe from the evidence in this case that the plaintiff, for a year, or a longer period, immediately prior to the breaking of said dam, had the opportunity to know that said dam was in a dangerous and unsafe condition, and that he believed it was dangerous and unsafe, then it was his duty, as an ordinarily careful, prudent, and discreet man, to have invoked the law

of the state, and have had said dam examined, and, if found unsafe, to have had it removed, or the nuisance abated, so as to prevent said injury and damages to his property, as the law makes it the duty of a person who has the means or opportunity of avoiding an injury, without committing a trespass upon the property of another, to take the proper measures to abate the nuisance and prevent the threatened injury and damages, and if he fails to do so he is guilty of contributory negligence, and cannot recover." The law of the state referred to in the instruction is the act of February 16, 1877, concerning dams and reservoirs (chapter 56, div. 5, Comp. St. Mont.). By the provisions of the law just cited, persons constructing or using dams or reservoirs are required to build them in a substantial manner, so that they will safely and securely hold waters, if upon the stream upon which any such dam or reservoir is situated, and below the same, there are settlers whose lives may be endangered, or valuable property which may be damaged or destroyed, by the breaking of such dam or reservoir and the escape of the waters therefrom. It is further provided by said law that if any one makes a complaint to the effect that any person is filling a dam or reservoir, and that life or property is or will be thereby endangered, the district judge shall appoint three persons to examine the dam or reservoir, and determine as to its security. These persons shall report to the district judge. If they find that it is imminently dangerous, they are empowered to draw the waters from the reservoir, to insure the safety of the persons and property below the same, or if they find it insecure, but not imminently dangerous, they shall report their finding to the district judge, who is required to cause a copy of said finding to be served on the owners of the dam, with a notice to proceed forthwith to make the dam secure; or to draw the water without delay, and that unless the owner comply with the notice, or shall show that the dam is secure, or that no property or life would be endangered by its giving away, it shall be the duty of the district judge to issue a writ commanding the sheriff to draw from said dam the waters thereof. The hearing provided for shall be before a jury of 12. An appeal may be taken upon giving to the persons holding property on said stream, below said dam, security against loss or damage resulting from the bursting of said dam or reservoir. The person making complaint of the insecurity of the dam shall, in the first instance, advance the necessary expenses of the jurors, and their fees, which sums may be recovered when judgment is rendered. Any person guilty of erecting or maintaining a dam or reservoir which endangers life or property in the manner provided for in the chapter referred to shall be deemed guilty of erecting or maintaining a nuisance, and, being thereof convicted, shall be punished as provided by law. It is ad-

mitted that plaintiff did not institute any proceeding, under this statute or otherwise, to have the dam declared dangerous, or a nuisance to the public. The jury, therefore, by finding for the plaintiff, utterly disregarded the particular instruction quoted above. In passing upon the motion for a new trial, however, the learned judge of the district court permitted the verdict to stand, entirely changing his view of the law as given in the first instance, thereby holding that an omission to invoke the aid of the statutory right to have the safety of the dam inquired into by judicial proceeding was not an act of negligence on plaintiff's part, which so far (if it at all) contributed to the overflow of his farm as to preclude him from obtaining relief in this action.

The appellants do not ask the court to reverse the case upon the question of practice,—that because the jury confessedly disregarded the law as given to them by the court, whether right or wrong, a new trial should be had,—but rely upon the ground that the instruction, as given, was the law, and that the jury, under the plain facts in evidence, disobeyed the law when they awarded plaintiff damages, it being an undisputed fact that he had never complied with the provisions of the statute authorizing complaint to be made before the district court. But it appears clear to us that the statutes which authorize proceedings to have a dam examined, to determine its safety or danger, and to try that issue, simply declare a permission and right, and prescribe how the same may be availed of, without imposing any legal duty whatever. *Railroad Co. v. Young*, 60 Tex. 201. Surely, to maintain a dam which imperils the safety of many people is a nuisance; hence the right to have the same abated was in the plaintiff, whether conferred by statutory authority or by the common law. *Wood, Nuis. § 3; Mayor, etc., v. Bailey*, 2 Denio, 433. A method was fixed by statute by which inquiry could be had into the construction of the work, for the purpose, evidently, of laying down a plain, certain, and expeditious procedure, capable of being summarily invoked by one who considered himself or his property in great or imminent peril. But we cannot believe that a compliance with the method is a condition precedent to maintaining a suit in negligence for the breaking of the dam. Plaintiff simply omitted to invoke a special proceeding whereby suspicion of great danger might be acted upon by following a statute, and advancing fees and costs as a guaranty of good faith. How can it be said that plaintiff was guilty of negligence at all, or how could such omission be said to be the juridical cause of the breaking of the dam? "The negligence of plaintiff," says Wharton on Negligence (section 324), "to make it a juridical cause, must be such that by the usual course of events it would result, unless independent disturbing moral agencies intervene, in the particular in-

jury. It may be negligence in me to cross a railroad on a level, when, by going a mile round, I could cross on a bridge. Yet this negligence, in case I am struck by a train, is not the juridical cause of the collision, if I keep a good lookout when I reach the road. I may negligently leave my goods in a warehouse, but this is not the juridical cause of their destruction, if such destruction comes, not as a natural and usual result of my negligence, but through the negligence of another, who sets fire to the warehouse." The defendants' dam did not overflow and break because the plaintiff omitted to complain of its construction before the district judge; that is, there is a total lack of connection of cause and effect necessary to be established to justify the argument that plaintiff contributed to his own damage. *Shear. & R. Neg. § 25; Thomp. Neg. p. 1151*. It is beyond dispute that defendants were in duty bound to use all reasonable care to maintain their dam in a safe and suitable condition with relation to its uses and to the safety of life and property of others below them on the creek. *Ang. Water Courses, § 336; Cooley, Torts, p. 570; Gray v. Harris*, 107 Mass. 492. And it was a breach of this duty that caused the plaintiff's damage, without any act of omission on plaintiff's part, amounting to a want of ordinary care, which produced the breaking or overflow. "The two essential elements in contributory negligence are a want of ordinary care on the part of the plaintiff, and a causal connection between that and the injury complained of; the rule being that a plaintiff cannot recover damages for an injury he has sustained, if the injury could have been avoided by the exercise of ordinary care on his part." *Beach, Contrib. Neg. § 9*. Plaintiff did all that could be reasonably expected of him. He notified the defendants of the condition of their dam. He had a perfect right to live upon the creek, and it would be highly unreasonable to require him to repair a defectively constructed dam belonging to others, and for the defectiveness of which he was in no wise responsible. It would likewise be a bad precedent to exonerate the defendants, otherwise clearly negligent, because a settler below them did not avail himself of the statutes quoted, which, as we have said, were a permission expressly accorded to him, but certainly never were intended to shield those who were careless from liability in damages for the consequences of negligently maintaining a fearful danger to those lawfully occupying their homes below the point of such danger.

These views render it unnecessary to discuss principles which might be applicable if plaintiff was a transgressor himself, seeking to hold defendants liable for their negligent acts. The judgment is affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(16 Mont. 356)

HOPKINS v. BUTTE & M. COMMERCIAL CO

(Supreme Court of Montana. July 8, 1895.)

INJURY TO LAND — OVERFLOW OF STREAM — OBSTRUCTION BY LOG JAM—EVIDENCE—DAMAGES.

1. In an action for the overflowing of his lands, caused by a jam resulting from negligence in driving 5,000,000 feet of logs, plaintiff testified to the formation of the jam partially across the stream; that the jam caused the water to overflow the banks above it, but that below it the water was within the banks, and that the swales and sloughs below the jam, which ordinarily in high water filled up before the water went over the banks, were dry, and that the defendant had only one man looking after the jam on the day in question. There was evidence that the next year, when the water was as high, the defendant, while driving its logs, stationed men along the drive to break the jam, and no overflow occurred. There was also evidence that the water stood upon plaintiff's ranch for 36 hours, that the floating and rolling of logs carried on the land by the flood contributed to the injury, and that at the time of the jam there was a freshet in the creek. *Held*, that the evidence warranted a finding that the overflow was caused by the jam, which resulted from defendant's negligence.

2. The value of the crops, and the expense of maturing, reaping, threshing, and moving them to market, are competent facts to be considered in arriving at the measure of damages to crops by the overflowing of a stream, caused by negligence in driving logs.

3. In an action for damage done by the overflow of a creek, resulting from negligence in driving logs, evidence that a mare and a colt were in a pasture when the flood came, that the water was from 2 to 15 feet deep, and nothing was again seen of the mare and colt, is sufficient to sustain a finding that the animals were lost in the flood.

4. In an action for an overflow of land, caused by a jam, resulting from negligence in driving logs, evidence of the method adopted by the defendant of breaking jams, by releasing and precipitating other jams upon them instead of releasing them as they formed, is admissible.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by John W. Hopkins against the Butte & Montana Commercial Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

The plaintiff recovered judgment for \$617 for damages caused by defendant flooding his land while driving logs on Deep creek. The defendant appeals from the judgment, and from an order denying a new trial. The principal contention on the appeal is that the evidence did not sustain the verdict, in that it was not shown that the damages were occasioned by the negligence of the defendant. The defendant was engaged in driving about 5,000,000 feet of logs down Deep creek. The plaintiff was a ranchman, cultivating a crop upon his land lying along the creek. The creek overflowed, and the water covered the ranch to a depth of from 2 to 15 feet, destroying growing grass, grain, and potatoes, carrying away fences, and killing a mare and colt. Plaintiff contends that the damages were caused by defendant's negligently managing its logs so that the same jammed, and caused

the water to overflow, scattering the logs and debris over the crop. The defendant's defense was that the damages were caused by reason of an extraordinary freshet, and not through its negligence.

A. J. Shores, for appellant. Leslie & Downing, for respondent.

DE WITT, J. (after stating the facts). We are of opinion that there is no question in this case that the damages complained of by plaintiff occurred, and that his loss was fully equal to the amount which the jury found. The only substantial question in the case is whether the evidence of the defendant's negligence appears to be sufficient to sustain the verdict found by the jury and upheld by the court in denying the motion for new trial. It seems to be true that the high water was occasioned by an unusually heavy rain in the mountains. In the afternoon of July 12, 1891, the plaintiff heard an unusual noise at the mouth of a slough at the upper end of his ranch. Upon examination he found a log jam had formed at that point. It is true that he admitted that he could not see whether the jam extended across the whole width of the stream. But he testified clearly that there was a jam at that point, and that the jam was throwing the water over the banks of the creek upon his land. He testified further that below the jam the water was within the banks, and that the swales and sloughs below the jam were dry, and that ordinarily in high water these sloughs would fill up before the water went over the banks. The plaintiff did not know when this jam went out. It may have been on Sunday night. He does not know whether the jam was there Monday. The water stood over his ranch at the maximum depth, the witness thinks, for about 36 hours. It also appears by the testimony of plaintiff that the defendant had only one man looking after the jams on the stream on that Sunday. This man had gone up the stream on Sunday morning, and released a jam near another ranch above plaintiff. This released jam ran down upon the jam at plaintiff's ranch. Another witness testified for plaintiff that he had had considerable experience in log driving, and that one man was not sufficient to look after the jams in a drive of logs 12 miles long and containing 5,000,000 feet. It appeared that the defendant had a considerable force of men—some 35 or 40—working on the drive, but that these men were at the rear end of the drive, and that they were engaged in breaking jams at the rear end, and that the jams so broken would run down upon the lower jams, sometimes breaking through them, and sometimes temporarily making the jams greater, and backing up the water to a greater extent. It was in testimony that men should have been stationed throughout the length of the drive to break jams as they occurred, and thus release the accumulated water. It also appears that in the following year—1892—the water

was nearly, if not quite, as high as in 1891, but that in the second year the defendant, while driving its logs, had men stationed along the drive to break the jams, and by this method of operation the damages which occurred to the ranchmen in 1891 were not repeated in 1892. It thus appears that by a different method of operation the defendant, in 1892, was able to avoid a repetition of the damages which occurred the year previous. The defendant introduced testimony that it had five men along the creek, and that the object of having them there was to prevent jams which were likely to occur if there was no one to look after them. But this witness does not know what the drivers were doing on the day when the damages occurred. It also appeared that the water stood upon the plaintiff's ranch, at the maximum height, for about 36 hours. This, it was claimed, indicated that the flooding occurred by the natural rise of the water, and not by the jam.

This case was before us for consideration in 13 Mont. 223, 33 Pac. 817. The case was then sent back for a new trial, for the reason that the court, in its instructions, had ignored the question of negligence, and had, in effect, instructed the jury that they might find for the plaintiff, regardless of the defendant's negligence. This error was cured on the second trial, and the jury were instructed in this matter. We are of opinion that the evidence was sufficient to sustain the jury in finding the negligence of defendant. There is some room to argue that the evidence shows that the flooding would have occurred by reason of the unusually high water, without regard to the log jams. But there is also evidence that the jams, and the floating and rolling of the logs over the crops, was the cause of the damages. It was the province of the jury to decide these questions of fact, and we are of opinion that they had sufficient evidence upon which to base their conclusion. The fact which we consider significant is that in the succeeding season, when the water was apparently as high as in 1891, damages were prevented by reason of the defendant's adopting the very simple precautions which plaintiff claims it neglected in the year 1891.

It is also contended that the court erred in allowing certain testimony as to the measure of damages. We think, however, that the case was tried upon the lines laid down in the case of *Carron v. Wood*, 10 Mont. 500, 26 Pac. 388. The value of the crops was shown, and also the expense of maturing them, and of reaping and threshing, and moving to market. It is also contended that the evidence was not sufficient to show that the mare and colt were lost by the negligence of the defendant. We have determined that the evidence was sufficient to sustain the jury in finding that the flooding occurred through the negligence of the defendant. It further appears that the mare and colt were in the pasture when the flood came; that the water

was from 2 to 15 feet deep; that nothing was again seen of the mare and colt. We think this evidence is quite sufficient to show that these animals suffered from the same disaster that destroyed the fences and the crops. The court allowed the plaintiff to prove the forming of certain other jams in the drive above plaintiff's ranch. This was objected to as incompetent. Plaintiff wished to show by this testimony what the action of the water was when retained by a log jam. We think this evidence was not objectionable when it is also considered that these other jams were in the same drive of logs. They showed the method of operating adopted by the defendant in allowing jams to form, and in breaking them by precipitating other jams upon them, instead of releasing them as they formed. The judgment and order denying the new trial are affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 243)

NEWELL et al. v. WHITWELL et al.

(Supreme Court of Montana. June 3, 1895.)

ATTACHMENT—AFFIDAVIT—DISSOLUTION—EVIDENCE—AMENDMENT.

1. Plaintiffs sued for \$4,016.40 for goods sold to defendants on 30 and 60 days' credit, and for \$950.55, due for goods sold on a credit which stipulated that the bill should become due if any suit was brought against the purchasers. Defendants, on motion to dissolve, made affidavit that plaintiffs agreed to extend a credit of \$5,000, and that only sums in excess of that amount should become due, and that the sum itself was not to become due so long as defendants continued to purchase goods from plaintiffs, and that in consideration defendants were to pay on all bills which were not paid at the end of 30 and 60 days 8 per cent. per annum. A letter filed as an exhibit contained an offer by plaintiffs to defendants of a credit of \$5,000, charging defendants interest on their overdue accounts at the rate of 8 per cent. per annum. The defendants, if the offer was satisfactory, were to forward a property statement for reference. The affidavit further stated that the conditional credit agreement on the back of the bills was never called to the attention of defendants and made a part of the dealings between the parties, and that none of the debts sued upon were due and payable. Attached as exhibits were invoices delivered to defendants by plaintiffs, in which the credit condition did not appear. Plaintiffs filed affidavits denying the \$5,000 credit as set out by defendants; averred that the property statement had never been received; reaverred the conditional credit agreement; and stated that 37 invoices of goods were delivered during their dealings with defendants, in nearly all of which the conditional credit agreement appeared. An affidavit stated that all the invoices delivered to defendants for which this suit was brought, except one, were sold on conditional credit of 60 and 30 days, and were now due, except \$950.55, where the conditional credit applied, and that attachments had been brought against the defendants by which that amount also became due. One of the defendants filed an affidavit denying that any action at law had been commenced against them, by plaintiffs, but alleging that the plaintiffs, in conspiracy with other creditors, commenced their actions in an order in which plaintiffs were

last, and agreed to share pro rata in the amounts recovered. *Held*, that an order dissolving the attachment was error.

2. An affidavit that defendants are indebted to plaintiffs upon an express and implied contract for the purchase price of goods, which is due and payable, is sufficient, under Code Civ. Proc. § 181, requiring the affidavit in attachment to show that the debt sued on is upon contract.

3. Upon motion to dissolve an attachment under Code Civ. Proc. §§ 200-202, providing that an attachment may be discharged for improper issuance of the writ, and allowing the defendants to support the motion and plaintiffs to oppose it by affidavits or other evidence, the merits of the main action cannot be tried.

4. Proceedings in attachment may be amended.

Appeal from district court, Flathead county; Dudley Du Bose, Judge.

Action by George R. Newell and others, doing business under the name of George R. Newell & Co., against F. R. Whitwell and another, doing business under the name of the Kalispell Mercantile Company. From an order dissolving an attachment, plaintiffs appeal. Reversed.

Suit in attachment. On July 28, 1893, the appellants, merchants in Minneapolis, Minn., instituted suit against respondents, merchants at Kalispell, Mont., to recover \$4,016.40, due for goods sold and delivered, and for the sum of \$950.55, to become due on September 11, 1893. Affidavit in attachment was made by plaintiffs' agent, in which it was alleged that defendants were about to dispose of their property for the purpose of defrauding their creditors. August 5, 1893, defendants moved to discharge the writ of attachment, on the grounds, substantially, that the affidavit failed to show that the sum charged for the goods was a reasonable, agreed, or any value thereof; that when the suit was commenced the debt upon which it was instituted was not due; that the goods purchased by defendants, and for which the suit was brought, were purchased upon time, as agreed upon by the parties, which time had not expired when the suit was instituted; and that the affidavit of plaintiffs was false and untrue. Other grounds were included in the motion, which it is not necessary to recite. To support that motion certain affidavits were filed by the defendants, denying any disposition of their property, other than in the usual course of business, and denying any fraud on their part, or any intended fraud. Upon August 19th plaintiffs filed an amended complaint, by leave of court, setting forth that between September 21, 1892, and June 5, 1893, defendants became indebted to plaintiffs for goods sold at the defendants' instance and request, between said dates, in the sum of \$4,016.40; that all of said goods were sold and delivered by plaintiffs to defendants on a credit of 30 and 60 days, and that all goods sold after April 10, 1893, were sold on 30 days' credit. Plaintiffs further allege that between May 29 and June 11, 1893, defendants became indebted to them in the sum of

\$950.55 upon open account for goods sold between said dates; that on terms of conditional credit the said sum of \$950.55 became due on September 11th, if the conditions under which the goods were sold did not transpire. The credit contract was as follows: "A conditional credit, as stipulated on the face of this invoice, will be allowed on this bill, provided that, should any suit or action at law be brought against, or any lien be given by, the purchaser named in said invoice, or if he shall assign, sell out, change, or retire from business, this bill shall at once become due and payable." Plaintiffs alleged that after the sale of the goods certain actions at law were commenced by various parties against defendants; that all these actions were brought before plaintiffs sued, by reason of which fact the said sum of \$950.55 became immediately due and payable. An amended affidavit in attachment was filed, in which E. S. Johnson, as duly-authorized agent of plaintiffs, swore to the total indebtedness of defendants to plaintiffs in the sum of \$4,966.95, upon an express and implied contract for the payment of money.

Upon August 19th, the defendants, in support of their motion to dissolve, filed their affidavits, substantially as follows: Defendants and plaintiffs agreed that plaintiffs would extend the defendants a line of credit to the amount of \$5,000, and that no amounts owing to plaintiffs, excepting sums exceeding \$5,000, should be due and payable; and as long as defendants continued to purchase goods from plaintiffs the \$5,000 was not to be due and collectible, and, when they ceased to do business with plaintiffs, then the whole indebtedness was to be due and payable; and defendants, in consideration of that agreement, were to pay on all bills which were not paid at the end of 30 and 60 days from the date of the purchase, according to the class of goods purchased, 8 per cent. per annum thereon. As an exhibit to their affidavit, defendants filed and attached a letter of plaintiffs to defendants, dated February 4, 1893. The tenor of this letter to defendants is that plaintiffs, being informed by their agent that defendants desired to trade with them, and would require a credit of about \$5,000, plaintiffs would be glad to accommodate them, and receive their business, charging defendants interest on their overdue accounts at the rate of 8 per cent. per annum. The letter continued: "If this is satisfactory to you, we shall be pleased to have a property statement from you for reference. * * * We inclose herewith a blank for this purpose, which we trust you will feel disposed to fill out and return to us." The affidavit of the defendants further stated that at the time of purchasing the goods no conditions on the back of the invoices or bills, or any other conditions thereon, were made part of the dealings between the parties, and that no contract, other than the one hereinbefore stated, was made between

the parties; and that when this suit was instituted, and the attachment issued, none of the debts upon which it was brought were due and payable; that the affidavits of plaintiffs stating the bills and invoices of goods sold and delivered to defendants by plaintiffs, and the conditions that the debt was to become due and payable upon the institution of any other suit, or issuance of attachment, are not true, but false. Affiants attached certain bills and invoices delivered to defendants by plaintiffs, in which the credit condition did not appear; and affiants state that their attention was never called to any condition on the bills for the purchase of goods, or any other paper by which the debts sued for were to become due at any other time than as heretofore stated, and that the credit condition was not part of the negotiations between plaintiffs and defendants.

The invoices attached to defendants' affidavits were for various articles of merchandise, and are summarized as follows: May 29, 1893, terms 60 days, \$376.44; July 11, 1893, terms 60 days, \$262.61; April 22, 1893, terms 30 days, \$335.79; April 29, 1893, terms 30 days, \$407.91; April 29, 1893, terms 30 days, \$172.20; May 29, 1893, terms 30 days, \$22.95.

George R. Newell and Thomas P. Jumper, in behalf of plaintiffs, filed affidavits, denying specifically that such an arrangement in relation to the \$5,000 credit, as sworn to by defendants, was ever contemplated or entered into, and denied that in the letter hereinbefore set forth such an arrangement ever was referred to or contemplated; and set forth that as a condition of extending to defendants the credit proposed and contemplated by said letter, defendants were required and expected to furnish the plaintiffs a property statement, but that defendants never furnished the plaintiffs any statement whatsoever; that there were continual dealings between the parties from September, 1892, to July 11, 1893; that some of the goods sold were for cash, without credit, but mostly on credit of 30 and 60 days, and that never were the defendants indebted to plaintiffs in the sum of \$5,000, and that they continued to pay to plaintiffs money on their account, and made several payments of \$500 each in May and June, 1893, and that at the time of the commencement of the suit there was owing and due at least \$4,016.40 for goods sold and delivered prior to May 31, 1893; that the parties correspond with one another, and that such correspondence in its purport is inconsistent with the agreement claimed by the defendants. The affiants re-aver the conditional credit agreement, and set forth that while the plaintiffs were selling goods to the defendants they sent and delivered 37 invoices, under various dates, in all, or nearly all, of which the conditional credit agreement was written and printed. Attached to the plaintiffs' affidavit are letters by plaintiffs to defendants asking for moneys on account, and

urging prompt remittances on account of hard times. One letter, dated May 5, 1893, states the amount of defendants' indebtedness to be \$1,265, plaintiffs asking for \$800 or \$1,000. Another letter, of June 5, 1893, states their indebtedness to be \$3,174.90; it asks for \$1,000. Another letter, dated July 6, 1893, informs defendants that plaintiffs have drawn for \$500. The letters of defendants to plaintiffs, also made part of plaintiffs' affidavit, ask for statements of account, and promise to send more money. One letter in particular, dated June 16, 1893, tells plaintiffs that they remitted plaintiffs \$500 the day before, and will remit again in a few days, and asks plaintiffs not "to crowd defendants in the matter, and they will do all they can for them."

E. S. Johnson, agent of the plaintiffs, swore by affidavit that he was familiar with the terms of credit given by plaintiffs to merchants in Montana; that he had examined all the bills and invoices of goods sold by plaintiffs to defendants, for which this suit was brought, and that there was but one item in all of said bills which was a credit of four months,—that was an item of \$80.43, dated September 21, 1892; that all of said goods sued for in this action were sold on conditional credit of 60 and 30 days, except \$950.55, where the conditional credit applied. He further states that on July 1st he was in Kalispell, and knew that suits and attachments had been instituted against defendants, and upon this information he acted by procuring counsel for plaintiffs. Affiant further denies any agreement between plaintiffs and defendants that the accounts were not due.

J. G. McLean, also an agent of plaintiffs, filed an affidavit denying the agreements as set forth by defendants' affidavits, and stating "that the longest time mentioned, even as a conditional credit, had expired on the whole sum of \$4,966.95 at the time this suit was instituted; but affiant alleges that it was in all bills and invoices of goods sold by the plaintiffs to the defendants, for the recovery of which value this action is brought, made a condition, and distinctly printed upon said bills as a part of the contract of sale, that the credit mentioned in said invoice and bills was a conditional credit, which condition was as follows." The conditional credit is then set forth fully. Affiant further states that before this suit was instituted other suits and attachments were issued for large sums of money.

Upon August 29th defendant Whitwell filed a counter affidavit, stating that he bought all the goods for his firm, and that he never assented to the credit memorandum, and that all the statements in relation thereto were false. He then proceeds as follows: "Affiant further says that at the time the said plaintiffs commenced their said action against these defendants, these defendants had not given any lien on any of their property, nor made any assignment, or sold out, or chan-

ged or retired from business, but that they were conducting their said business in the usual way; affiant further says that he is informed and believes that no action at law had been commenced against these defendants at the time these plaintiffs commenced their said suit, but that these plaintiffs, acting together with other creditors of the defendants,—Griggs, Cooper & Co., C. Gotzian & Co., W. S. Conrad & Co., and C. R. Groff,—secretly agreed together to commence their said actions in the order in which the same were commenced, and share pro rata in the collections of their said claims, all of the said creditors well knowing that their said claims were in a large part not due. Affiant says, and has reason to believe, that all of said suits were prepared by the same attorneys, at the same time. Affiant further says that at the time the writ of attachment was served on these defendants the attachments for the other above-named plaintiffs were served, and that they were all served at the same time and simultaneously; and further affiant sayeth not."

Newell & Jumper, for plaintiffs, filed another affidavit, in which they stated that said accounts sued on, \$4,016.40, were due by virtue of the expiration of the time credits, and that \$950.55 became due by virtue of suits against the defendants commenced before this action was.

Upon the hearing on the motion to dissolve, the following proceeding was had: "After argument by counsel, and it being admitted in open court by the plaintiffs' counsel that the sum of \$666.84 was due only by virtue of the fact that there was a certain clause placed upon the invoices of goods shipped from the plaintiffs to the defendants by virtue of which the debt would become due, provided the defendants were attached at any time, it was further admitted by plaintiffs' counsel that the invoices of goods amounting to \$666.84 did not have this condition upon them, whereupon the court informed plaintiffs' counsel that he would decide as to that amount the debt was not due, and would dissolve their attachment, unless they amended their affidavit in conformity with the amount that there was actually due. Plaintiffs' counsel contended that there were thirty-seven invoices of goods from plaintiffs to defendants in which the condition for the maturity of the entire debt does appear, and that, even though there were three or four invoices, amounting to \$666.84, on which this condition was absent, yet there were enough invoices in which the condition did appear to work the maturity of the entire debt, and therefore refused to amend. Plaintiffs' counsel further contended that the debt was an entire debt, the court finding that it was not. Plaintiffs' counsel refused the offer to amend, and thereupon the court ordered, adjudged, and decreed that the said attachment be dissolved." From the order dissolving the attachment, plaintiffs appeal.

McIntire & Clinton and Strevell & Porter, for appellants. P. J. McLaughlin and H. G. McIntire, for respondents.

HUNT, J. (after stating the facts). Upon the hearing on the motion to dissolve the attachment the court heard no testimony other than the affidavits contained in the statement, hereinbefore recapitulated. We may concede that upon disputed questions of fact, where there is a substantial conflict between the statements made by those who seek to dissolve the attachment and those who try to retain such a lien, the court will not disturb the decision of the district judge, unless it is clearly against the preponderance of evidence; yet we are irresistibly led to a conclusion, in the case before us, directly opposite to that entertained by the district court. It must be remembered that the case is not one where the witnesses testified in person, and where the manner in which they gave their evidence might have materially aided the trial judge in weighing their credibility. For this reason the case must be decided by this court precisely upon what was before the district court; that is, upon record evidence, and nothing else. *Robinson v. Melvin*, 14 Kan. 484; *Landsman v. Thompson*, 9 Mont. 182, 22 Pac. 1148. We regard the statement made by the defendants to the effect that plaintiffs were to extend the defendants a credit of \$5,000, and that all sums in excess of \$5,000 were alone to be collected, so long as defendants continued to do business with plaintiffs, as wholly unreasonable on its face. It is incredible that such an unusual agreement, which was a practical loan of \$5,000, never to be repaid if respondents traded with appellants, could have been entered into. But, if our conclusion in relation to this agreement, being of itself improbable, is erroneous, to satisfy us that we are right we have only to refer to the correspondence between plaintiffs and defendants, wherein the defendants, long prior to the time when their credit even approximated the sum of \$5,000, were asking leniency at appellants' hands in collections, and making remittances to the plaintiffs, thanking them for past favors, and promising to clear their accounts up. In one letter, quoted in part in the statement of the case, defendants ask plaintiffs not to "crowd them." It naturally suggests itself, why should the defendants ask the plaintiffs not to crowd them when they only owed plaintiffs about \$3,000, and under their agreement, as contended for, there could be no indebtedness collected until a maximum credit of \$5,000 had been incurred? The statements of several witnesses for the plaintiffs all go to show that the credits extended were for less than four months, with but one exception; and that the moneys were due for each and every invoice, prior to the institution of this action, except for the amount of those invoices which only became due by virtue of the happening of the contingency provided for

in the credit memoranda. In relation to the goods sold to the defendants for the \$950.55 due on such memoranda of credit, we think the weight of testimony is clearly on the side of the plaintiffs. It appears by the affidavits of Johnson and McLean and others that the terms of credit upon goods sold on invoices, to the amount of \$4,016.40, had expired, and that without any credit condition that sum would be due; but that in all the invoices of goods sold by plaintiffs to defendants and sued for in this action, the conditional credit was printed upon the bills, and made part of the contract of sale, and that the sum total of the amount due upon goods sold under the conditional credit agreement exceeded the sum total of the amount sued for. It further appears that certain goods were sold for cash in the course of transactions between the parties, and that of 37 invoices sent by plaintiffs to defendants in the course of the dealings, all but 3 or 4 had the credit memoranda appearing upon the face of the invoice. We can but think that the argument of plaintiffs is reasonable and fair, when they say that the only invoices which did not contain the memoranda of credit clause were cash transactions between the parties, and are therefore immaterial in considering this motion in the suit. Such a view conforms with the several statements made by plaintiffs' witnesses, which statements are not successfully controverted by the defendants. The statement by defendants that their attention had not been called to the credit clause is entitled to very little or no weight. We cannot believe that a mercantile firm would be so careless in reading its invoices as to overlook such an unusual and important condition on so many invoices of goods sent them.

There is an attempt on the part of the defendants to deny that the claims apparently not due did not become so by virtue of any suits against defendants; but this portion of the affidavit of defendant Whitwell is evasive, and evidently sham, because he does not contradict what is averred to be shown by the records, namely, that Griggs, Cooper & Co., and others, had instituted suits against his firm before plaintiffs sued. His statement that these plaintiffs and other creditors secretly agreed to commence their actions in the order in which the same were commenced, and share pro rata in the collections of their claims, all of said creditors well knowing that their said claims were in a large part not due, is in itself a contradiction of the averment that no suits had been instituted. A careful reading of the aforesaid affidavit of defendant Whitwell, filed August 29, 1893, will demonstrate the falsity of its contents, provided, of course, summons had been served upon the defendants, of whom he was one, in the proceedings to which he himself refers in a part of his affidavit on the motion to dissolve.

The respondents argue that the plaintiffs'

counsel in open court admitted that \$666.84 of the account sued on was not due, and, although opportunity was offered the plaintiffs to amend, they refused to do so. We do not construe the attitude that the plaintiffs assumed, which is exactly set forth in the statement of facts, to be an admission of the fact that \$666.84 of the debt sued for was not due, inasmuch as counsel expressly restricted their admissions to the statement that that amount was due only by virtue of the credit memoranda clause upon the invoices. Plaintiffs' counsel did admit that the invoices amounting to \$666.84 did not have the credit condition upon them; but further stated that there were 37 invoices in which the condition of credit did appear, and that, notwithstanding the fact that 3 or 4 invoices, amounting to \$666.84, did not have that condition, yet there were enough invoices upon which it did appear to make the entire debt sued for due. Under such a contention made by the plaintiffs, and not directly and specifically controverted by any affidavits of the defendants, we think that it was error on the part of the district judge to put the plaintiffs upon an election requiring them to either amend their affidavit in attachment, or to submit to a dissolution thereof. Our conclusion is that, upon all the facts as they appeared before the learned judge of the district court, the affidavits of respondents presented no substantial conflict with the statements of the plaintiffs, and contained many statements so highly improbable as to deny to them claims to belief. *Landsman v. Thompson, supra.*

Respondents next argue that the affidavit upon which the attachment in this case was issued is fatally defective, upon the ground that part of the claim was not due; but this argument is based upon the hypothesis that the ruling of the court was correct that \$666.84 of the amount sued for was not yet due. Our opinion upon the merits renders it unnecessary to discuss the question of whether or not an attachment is void where the affidavit states that a greater sum is due than is subsequently determined to be due. We think, however, that under the weight of authority, where a person has, in good faith, made a mistake in the amount of the indebtedness, to secure which the attachment was issued, it is within the power of the court to permit an amendment to be made, and judgment to be entered in the proper sum, and that the plaintiff should not lose his whole lien because of an inadvertent error. The procuring of an attachment is a proceeding within the spirit of the Code, and, if such proceeding is defective, the same may be amended in the furtherance of justice, like any other proceeding, under section 114. *Pierse v. Miles*, 5 Mont. 550, 6 Pac. 347; *Magee v. Fogerty*, 6 Mont. 237, 11 Pac. 668; *Joseph v. Clothing Co.*, 13 Mont. 195, 33 Pac. 1; *Peiffer v. Wheeler*, 76 Hun, 280, 27 N. Y. Supp. 771; *Insurance Co. v. Dimmick* (Sup.) 22 N. Y. Supp.

1096; 43 Maxw. Code Pl. 535; *Struthers v. McDowell*, 5 Neb. 491. The legislature has not only failed to disapprove of these repeated judicial interpretations of the attachment laws, but has expressly sanctioned them by the adoption of a provision in the new Code of Civil Procedure, passed in 1895, permitting amendments to the affidavit in attachment. Section 918, Code Civ. Proc.

Finally, we are asked to declare the affidavit in attachment in this case wholly insufficient, because, under section 181, Code Civ. Proc., the affidavit must show the existence of certain facts,—among others, that the debt sued on is upon contract. The amended affidavit filed pursues the usual course of simply stating the affiant's conclusion, namely, that defendants are indebted to plaintiffs in the sum of \$4,966.95, with 10 per cent. per annum interest thereon from the 28th day of August, 1893, upon an express and implied contract for the payment of money, which is now due from defendants to plaintiffs. But we think that such an affidavit is sufficient. Under our statutes the clerk must issue the writ of attachment when the affidavit required by law has been filed, and the necessary undertaking has been given. It certainly was not contemplated by the statute that the clerk should exercise more than a ministerial duty in issuing a writ of attachment; and, where the ultimate facts are set forth as fully as they were in this case, the statute has been substantially complied with. *Wheeler v. Farmer*, 38 Cal. 203; *Bank v. Boyd*, 86 Cal. 286, 25 Pac. 20; *Gutman v. Iron Co.*, 5 W. Va. 22; *Drake, Attachm.* § 98; 1 *Wade, Attachm.* pp. 120, 131; *Weaver v. Hayward*, 41 Cal. 118; *Crawford v. Roberts*, 8 Or. 324. Under a statute substantially like ours, requiring an affidavit showing the nature of the plaintiff's claim, it has been held reference may be had to the complaint where the statement is not as full in the affidavit as may be desired. *Hart v. Barnes*, 24 Neb. 782, 40 N. W. 322; *Drake, Attachm.* § 95; *Wap. Attachm.* p. 87. We might rest the decision of this case upon the views hereinbefore expressed. An important question of practice, however, was ably presented to the court as the principal one involved, and, in view of the fact that we have given to it a very careful examination, it is proper that we express what seems to us to be the better view of the point raised.

By the affidavits used on the motion to dissolve, the real issue between the parties was whether the debt sued on by the plaintiffs was due wholly or in part. To determine this issue involved a consideration of the entire merits of the controversy between the parties. We are not prepared to believe that such a determination can be had on a motion to dissolve an attachment. By section 200 of the Code of Civil Procedure the only ground upon which an attachment may be discharged is that the writ was improperly issued.

If this statute were standing by itself, we doubt whether any inquiry could be had beyond what might be apparent by the records in the case before the court; but the law evidently contemplates a further examination, for, by sections 201 and 202, the motion to discharge an attachment on the ground that the writ was improperly issued may be made upon affidavits, as well as upon the papers themselves; and the plaintiff may oppose these affidavits by counter affidavits, or other evidence, in addition to those on which the order of attachment was made. We therefore think that an attachment can be dissolved for irregularities or imperfections in its issuance, not only apparent upon the writing and the printing contained in the papers, but upon other grounds, wherein it is made to appear that the issuance of the writ has been improper or irregular.

But how far can the investigation under the motion go, and how restrictive or how liberal are the terms of the statute? If, for instance, the notary taking the oath of the plaintiff to the affidavit was not in fact a notary; if on the same demand a second writ has been issued in the same county; or where the bond was not signed by those purporting to have signed it; or where the party making oath to the affidavit as the agent of the plaintiff was not in fact his agent; or perhaps in other instances, where the writ is founded upon facts not the same ones constituting the cause of action, and where a decision upon such facts is not a decision upon the identical issue to be tried to a jury, and upon which plaintiff's right of action solely depends,—we think that a motion to dissolve the attachment upon the ground that it was improperly issued is contemplated by the statute, and in such instances affidavits may be resorted to to properly place before the court the information necessary for it to have in order to base a finding upon that the writ has been improperly issued, and to make an order of discharge. But we do not think that it is within the terms of the statute, or within the scope of an inquiry into whether there has been an improper issuance of the writ, for the district court to try the merits of the main action in a motion to dissolve the attachment. If it were, the court, by the expression of an opinion upon disputed questions of fact, could, on a motion to dissolve to-day, render a judgment involving the merits of the suit, which the law says a jury alone can do to-morrow, if either party elects to have a jury. It is urged that an attachment proceeding is but ancillary to the main action, and that a trial upon that issue does not affect the merits of the suit. This is true, but it does not dispose of the anomalous position to which the defendants' reasoning carries us, if the judge may try the facts and destroy the entire value of the plaintiff's judgment by dissolving the attachment, thus declaring it improvidently issued; while a jury, upon precisely the same testi-

mony, and upon the identical issue, might decide contrary to the judge, and award the plaintiff a verdict for all he asks, upon the ground that the debt is due. Or, to carry the illustration further, after the defendants have had the motion to dissolve sustained because the debt was not due, they might default as to the action, and thus confess it was due. Under such conditions what would plaintiff's position be? By the previous ruling of the judge on the merits his debt was not due, but by the verdict of the jury on the merits his debt was due. Between this legal game of battledoor and shuttlecock, he would have a judgment good only in form, without any substance wherewith to satisfy it. It may be that cases will arise where it is difficult for the trial court or judge to say whether the facts, when disputed on a motion to dissolve, are the same ones upon which the cause of action depends. But, notwithstanding such occasional perplexities, we believe that our construction of the statutes is the correct one, and that far less injurious consequences will flow from pursuing the rule laid down herein than would from holding that the statutes permit the directly disputed issues of the main suit to be adjudicated by the trial court upon *ex parte* affidavits, and thus too often destroy the object of the suit itself,—the collection of a debt. This question has been considered by the supreme court of New York a number of times within the past few years. In *Lowenstein v. Salinger*, 17 N. Y. Supp. 70, it was held that the court would not ordinarily, on motion to vacate an attachment, try questions regarding the cause of action which should properly be left to be determined on a trial. This ruling is approved of by the same court in *Brown v. Wigton*, 18 N. Y. Supp. 490, where the court refused to dissolve an attachment because the affidavits raised the merits of the controversy. In *Paper Co. v. Johnson, Id.*, it was sought to vacate an attachment on the ground, according to the affidavit of the defendant, that there was no such debt due as was claimed in the complaint. It was held that was a question which could only be disposed of upon the trial, and could not be considered by the court, as the facts were not undisputed, nor were the legal conclusions certain. In *Johnson v. Door & Trin Co.*, 29 N. Y. Supp. 797, on an appeal from an order denying the motion of appellant, a junior attaching creditor, to vacate the plaintiff's action, the supreme court adhered to the principle laid down in the decisions just cited, and refused to dissolve the attachment on the ground that the court would not, on such an application, pass upon the merits of the action. The last case which we have been able to discover is that of *Kirby v. Colwell*, reported in 81 Hun, 385, 30 N. Y. Supp. 880, and decided in October, 1894. A motion was there made to vacate an attachment, solely upon the ground that plaintiff had no cause of action against the defendants, and the affidavits presented in sup-

port of the motion denied the contract pleaded, or the rendition of the services, which were the basis of the plaintiff's complaint. The trial judge vacated the attachment, but the supreme court held that when, upon a motion of this character, the only question presented relates to the existence of plaintiff's alleged cause of action, and is one of fact, and not of law, it should be left for determination at the trial, and not be decided upon affidavits. We believe the New York rule to be the correct one, subject to the qualifications hereinbefore discussed, and generally to the further qualification that, "where the facts are undisputed, and the legal conclusion certain, it would be oppressive to hold an attachment which is clearly without foundation." *Lowenstein v. Salinger*, supra. The case of *Elling v. Kirkpatrick*, 6 Mont. 119, 9 Pac. 900, was clearly within the New York rule. The facts therein upon which the motion to dissolve the attachment was made were written legal instruments. They were such as would lead up to certain legal conclusions, and addressed themselves entirely to the consideration of the court, and not a jury. See, also, *Herrmann v. Amedee*, 30 La. Ann. 303, where it was held that the defendant might put in issue, and require to be passed upon, the allegations of the plaintiff's affidavit, on which the writ itself is issued, without reference to the merits; but where the petition shows a cause of action, although the allegations are not true in fact, or the defendant has defenses on which the demand of plaintiff may be defeated on the merits, neither the truth of the allegations nor the defense on the merits can be inquired into on the rule to show cause. The general doctrine is also recognized in *Carnahan v. Gustine* (Okla.) 37 Pac. 594, although in that case the court follow the Kansas cases, and *Rosenberg v. Burnstein* (Minn.) 61 N. W. 684; *Miller v. Chandler*, 29 La. Ann. 88; *Reiss v. Brady*, 2 Cal. 132; *Drake*, Attachm. § 418. An analogy, too, may be found in a hearing on an order of arrest against a debtor. *Griswold v. Sweet*, 49 How. Prac. 171.

Several cases cited by the respondents seem to hold that there may be a trial of the merits on the motion to dissolve. The early Kansas cases, *Robinson v. Melvin*, 14 Kan. 484, and *Bundrem v. Denn*, 25 Kan. 430, upon critical examination, scarcely go as far, we think, as the respondents would have the court go in this case. If they do, we hold that they do not state the law correctly, as applied to our statute. But in considering the Kansas cases it is highly important to note that under paragraph 4323, Gen. St. Kan., a defendant may, at any time before judgment, move to discharge an attachment as to the whole or part of the property attached, without statutory limitations, such as Montana has, to the grounds upon which the motion may be based. The statutes of Nebraska (section 4745, Consol. St. Neb.) also permit a motion to discharge a writ of attachment on exactly the

same grounds as the Kansas statutes, with no express limitations, and yet the supreme court of Nebraska held, in *Olmstead v. Rivers* (1879) 9 Neb. 234, 2 N. W. 366, that, where a motion was made to discharge an attachment on the ground that the debt was not due at the commencement of the suit, the truth or falsity of the statement "cannot be inquired into on a motion to dissolve the attachment. That question can be settled only on a trial of the issues under the pleadings." The late Kansas cases proceed upon the doctrine of stare decisis. In Pennsylvania and several other states the statutes confer the power on the court or jury expressly to hear evidence, or determine the truth of the allegations contained in the affidavit upon which the writ is issued, and to dissolve or continue the liens of such attachments, according as he or they shall find the allegations of such affidavit sustained or otherwise. *Walls v. Campbell* (Pa. Sup.) 17 Atl. 422; *Woods v. Tanquary* (Colo. App.) 34 Pac. 737; chapter 6, Code Colo. 1887. The case of *Avery v. Zander* (Tex. Sup.) 13 S. W. 971, relied on by respondents, held that where the complaint, on its face, showed that certain of the claims were not due, and the affidavit alleged that the defendant was indebted to the plaintiff in the aggregate amount sued for, without specifying what part of the claims were due, and what part were not due, an attachment was properly dissolved. But the court overlooked an important point in the case. After the original suit was instituted, by leave of court the plaintiff filed an amended petition, precisely as was done in the case at bar, describing with greater particularity the claim sued on, and showing what part was due and what part was not due. There is nowhere throughout the opinion any allusion to this amended complaint, and the ruling of the lower court was sustained wholly upon the ground that the original complaint and affidavit showed part of the claim was not due.

To conclude, if our views of the proper limitations to be put upon an inquiry into whether an attachment has or has not been improperly issued require modification, we think it may be had, possibly, in not confining the inquiry on the motion to cases where the facts are entirely undisputed, or where the irregularities or defects or improper modes of procedure are intrinsic and not dependent upon proofs aliunde the record. The order of the district court dissolving the attachment is reversed.

PEMBERTON, C. J., and DE WITT, J.,
concur.

(16 Mont. 265)

GRIGGS, COOPER & CO. v. KALISPELL
MERCANTILE CO.

(Supreme Court of Montana. June 3, 1895.)

Appeal from district court, Flathead county;
Dudley Du Bose, Judge.

Action by Griggs, Cooper & Co. against the Kalispell Mercantile Company on promissory note and open account. From an order refusing to dissolve an attachment, defendant appeals. Affirmed.

H. G. McIntire and P. J. McLaughlin, for appellant. C. H. Foot and Strevell & Porter, for appellee.

HUNT, J. Suit for money due on promissory note and open account. Attachment issued. Motions to dissolve were filed by defendants, raising substantially the same legal questions discussed and decided in *Newell v. Kalispell Mercantile Co.*, 40 Pac. 866. No question of fact arose, however, herein, upon the argument or at all, as appears in the *Newell* Case, wherein the court required plaintiffs to elect to reduce the amount claimed in their affidavit, or submit to a dissolution of their attachment. The district court overruled the motion to dissolve on the legal questions presented, evidently construing the law of amendments as we do. As the principal points presented in this case are passed upon in the opinion of the *Newell* Case, supra, upon the authority of that decision the order of the district court refusing to dissolve the attachment is affirmed.

PEMBERTON, C. J., and DE WITT, J.,
concur.

(16 Mont. 360)

STATE v. BRETT.

(Supreme Court of Montana. July 8, 1895.)

FILING INFORMATION—CONSTITUTIONAL LAW—
FORGERY—CITY WARRANT.

1. Under Const. art. 3, § 8, allowing criminal actions to be prosecuted by information "after examination and commitment by a magistrate, or after leave granted by the court," an information may be filed with leave of court without examination and commitment.

2. Const. art. 3, § 8, in allowing an information to be filed with leave of court without preliminary examination, does not violate Const. Amend. U. S. art. 14, prohibiting any law abridging the privileges or immunities of any citizen and any state from depriving any person of life, liberty, or property without due process of law, or denying any person within its jurisdiction equal protection of the laws.

3. A city warrant is a "draft," within the meaning of Comp. St. div. 4, c. 7, § 93, making it forgery to falsely make, alter, forge, or counterfeit any draft.

4. Where a city warrant valid on its face is altered with the intent to defraud, the crime of forgery is complete.

5. The fact that a city had exceeded the constitutional limit of its indebtedness at the time of the issuance of a warrant is no defense on a prosecution for a forgery of the warrant.

Appeal from district court, Lewis and Clarke county; H. N. Blake, Judge.

Henry Brett was convicted of forgery, and appeals. Affirmed.

Defendant appeals from a conviction of forgery. The information charged that the defendant, "having then and there in his possession a certain writing and warrant of the city of Helena for the payment of money, of the tenor following, to wit:

"\$7.50. Helena, Montana, Oct. 1, 1894.

"The treasurer of the city of Helena, Montana, will pay to the order of H. Mitchell seven $\frac{50}{100}$ dollars for labor, out of any moneys in the treasury belonging to the street fund.

Elbert D. Weed, Mayor.

"Stephen Carpenter, City Clerk.

"No. 19,608.

"Presented and registered, and not paid, for want of funds,

"Oct. 29, 1894.

"C. B. Garrett, R., City Treasurer.

"H. Mitchell.

—"Then and there falsely, fraudulently, and feloniously altered and raised the same by adding to the word 'seven,' in the body of said warrant, the letters 'ty,' and by falsely, fraudulently, and feloniously adding to the figure '7,' where the said figure appears in the body of said warrant, the figure '0,' so that said warrant became, and then and there was, of the tenor following, to wit:

"\$70.50. Helena, Montana, Oct. 1, 1894.

"The treasurer of the city of Helena, Montana, will pay to the order of H. Mitchell seventy ⁸⁰/₁₀₀ dollars for labor, out of any moneys in the treasury belonging to the street fund. Elbert D. Weed, Mayor.

"Stephen Carpenter, City Clerk.

"No. 19,508.

"Presented and registered, and not paid, for want of funds.

"Oct. 29, 1894.

"C. B. Garrett, R., City Treasurer.

"H. Mitchell.

—"With intent to injure and defraud the said city of Helena, which said city of Helena," etc.

The defendant filed a motion to quash the information, because "he was not legally committed, and is not legally held, in this: That the said informations do not charge the defendant with the offense for which he was held to answer, or any other offense disclosed before the committing magistrate, said defendant being charged by complaint before the committing magistrate for forging an order for the payment of moneys of the city of Helena to one J. Patrick, and the offense disclosed at such hearing relates to such offense alone, and no charge was made or facts disclosed at such hearing in regard to the offense charged in said informations, or either of them, nor was he held therefor." The court overruled the motion. The defendant then filed a demurrer, the principal grounds of which were that the instrument charged to have been forged is a city warrant, which is not made the subject of forgery, under the statutes; that the instrument charged to be forged is wholly void, in that the indebtedness of the city of Helena, as limited by the constitution and laws of the state, was exceeded by many thousand dollars at the time that the forgery is charged to have been committed. The demurrer was overruled. A trial was had. The state introduced its proof. Thereupon the defendant offered to prove "that the outstanding and unpaid bonds of the city of Helena, October 1, 1894, amounted to the sum of \$391,000; that the outstanding and unpaid warrants and floating indebtedness of said city of Helena, issued, registered, and unpaid, be-

fore the warrant charged to be forged by the defendant in said information, amounted to the sum of \$311,135, making a total of \$702,135 indebtedness of the said city of Helena; that the last assessment and valuation of property of said city of Helena in the year 1894, duly made by the regularly elected assessor of said city, amounted to the sum of \$13,500,000; that three per cent. of said valuation and assessment, as limited by the constitution, is \$405,000; that the warrant charged to be forged in the information is void by the constitution, and utterly worthless for all purposes, and hence not a subject of forgery." This evidence was objected to, on the ground that it did not constitute a defense, and was immaterial and irrelevant. The court sustained the objection of the state. After conviction, a motion in arrest of judgment was made, because the court had no jurisdiction to try the case, because the information was not based upon the offense charged in the complaint before the committing magistrate, nor the evidence disclosed before said magistrate, nor on the commitment; also because the facts stated in the information did not constitute a public offense. The motion was overruled.

O. W. Wiley, for appellant. Henri J. Haskell, for the State.

HUNT, J. (after stating the facts). It appears by the record that the information upon which the defendant was convicted of the crime of forgery was filed by leave of court. Nevertheless, it is argued, a prosecution by information, where there has been no preliminary examination, is illegal, and a violation of constitutional rights. Const. art. 3. § 8, expressly provides that "all criminal actions in the district court, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment, without such examination or commitment, or without leave of court." It is evident that one of the objects of the constitution was to do away, to a great extent, with the machinery and expense of a grand jury, by substituting therefor prosecution by information. It is not necessary, in order to vest power in the county attorney, to file an information that there shall be a preliminary examination and commitment. He may act, after leave has been granted by the court, in a case like the one at bar, where there may not have been any charge or information before a committing magistrate. One of two methods of procedure is indispensable where an information is filed,—either there must have been an examination and commitment, or there must have been leave of court procured. But both steps are not required. A plain interpretation of the words of the constitution by which every clause of the section quoted shall be effective leads to this conclusion. We think, too, that

the rights of a defendant are guarded, no matter what procedure is followed.

1. Where an investigation into his guilt or innocence is had before a committing magistrate, and a commitment is the result, such a judicial inquiry is sufficient to justify the county attorney in proceeding in the district court without first obtaining leave of that court to file an information, formally charging the defendant with the offense for which he was examined, or any other offense, by the facts disclosed upon such preliminary hearing. The protection rests in the guaranty of a right to a judicial review of the matter by an impartial magistrate.

2. Where no examination has been had before a magistrate, and no commitment has been made, in such case, to protect the rights of the defendant, and to guard him against oppression or malice, and to prevent abuse of any general power vested in the county attorney, leave of the district court is necessary to be obtained. Thus, again, there is the guaranty that a judicial order will be required before there can even be a charge preferred. It is suggested that obtaining of a leave of the court is a mere perfunctory matter, and is granted of course. This argument, if true, reflects credit upon the several county attorneys of the state for having administered their offices with that high sense of impartial responsibility and power imposed upon them by the constitution, but it loses its entire force if an instance should arise where a prosecuting officer oppressively, maliciously, or otherwise illegally should attempt to unjustly harass any citizen by filing an information charging him with crime. At once, upon proper showing, or doubtless by order of the court of its own motion, where the court should believe that a wrong was about to be done, the leave of the court would be suspended or denied, until an inquiry could be had into the reasons for the official acts of the county attorney in filing the information, and until the court was satisfied by the showing made that the case was one where an information should be filed. Thus, again, the guaranty that judicial leave will be had before instituting a prosecution affords safety to the innocent, quite ample to prevent any abuse of the power of the state, in the hands of a prosecuting attorney. See *State v. Boswell*, 104 Ind. 541, 4 N. E. 676.

3. Where a grand jury investigates crime, they may act independently of any preliminary charge, or without the permission of the court. The formality of the organization of a grand jury, its well-tested utility as an institution of the law, its intelligence, its numbers, and its presumed impartiality, themselves are deemed sufficient assurances that the jurors will abide by their oaths under the law to present no indictment "through hatred, malice or ill will, nor leave any unpresented through fear, favor or affection, or for any reward, or the promise or hope thereof." For these reasons, doubtless,

the constitution has vested this power of indictment in the grand jury, and saw fit not to restrict their jurisdiction by any limitations other than those usually governing the conduct of such a body.

We are cited by appellant to several cases in California, Kansas, and Michigan, but none of those decisions are applicable, because the provisions of the constitutions and statutes of those states either limit the right to file an information to cases where there has been an examination and commitment by a magistrate, or expressly prohibit that method of prosecution, unless there has been such examination and commitment. In California, by section 8, art. 1, of the constitution, offenses shall be prosecuted by information, after examination and commitment; and, by section 995 of the Code of Criminal Procedure of California, an information shall be set aside if, before the filing thereof, the defendant has not been legally committed by a magistrate. *People v. Christian* (Cal.) 35 Pac. 1043. Procedure like that of Montana, after obtaining leave of court, is not known to that state; and it is well to note that the annotations to sections 1730 and 1910 of the Penal Code now in force are not made with relation to the proper effect to be given to the authorization in the constitution of Montana permitting informations to be filed where leave of court has been obtained, without regard to whether there has been any preliminary examination before a magistrate. In Kansas, it is also expressly provided by statute (paragraph 5133, Gen. St. 1889) that "no information shall be filed against any person for any felony until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination," etc. In Michigan, it is provided by section 9555, p. 2299, How. Ann. St., that no information shall be filed until there has been a preliminary examination, unless such person shall waive his right to such examination. *People v. Evans*, 72 Mich. 367, 40 N. W. 473.

Appellant raises the additional point that even if the constitution of the state does authorize prosecution by information without preliminary examination having been had, where leave of court is first obtained, such a proceeding is a deprivation of the liberty of the citizen, without due process of law, and is an infringement abridging the privileges and immunities of citizens of the United States, as guaranteed by the fourteenth article of the amendment of the constitution of the United States. The supreme court of the United States, in *Hurtado v. People*, 110 U. S. 534, 4 Sup. Ct. 111, 292, affirmed the doctrine laid down in the earlier case of *Davidson v. New Orleans*, 96 U. S. 97, that "it is not possible to hold that a party has, without due process of law, been deprived of his property when, as regards the issues affecting it, he has, by the laws of the

state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." "In the fourteenth amendment," speak the court, "by parity of reason, due process of law refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." "It follows that any legal proceeding, enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." And, again, the same court, in *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105, decided that a statute of New Jersey conferring upon one charged with crime the right to waive a trial by jury, and to elect to be tried by the court, and conferring power upon the court to try the accused in such case, is not in conflict with the constitution of the United States. Justice Shiras approvingly quotes from a former decision of Justice Bradley in *Missouri v. Lewis*, 101 U. S. 22, as follows: "There is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to; for, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances. The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states, separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceedings. * * * Where a part of the state is thickly settled, and another part has but few inhabitants, it may be desirable to have different

systems of judicature for the two portions,—trial by jury in one, for example, and not in the other * * * It would be an unfortunate restriction of the powers of a state government if it could not, in its discretion, provide for these exigencies."

Guided by the discussions and logical reasoning of such constitutional expounders as Justices Miller and Bradley, we are of the opinion that, by the clause under discussion, the framers of the constitution of the state formulated a somewhat new and presumably improved procedure in criminal cases, limited, but general in its application; always circumscribed in its operation by depending upon the sound approval of a court before its power may be legally invoked to charge a citizen with crime who has never had the opportunity of a hearing before a committing magistrate, or whose conduct has not been investigated by a grand jury. We are therefore unable to see how the proceeding authorized by the constitution in any way interfered with the administration of the regular course of law. Leave of court being necessary, the individual is not subjected to any arbitrary exercise of the powers of the state not restrained "by the established principles of private right and distributive justice." *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577; *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224. In *State v. Sureties of Krohne (Wyo.)* 34 Pac. 3, Groesbeck, C. J., in a learned opinion, analyzes a former statute of that state, which authorized a prosecuting officer, without any authority of the court first being obtained, to file an information, and comes to the conclusion that, although the provision was an extreme one, yet it did not conflict with the constitutional safeguards thrown about every citizen of the state. It is unnecessary for this court to pass upon such a statute, or an equally liberal statute to be found in the state of Washington, and criticised by Judge Handford in *Re Humason*, 46 Fed. 388, or the laws of other states which permit informations to be filed without the leave of court first obtained. See, on this point, *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635, and cases cited in the opinion of Groesbeck, C. J., *supra*. It would seem, too, that there is much more room for argument against the validity of a statute where the county attorney may proceed without leave of court than where such leave is a prerequisite to filing an information. But if, as is held in several of the decisions cited, there is no infringement upon rights where no leave is required, and no examination need be had, a fortiori can it be said that none are denied where a court must exercise a control over the action of the county attorney.

The point that a city warrant is not the subject of forgery is not well taken. The statute makes it forgery to "falsely make, alter, forge, or counterfeit any * * * writing obligatory, draft, * * * contract," etc.

Comp. St. div. 4, c. 7, § 96. A city warrant or order, regular on its face, and apparently drawn according to law on the city treasurer, signed by the mayor of the city, and countersigned by the city clerk, for the payment of moneys out of a specific fund, is a draft. Daniel, Neg. Inst. §§ 427, 428. It is therefore made the subject of forgery by the statute quoted.

The warrant is not illegal upon its face. On the contrary, it purported to be good and valid for the purposes for which it was made. On its face it would have the effect to defraud those who might act upon it as genuine. Therefore, if it was altered with intent to defraud on the part of the defendant, the crime of forgery was complete. *People v. Bibby* (Cal.) 27 Pac. 781; *State v. Vineyard*, 16 Mont. —, 40 Pac. 173; 2 Blsh. Cr. Law, §§ 523, 533.

Appellant finally argues that he ought to have been permitted to prove that the warrant was void, because the city of Helena had exceeded the constitutional limit of its indebtedness at the time the draft in question was issued. This argument is well answered by the observations of the supreme court of California in *People v. Munroe*, 35 Pac. 326. In that case the defendant was convicted of forgery. The writing was an assignment of the unearned salary of a public school teacher for the next ensuing month, together with an order on the city auditor of Los Angeles for the warrant representing such salary. It was claimed that the purported author of the writing, being a public school teacher, was a public officer, and that the sale or assignment of an unearned salary by a public officer was void, being against public policy, and, the writing being void, it could not be the basis of a charge of forgery. The court held that the writing was the subject of forgery, and, in discussing obligations *ultra vires*, said: "Obligations *ultra vires* stand upon the same level with contracts against public policy as to the offense of forgery. If one is not the subject of forgery, neither is the other. In England, corporations are created by special acts of parliament. Within those acts are found the measures of their powers. In this country, the general statutes, in connection with the articles of incorporation, which are public records, form the limitation of their powers. Thus, the world deals with corporations with a knowledge of the extent of their powers, and ignorance of the law forms no defense to the plea of *ultra vires*. If this appellant's position be sound, all contracts of corporations which are *ultra vires* are not the subject of forgery. Neither would bonds of municipal corporations which are *ultra vires* form the foundation for a prosecution for forgery. The determination of the powers of corporations, both private and municipal, is a question often involving the most complex principles of legal jurisprudence; and, if *ultra vires* contracts may not be forged, a rich field for the

successful practice of fraud is presented to the forger. In *State v. Eades*, 68 Mo. 150, it is said that the fraudulent making of a false municipal certificate of indebtedness is forgery, though the municipality had no power to issue such certificate; and this principle is in line with sound reason, and fully commends itself to our views. It is held that contracts made under an unconstitutional law are void. Every man is presumed to know the law, and appellant's contention would free the criminal forging such a contract. *Vilhac v. Railroad Co.*, 53 Cal. 208. In other words, it would be a good defense to a prosecution for forgery that the law under which a genuine contract similar to the forged one might be made is unconstitutional. Such a plea is too remote from the crime of which the accused stands charged, and his liberty must be regained on more substantial grounds. As to what contracts are against public policy, or *ultra vires*, or void as creations under unconstitutional statutes, we think matters entirely foreign to a prosecution for forgery. In the examination of such grave and abstruse questions, the criminal element of the case would soon be lost to view."

We find no error in the case. The judgment is affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(16 Mont. 372)

ATKINSON et al. v. CITY OF GREAT FALLS et al.

(Supreme Court of Montana. July 8, 1895.)

CITY INDEBTEDNESS—CONSTITUTIONAL LIMIT—ACTION TO ENJOIN CONTRACT—PROOF OF CITY'S LIABILITY.

Where, in defense to an action to enjoin a city from carrying out a contract for paving, on the ground that it is in violation of Const. art. 13, § 6, limiting the indebtedness of a city, defendants set up that the cost of the paving is payable out of a special fund assessed against the abutting land, and did not constitute a liability of the city, defendants must show that proper steps have been taken to assess the abutting lands for the paving, and that the contractor has expressly agreed to accept the fund raised by such assessment, and has waived all right to hold the city liable for the cost of the paving.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by Wilmer Atkinson and others against the city of Great Falls and another to enjoin the carrying out of a contract for paving. Judgment was rendered for defendants, and plaintiffs appeal. Reversed.

Ransom Cooper for appellants. Largent & Huntoon and Samuel Stephenson, for respondents.

PEMBERTON, C. J. This is an action for an injunction to restrain the defendants, the city of Great Falls and Henry Vogel, from carrying out a contract entered into between them for the paving of a street in said city. The contract price for the paving is \$43,000.

The main ground upon which the injunction is sought is that the carrying out of this contract will increase the indebtedness of the city beyond the constitutional limitation of 3 per centum of the taxable property in said city as shown by the last assessment thereof. Section 6, art. 13, of the constitution. The complaint alleges that the contract sought to be enjoined is in violation of said section, and is therefore void. The answer denies the facts stated in the complaint, and alleges that the cost of paving said street in accordance with the resolutions of the city council of said city and the terms of the contract entered into between said city and Vogel is assessed to the abutting owners on said street, except the sum of \$12,000, being the cost of paving the intersections and crossings of the street to be paved, and that the warrants to be drawn by said city in payment of such paving are to be drawn on a "special fund," assessed against the property abutting on the street to be paved, except for the sum of \$12,000 for paying the intersections and crossings of said street, which sum is to be paid out of the general fund of the city. The answer denies that the city, by incurring this indebtedness, will exceed the constitutional limitation of indebtedness as alleged in the complaint. At the conclusion of the testimony on the part of the plaintiffs the court sustained a motion by the defendants for a nonsuit, on the ground that there was no evidence to support the allegations of the complaint, and entered judgment dismissing plaintiffs' complaint, and for costs. From this judgment the plaintiffs appeal.

The evidence of the city clerk is substantially to the effect that at the time the contract in question was entered into the city was indebted in the sum of \$236,256.33; that the city had in cash in all its funds \$35,076.25; that \$20,859.92 were locked up in the suspended and insolvent Merchants' National Bank, and not available, except a 10 per cent. dividend on said sum, which had been paid; that there was due the city at the date of the contract the sum of \$15,640.73 from property benefited by special improvements; that on August 20, 1894, the city council awarded the contract in question to defendant Vogel. The county clerk and recorder of the county testified that the county board of equalization completed its work of equalizing the assessment roll of the county for the year 1894 on the 19th day of August of that year; that on the 22d day of August thereafter the board was in receipt of a letter from the state board of equalization, directing that the assessment of certain personal property should be raised 10 per cent. by the county board. But when the county board made such raise or increase in the assessment of this personal property does not appear. It is agreed that the assessment of taxable property for state and county taxes within the city of Great Falls for the year 1893 was \$7,500,000, and for the year 1894, \$8,000,000. It is contended

that the evidence of the city clerk should not have been admitted, because it was not the best evidence of the matters in relation to which he testified, in that he did not introduce the books of the city, showing the city's indebtedness. It is true that in his testimony he gave estimates, and assumed to approximate the indebtedness of the city in some instances. But he testified from memoranda, evidently prepared by himself from the books kept by him as clerk of the city. Nor does it appear that the production of the books was demanded, or that any specific objection was made to his testifying from memoranda made by him therefrom. While this evidence is not as clear and exact as it should have been, especially in a case involving such grave questions of law and fact, and while we cannot but condemn the looseness characterizing the introduction of the evidence, yet we think there was evidence substantially tending to prove the allegation of the complaint that the city, by entering into the contract in question, exceeded its constitutional limitation of indebtedness. The defendants claim in their answer that the sums due the city from property benefited by special improvements are resources of the city, and in no manner constitute an indebtedness or liability of the city. They claim that \$31,000 of the contract price of the paving of the street in question will not become an indebtedness of the city, as the same is to be paid out of a special fund assessed upon the property abutting upon the street to be paved. We think there was such a showing made by the evidence as to the amount of the city's indebtedness as to require the defendants to prove these allegations by showing that the warrants or other obligations drawn and to be drawn by the city on these special funds are so specific and unequivocal in their terms as to fix the liability for the payment thereof on such special funds, and leave no question that the city is in no way liable therefor. This can only be properly done by putting these warrants or other obligations in evidence, so that the court may determine, from an inspection thereof, whether the special funds are solely liable for the payment thereof, or whether or not they constitute an indebtedness of the city. A determination of this question is necessary in ascertaining whether the city has exceeded the indebtedness it may incur under the constitution.

It would seem that, if the city has taken the proper steps under the law to assess the property abutting on the street intended to be paved, under the contract in question, with the cost of the improvement, and if, in entering into the contract, it has expressly and clearly excepted and protected itself from any liability thereunder for such cost, and the liability created by such contract is confined and restricted to the special fund created by the special assessment upon the property abutting on the street to be paved,

and the contractor has expressly agreed to accept the fund raised by said special assessment, and has expressly waived all right to hold the city in any wise responsible or liable for the cost of the paving of said street, then such contract would not create such an indebtedness of the city as is prohibited by section 6, art. 13, of the constitution of the state. *U. S. v. Ft. Scott*, 99 U. S. 152; *Fowler v. City of Superior (Wis.)* 54 N. W. 800; *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462; *Dill. Mun. Corp.* (4th Ed.) § 135.

It is possible that, after a very full examination of the authorities bearing upon the question involved in this suit, a determination could be reached upon the record before us, but, as the briefs and arguments of counsel are almost wholly directed towards the single issue of what was the indebtedness of the city at the date of the contract in question, and as it is important that a decision on the motion for nonsuit be made without delay, we prefer to reserve any decision on legal questions until the facts are more clearly before us, and until argument may be had on such other points as are probably involved when the facts are finally determined. The judgment is reversed, and the cause remanded for new trial, and the district court is advised to issue a restraining order until the cause is finally determined.

DE WITT and HUNT, JJ., concur

(22 Nev. 374)

Ex parte AH KEE et al. (No. 1,443.)

(Supreme Court of Nevada. July 6, 1895.)

HABEAS CORPUS—ILLEGAL COMMITTANCE.

1. When an accused person is held by a judge for examination before him, under the provisions of the habeas corpus act, the judge is invested with such powers only as are conferred on other magistrates in matters of preliminary examination.

2. Under Gen. St. § 4032, providing that, when a person arrested for crime is taken before a magistrate, the examination must be completed at one session, unless it be adjourned for good cause shown, in which case the adjournment cannot be for more than six days in all, on hearing on habeas corpus, where the judge holds the commitment invalid, the commitment of relator for 27 days to await examination pending an adjournment is illegal.

Application for writ of habeas corpus by Ah Kee and others. Granted.

D. S. Truman, for petitioners. R. M. Beaty, Atty. Gen., for the State.

BONNIFIELD, J. On application of the petitioners, duly made, a writ of habeas corpus was duly issued and directed to D. J. Hadley, sheriff of Humboldt county, and made returnable before this court. On the return of the writ, the following facts, substantially, are disclosed, to wit: Upon the preliminary examination of the petitioners, charged with committing the crime of grand larceny, a justice of the peace of Humboldt county ordered

that they be held to answer, and they were committed to the custody of the sheriff. Subsequently, the petitioners were taken before Hon. A. E. Cheney, district judge of the district court of the Second judicial district in and for Humboldt county, in obedience to the commands of a writ of habeas corpus issued by him. Upon the hearing of the matter on the 18th day of June, 1895, the judge held that the warrant of commitment was wholly insufficient to authorize their detention by the sheriff. It appearing to the judge that the petitioners are guilty of a criminal offense, he committed them to the custody of the sheriff for examination before him, and set the 15th day of July, 1895, for such examination. The petitioners then and there, by their attorney, objected to the adjournment of the examination to such late day, and on the next day (the 19th day of June) applied for a modification of the order, fixing July 15th for the examination, so that it might be proceeded with on the 22d day of June. The application was denied, on the ground that the judge had prior official engagements. The petitioners objected, and excepted to the ruling denying their request. The petitioners are now held and detained by the sheriff under the order of the judge committing them for examination before him to be held on the 15th day of July. Is their detention illegal? We are of opinion that it is, and that they must be discharged from custody.

When an accused person is held by a judge for examination before him under the provisions of the habeas corpus act, he is invested with such powers only as are conferred on other magistrates in matters of preliminary examinations. A person accused of and arrested for crime is entitled to prompt examination by the spirit and letter of the General Statutes, as will appear from the several provisions. The defendant must in all cases be taken before the magistrate, without unnecessary delay by the arresting officer. Section 4002. If the magistrate who issued the warrant of arrest be absent or unable to act, the defendant may (must) be taken before the nearest or most accessible magistrate in the same county. Section 4001. When the defendant is taken before the magistrate upon an arrest, he shall be immediately informed of the charge against him, and his right to the aid of counsel. Section 4029. The magistrate shall immediately after the appearance of counsel, if counsel be required, or after waiting a reasonable time for counsel, proceed to examine the case. Section 4031. The examination must be completed at one session, unless it be adjourned for good cause shown. The adjournment cannot be for more than two days at each time, nor more than six days in all, unless by consent or motion of the defendant. Section 4032. A prisoner's rights are to be considered and respected. He is not presumed to be guilty because he is under arrest. The presumptions are the other way. The examination should not be

delayed to suit the convenience or personal accommodation of the officers of the law. Church, *Hab. Corp.* (2d Ed.) § 242; *In re Peoples*, 47 Mich. 626, 14 N. W. 112. In the case under consideration, the petitioners could have been examined before any justice of the peace in Humboldt county when the judge was unable to proceed with the examination on account of other official duties. The petitioners being held in custody of the sheriff for examination since the 18th day of June, and no examination having been had, and their examination having been adjourned for more than six days, without their consent, their restraint is illegal, and they are entitled to their discharge from the custody of the sheriff of Humboldt county, and such discharge is hereby ordered.

BIGELOW, C. J., and BELKNAP, J., concur.

(21 Colo. 367)

WILCOX et al. v. JOHN.

(Supreme Court of Colorado. July 1, 1895.)

PUBLIC LANDS—MORTGAGE BEFORE FINAL PROOF.

A mortgage or a trust deed of land by a pre-emptor prior to the time of making his final proof thereon is not a grant or conveyance, within Rev. St. U. S. § 2262, providing that "any grant or conveyance which he may have made except in the hands of a bona fide purchaser for valuable consideration, is null and void except as provided in section 2288."

Appeal from district court, Las Animas county.

Action by James M. John against James Wilcox and others for possession of land. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action in the nature of an action of ejectment, brought by appellee, James M. John, as plaintiff, to recover from appellants, James Wilcox and William Moad, a quarter section of land situate in Las Animas county. There is no dispute as to the facts, which are as follows: One James Hunt was the patentee of the land in question, and each of the parties to this suit derails title through said Hunt. On the 18th day of November, 1886, the title to the land then being in the United States, Hunt was residing upon the same, claiming title thereto under the pre-emption laws of the United States. At that date, and while so residing upon and claiming the land as a pre-emptor, Hunt executed a deed of trust, in which he attempted to convey said quarter section to one A. C. McChesney, as trustee, for the use of one W. F. Hall. This trust deed was executed for the purpose of securing the payment of \$204, which Hunt at that time borrowed from Hall for the purpose of paying the expense of proving up and purchasing the land from the government. It is admitted, however, that no part of the money borrowed by Hunt was ever used to pay for the land. In fact, he did not at that time make final proof and entry, but soon thereafter caused the greater part of the mon-

ey to be paid to A. C. McChesney, the trustee, who returned \$140 of it to William Hall, to be applied in part to the satisfaction of the Hunt note. Hunt continued to reside upon the land, holding and claiming the same as a pre-emption, and on the 20th day of June, 1888, made final proof in regular form, and received his certificate of purchase therefor. On March 16, 1888, S. A. Pauley and Henry George obtained a judgment against Hunt for the sum of \$427. This judgment was rendered by the district court of Las Animas county, and the plaintiffs claimed a lien on the real estate then owned by the defendant, or which he might thereafter acquire, but no transcript of the docket entry of this judgment was ever filed with the clerk and recorder. Execution was, however, issued, and delivered to the sheriff; and, after Hunt obtained title to the land, this execution was levied upon the premises in question, and the same were sold and deeded by the sheriff to the plaintiff in this action. This levy and sale were made subsequent to the conveyance to Wilcox and the filing of the same for record, as herein-after detailed. On the 26th day of June, 1888, Hunt executed a warranty deed to the defendant James Wilcox, which deed was immediately filed for record and duly recorded in the office of the county clerk and recorder of Las Animas county. The deed describes the land as located in range 23, and adds the following words: "Being the same land as acquired from the government by virtue of receiver's receipt No. 5,018." In this deed the range is incorrectly given; it should be 63 instead of 23. Upon these facts, the district court entered judgment for the plaintiff. The defendants bring the case here by appeal.

Northcutt & Franks, for appellants. James H. John, for appellee.

HAYT, C. J. (after stating the facts). Appellee claims title through two sources, viz.: First, a purchase made under the trust deed of the pre-emptor to McChesney, to secure the payment of a debt due from him to Hall; second, the judgment, levy, and sale resulting from the suit of Pauley and George. It is conceded that the title under the deed of trust is prior in point of time to that claimed by appellants, and it is also admitted that all the necessary steps, such as recording, foreclosures, etc., under the trust deed were duly taken, the single question being as to the right of a pre-emptor to mortgage the land before making final proof and obtaining a receiver's receipt for the same. Appellants claim that a trust deed given under such circumstances is in contravention of section 2262 of the Revised Statutes of the United States, which requires of the pre-emptor, among other things, an oath that "he has not settled upon and improved such land to sell the same on speculation, but in good faith, to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made

any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself." It is further provided that "any grant or conveyance which he may have made, except in the hands of bona fide purchasers for a valuable consideration, shall be null and void, except as provided in section 2288." It has been held in a few cases that a mortgage or a deed of trust upon land is a grant or conveyance within the meaning of the statute, and consequently void. *Brewster v. Madden*, 15 Kan. 249; *Brake v. Ballou*, 19 Kan. 397; *Ainsworth v. Miller*, 20 Kan. 220. And this seems to have been the ruling of the land department at one time; but, as early as 1882, Mr. Teller, the secretary of the Interior, called attention to the unsoundness of the prior decisions of the department, and in a carefully prepared opinion held that the mere possibility of a title resulting for the benefit of another person, as in the case of a mortgage, was not sufficient to prevent the pre-emptor from obtaining patent. The rule then announced, has, we think, been uniformly followed by the department since. It is founded upon sound reasons, and in practice it has not infrequently been of benefit to settlers in negotiating loans to carry them over periods of drought or of business depression, and should be maintained, if not inconsistent with the terms of the statute, as it is of the highest importance that the decisions of the courts in these matters should be in harmony with the rulings of the land department.

The rule contended for by appellants whereby a mortgage is held to be interdicted is founded upon a somewhat forced construction of the words "grant" and "conveyance," as used in the statute. By the later, and, as we think, the better-considered cases, it is held that neither a mortgage nor a deed of trust is a grant or a conveyance within the prohibitory clause of the statute. *Norris v. Heald*, 12 Mont. 282, 29 Pac. 1121; *Fuller v. Hunt*, 48 Iowa, 163; *Jones v. Tainter*, 15 Minn. 512 (Gil. 423). It is not claimed in this case that the deed of trust was executed for any purpose prohibited by the statute. On the contrary, the bona fides of the transaction is admitted. The title procured by plaintiff as a result of the foreclosure and sale, being in all respects regular, must be upheld. This renders any consideration of appellee's second source of title unnecessary. The judgment of the district court is affirmed. Affirmed.

(21 Colo. 348)

WILCOX v. AMERICAN SAV. BANK.

(Supreme Court of Colorado. July 1, 1895.)

AMENDMENT OF PLEADINGS—TIME TO PLEAD.

1. Under Code Civ. Proc. § 78, providing for amendments to pleadings, a complaint in an action by a corporation on a note may be amended
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by the insertion of the word "The" as a part of the name of the corporation, and by changing the middle initial of the maker of the note from "N." to "H."

2. A refusal to allow the defendant further time to plead after amendment of the complaint by insertion of the word "The" as part of the name of the suing corporation is proper.

Appeal from district court, Las Animas county.

Action by the American Savings Bank against James Wilcox on promissory notes. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action brought by appellee against the appellant upon six promissory notes alleged to have been executed by appellant, C. N. Swatzel, and John McBride, and payable to the order of the American Savings Bank of Trinidad. The original complaint was entitled "American Savings Bank v. James Wilcox," and, *inter alia*, averred that the plaintiff was a corporation duly incorporated, etc. Defendant answered by a verified general denial. Over objection, the plaintiff was permitted to introduce in evidence a certificate of incorporation of "The American Savings Bank," and also certain notes set out in *haec verba* in the complaint, with the exception that they were signed "C. H." instead of "C. N." Swatzel. Upon a motion for a nonsuit being interposed because of a variance between this proof and the allegation of the complaint, and over the objection of appellant, the court allowed plaintiff to amend by inserting the word "The" before the name of the corporation in the title of the action, and "H." in lieu of "N." as the initial letter of Swatzel's middle name. Upon being denied further time to plead to the complaint as amended, appellant declined to introduce any testimony, whereupon the court rendered judgment in favor of appellee for the amount of the note and interest. Appellant assigns error upon the action of the court below in admitting the foregoing evidence, and allowing the amendment specified.

Northcutt & Franks, for appellant. W. H. Spencer and W. B. Morgan, for appellee.

GODDARD, J. (after stating the facts). It is apparent from this record that the omission to prefix the article "The" to the name of plaintiff bank, and the mistake in the initial letter of Swatzel's middle name, were mere clerical errors, that could not possibly mislead the appellant as to any defense he may have had to the notes in question; nor could their correction by amendment upon the trial in any way inure to his prejudice. He was informed of the identity of the notes sued on by the face of the complaint itself, and, by the copies there set out, he was advised that the American Savings Bank was the payee, and was in fact the plaintiff, and also that they were the notes he executed in conjunction with C. H. Swatzel. It is too plain to admit of controversy that the court

below, in allowing the amendments complained of, acted clearly within the purview of section 78 of the Code of Civil Procedure, and would have violated both its letter and spirit had it not permitted them to have been made.

The further objection to the testimony of the witness Robinson is equally without merit. It is to be regretted that section 391 of the Code, which provides for the assessment of damages upon the dismissal of an appeal for want of prosecution, is not broad enough to cover cases wherein appeals are taken upon trivial grounds; but, since it is not, we can do no more than simply to affirm the judgment of the court below, which is accordingly done. Affirmed.

(21 Colo. 218)

PEOPLE ex rel. BENTLEY et al. v. LE FEVRE et al.¹

(Supreme Court of Colorado. May 20, 1895.)
DISTRICT COURT JUDGE—LENGTH OF TERM OF OFFICE—FILLING VACANCY.

Const. art. 6, § 12, as amended in 1886, provides for the election in each district of one or more district court judges for a term of six years. Section 15 provides that district court judges shall be elected at the first general election thereafter, and that the terms of all district judges shall expire on the same day. Section 14, as amended in 1886, provides that the number of districts and number of judges for each district may be increased or diminished by the general assembly. Section 29, which originally provided that vacancies in the offices of district judges should be filled by election unless the unexpired term did not exceed one year, when it was to be filled by appointment of the governor, was amended so as to provide for the filling of any vacancy in the office of district judge by appointment of the governor, the appointee to hold office "until the next general election, and until their successor elected thereat shall be duly qualified." *Add*, that the term of office of a district judge appointed to fill a vacancy created by resignation, or to fill a newly-created office, or elected at the first election after the creation of a new office or a new district, expires at the general election at which judges of the district court are regularly elected. Goddard, J., dissenting.

Application on the relation of John A. Bentley and others against Owen Edgar Le Fevre and others, for writ of quo warranto to test defendants' right to the office of district judges. Writ denied.

In 1887, under the authority of amended section 14 of article 6 of the constitution, the general assembly increased by one the number of judges in the Second judicial district of this state. The office was provisionally filled by the appointment thereto by the governor of Platt Rogers, who held the office until the next general election, in November, 1887, when T. S. Decker was elected as his successor. At the general election in 1888, Judge Decker was again elected to such office for a full term, qualified, and held the same until December, 1890, when he resigned. To fill the vacancy caused by that resignation

the governor appointed the relator Bentley, who held the office until the general election in 1891, when Judge Bentley was elected as his own successor. In 1889 the general assembly again increased the number of judges of this district by providing for two additional judges, and T. B. Stuart and O. B. Liddell were appointed by the governor to hold such offices until the next general election, at which regular election, in November, 1889, the relators Rising and Graham were elected as successors to Stuart and Liddell, and entered upon the discharge of the duties of their office early in the following December. In 1891 the legislature provided for one more judge for this same district, and Alvin Marsh held the office by appointment until the November election in 1891, when the relator Barns was elected, and qualified as the successor of Judge Marsh. At the regular election in 1894 five judges were elected in this judicial district,—the four respondents and George W. Allen. The four relators held the office of district judge continuously from the time of their election as aforesaid until the 8th day of January, 1896, which is the day fixed by statute for the beginning of the term of office of all state, district, and county officers elected for a regular term at the previous general election; upon which day the respondents, as it is alleged, ousted the relators from such said office, and now are holding such office, and performing the duties and receiving the salary thereof.

This is an action in the nature of quo warranto to determine the rights of relators to the office of judges of the district court of the Second judicial district of the state. The question to be determined is the tenure of office of a district judge elected at a time other than at the election which will, in this opinion, be termed the regular sexennial election for district judges; and, as is the case with three of the relators, the tenure of office of district judges elected thereto at the first election held under the provisions of an act of the legislature passed under the authority of amended section 14 of article 6 of the constitution, creating a new judicial district, and providing for a judge therein, or providing for additional judges in an old or existing district. The issue is well defined, and involves the proper interpretation and construction of the constitutional provisions which are copied below. The question may be differently stated in this way: Does a district judge, so elected, hold his office for the full term of six years, or only until the next succeeding sexennial election, and until a successor is elected and qualified? Section 12 of article 6 of the constitution, as it was adopted in 1876, divided the state into judicial districts, "in each of which there shall be elected by the electors thereof, one judge of the district court therein, whose term of office shall be six years." By section 18 the number of the original districts

¹ Rehearing denied July 1, 1896.

was fixed at four, "until otherwise provided by law." By section 14 it was provided that the general assembly may, after the year 1880, but not oftener than once in six years, increase the number of the judicial districts, and the judges thereof. In 1886 sections 12 and 14 were amended—section 14 by providing that the general assembly, by a two-thirds vote of each house, may at any session increase or diminish the number of judges for any district, or increase or diminish the number of judicial districts and the judges thereof. Section 12 was amended so as to harmonize with amended section 14, by providing that one or more judges shall be elected in each district. In all other respects these two sections are as originally adopted. Section 15 has never been amended, and is as follows: "The judges of the district court first elected shall be chosen at the first general election. The general assembly may provide that, after the year eighteen hundred and seventy-eight, the election of the judges of the supreme, district, and county courts, and the district attorneys, or any of them, shall be on a different day from that on which an election is held for any other purpose, and for that purpose may extend or abridge the term of office of any such officers then holding, but not in any case more than six months. Until otherwise provided by law, such officers shall be elected at the time of holding the general elections. The terms of office of all judges of the district court elected in the several districts throughout the state, shall expire on the same day; and the terms of office of the district attorneys elected in the several districts throughout the state shall, in like manner, expire on the same day." Section 20, as it originally stood, is as follows: "All officers provided for in this article, excepting judges of the supreme court, shall respectively reside in the district, county, precinct, city or town for which they may be elected or appointed. Vacancies in elective offices shall be filled by election, but when the unexpired term does not exceed one year, the vacancy shall be filled by appointment as follows: Of judges of the supreme and district courts, by the governor; of district attorneys, by the judge of the court for which the office appertains, and of all other judicial officers by the board of county commissioners of the county where the vacancy occurs." The first sentence of the amended section is the same as the first sentence of the original, and from there on the amended section is as follows: "Vacancies occurring in any of the offices provided for in this article shall be filled by appointment as follows: Of judges of the supreme and district courts, by the governor; of district attorneys, by the judge of the court of the district for which such attorney was elected; and of all other judicial officers, by the board of county commissioners of the county wherein the vacancy occurs. Judges of the supreme, district, and county courts

appointed under the provisions of this section shall hold office until the next general election and until their successors elected thereat shall be duly qualified."

Willard Teller, V. D. Markham, Caldwell Yeaman, H. B. O'Reilly, A. S. Blake, and Thomas Mitchell, for plaintiffs. Joseph C. Helm, Bartels & Blood, James H. Brown, and Victor A. Elliott, for defendants.

CAMPBELL, J. (after stating the facts). The foregoing are all the specific provisions of the constitution which we deem necessary to set out in full, though others will be referred to in the appropriate place. We premise by saying that this court has already passed upon a case similar to this, and has given to the provisions of the constitution applicable to the case at bar a construction which, if adhered to now, settles this case in favor of respondents. If we followed our own inclinations, we would refrain from an extended opinion at this time, and content ourselves by referring with approval to the able opinion by Mr. Justice Elbert in the former case. But the decision in that case was given in response to a request from the governor of the state, under the authority which he has by amended section 3 of article 6 of the constitution, and in one sense may not be as binding a precedent as if rendered in a case litigated by opposing parties. Yet, as a matter of fact, an inspection of the files and record in that case shows that, while the proceeding was ex parte, the principal or only brief was filed by the judges then holding office, and claiming that their term continued for the full period of six years, which contention is the same as that now urged by the relators. Most elaborate and exhaustive arguments, both oral and written, and a number of voluntary opinions given by distinguished and able members of the bar of this and other states, have been presented for our consideration, and, considering the premises mentioned, the importance of the question involved, the great public interest which the case carries, and the fact that a precedent should be established in a case where unquestionably both sides appear, and the issues involved are fully presented, we have concluded to give to it more consideration than otherwise we would be disposed to do.

If we correctly understand the contention of relators, it is that the term of office of a district judge is, by amended section 12, unvaryingly fixed at six years, and that whenever a district judge is elected by the people, whether at the regular sexennial election for district judges or at an election to fill the office after the expiration of the term of one appointed to fill a vacancy, or to fill an office provided for in a newly-created district, or an office where an additional judge is provided for in an old or existing district, the one so elected holds for the full period of six years. The theory of respondents is that only

such judges as are elected at the regular sexennial election for district judges hold for the full term of six years, and that those elected at any other election hold only from the time of their election until said regular sexennial election occurs, and until their successors are duly elected and qualified. The propositions into which the arguments of counsel for relators may be conveniently divided are as follows:

First. Under the provisions of the constitution which are involved in this case, section 15 was applicable only to those district judges who were elected at the first general election in 1876 (and when section 15 is mentioned in this opinion reference is had to that portion thereof relative to the expiration of the term of office of district judges). Thereafter the conditions were such that nothing could arise upon which the section might operate, and therefore its usefulness and purpose were at an end.

Second. Under said original provisions, section 15 still may be considered applicable to all district judges who were elected at any time, especially as section 29 expressly makes mention of unexpired terms in the office of district judges.

Third. But, after sections 12, 14, and 29 were amended, the uniformity in the election of district judges which was contemplated and intended by article 6 before any amendments were adopted, was destroyed, fractional or unexpired terms in the office of district judges abolished, and section 15 repealed by implication.

Fourth. Under the acts of the general assembly passed in pursuance of the authority granted by amended section 14 of article 6 (a) there was no vacancy in the office of district judge of a new district, or in the office of an additional judge in an old one, to be filled before the election thereto of an incumbent; (b) if, however, there is such a vacancy to be filled, then, by virtue of the provisions of amended section 29, it is completely filled by the appointment made by the governor, and after the expiration of the term of the appointee who holds till the next general election there is no vacancy to be filled, and the one first elected thereafter holds for a full term, and not for any part of a vacancy.

However inconsistent may be the arguments of different counsel for the same party to a suit, if any position assumed is sound it is the duty of the court to select the true and reject the false. This reference is pertinent at the outset, because it will be observed that these four propositions do not altogether harmonize, and the numerous arguments made by different counsel, and by those who have favored us with their briefs, are not always in harmony as to every contention urged. Our reference, therefore, in this opinion to the arguments advanced by counsel must not in every sense be taken to include all of the counsel for relators. Unless thus understood, it might appear that the same able counsel

were presenting inconsistent and self-contradictory arguments on the same proposition, and thus be subject to the charge of inconsistency.

The foregoing is the chronological order, and perhaps the logical order, in which these propositions naturally present themselves. The second and third propositions might properly be included in one statement, and, while it will not be possible to keep entirely distinct the first three propositions in the discussion, yet by reason of the conclusion which we have reached it will best subserve our purpose first to consider the second and third propositions in one general discussion, and then in the main to consider the remaining propositions in at least a partially separate treatment.

1. Relators' argument is not strengthened by reason of anything contained in amended section 12. The only respect wherein it differs from the original section is in that provision authorizing the election of more than one judge in a given district whenever the general assembly has provided for more than one judge therein. Original section 14 gave to the general assembly the power to increase the number of districts and the judges thereof after the year 1880, but not oftener than once in six years. From this fact relators would draw the inference that this limitation upon the power of the general assembly to act only once within the period of six years indicated a recognition in this section of the applicability of section 15 to the terms of office of all district judges whenever elected; but when, by amended section 14, all restriction as to time was removed from the legislature, and authority given to increase the number of judges at any session, and as often as it might see fit, this clearly indicated an opposite or contrary recognition, to the effect that section 15 no longer was applicable to any future election. But even a casual reading of the original section will dispel any supposition that original section 14, of itself, was a recognition of any uniformity in the election of district judges. As the sessions of the legislature, under the constitution, come in the odd-numbered years, and the regular sexennial election for district judges in successive periods of six years from the year 1876, under the old section, when the legislature provided for an increase of judges, the first election thereof, after the taking effect of the act creating the new office, could not, in the ordinary course of legislation, well be contemporaneous with the said sexennial election. Of course, under the amended section, there could be no identity as to time in such elections. In all other respects amended sections 12 and 14 are as they were in the original sections, and no support for relators' theory can be drawn from the amendments to either section. In our view, the only amended section that furnishes any basis for the third and second propositions advanced by relators is amended section 29. Original

section 29 provided that all "vacancies in elective offices shall be filled by election, but when the unexpired term does not exceed one year, the vacancy shall be filled by appointment." The amended section provides that vacancies in judicial offices "shall be filled by appointment" and "judges of the * * * district and county courts appointed under the provisions of this section shall hold office until the next general election." It will be observed that the new section omits the clause of the old as to unexpired terms, and from this it is said (which is undoubtedly true) that some intention must be imputed to such omission. By a most ingenious argument relators claim that in making this omission the intention of the people when the amendment was adopted clearly was to do away with all fractional terms in the office of district judge, and make all elective terms therein a full term of six years. For, say relators, if there had been the intention still to preserve a fractional term, it would have been easy to express that desire by retaining the provision to that effect, or by the employment of language similar thereto in meaning. But the object of this amendment has been considered by this court in the case of *People v. Wright*, 6 Colo. 92, where it is said: "Under this repealed section [29], whenever a vacancy occurred in any elective judicial office, and the unexpired term exceeded one year, it became necessary to call and hold a special election to fill the vacancy. The chief, if not the only, object of the amendment, was to obviate the expense and inconvenience of such special elections." If such was the object, and the only one,—as it seems to us it was,—then there was no intention on the part of the people in omitting the language in question, such as is claimed by relators. Under the original section, if the vacancy was for less than one year, it was filled by appointment; if for more than one year, by election. The unexpired term of a district judge referred to in original section 29 existed, not because of its recognition in that section, but evidently because the full term of six years prescribed in section 12 was necessarily limited in every case where the incumbent held under an election occurring at any time other than the regular sexennial election; so that in such cases the full term of six years was qualified by section 15. The use of the words "unexpired term" in original section 29 did not make of the term of a district judge two classes or kinds, viz. a full term and a fractional term; but the use of such words therein was merely a recognition of such classes made necessary by the other two sections named, and original section 29 merely provided how the unexpired terms should be filled whenever the contingencies happened which gave rise to them, and not that there should be full terms and unexpired terms in the office. This being so, when section 29 was amended for the objects stated above, there was no longer any

reason for retaining the words, "when the unexpired term does not exceed one year." The unexpired term of such office was not intended to be destroyed, but it would exist thereafter as well as before whenever an election was held at any time other than at the sexennial election. The amendment, therefore, was made, not to abolish fractional terms, but to do away with special elections; and thus change the manner of filling vacancies in a term, and by so doing the continued existence of a vacancy and fractional and full terms was recognized.

2. Much of what has been elsewhere said is applicable to the first proposition, but we proceed now to a separate consideration of the same. By laying special emphasis upon section 12 as entirely disconnected, relators insist that every term of a district judge who is elected to the office must be for the full term of six years. Of course, this applies to the district judges elected at the first election. Section 15, say the relators, applies only to such judges, or, if it does not, then section 12 must, in certain cases, be qualified and limited. Indeed, the terms of the district judges first elected might not be of the same length, although section 12 unqualifiedly fixed the term at six years; for by section 6 of the schedule the terms of the district judges were made to begin from the filing of their respective oaths of office. The constitution being silent upon this subject, it was strictly the exercise of a legislative power to fix the beginning of the regular terms of those judges elected at all subsequent elections. This the legislature did (section 936, Laws 1877), and made the regular terms of district judges begin on the second Tuesday of January next after their election. Therefore the term of office of the district judges first elected began when they filed their respective oaths of office, and ended on the second Tuesday next after the sexennial election for district judges in the year 1882; and, if section 12 is to be taken without reference to any other kindred provision, we see that it was not applicable, even to the district judges first elected. This merely serves to emphasize the point that it is necessary for all the kindred provisions of the constitution to be construed together. But we say that these original sections must be construed together. It is conceded by all the counsel that fractional terms still exist in the office of supreme judges, but section 7 of article 6 expressly provides that the term of office of a supreme judge shall be nine years, except as otherwise provided in that article. The only exception therein provided is as to the judges elected at the first election in 1876, who, by virtue of section 8 of article 6, are so classified that one shall go out of office every three years. That this latter section may be so allowed to operate, section 7 is qualified whenever a supreme judge is elected to fill a vacancy in the term or in the office of any supreme judge. The reason for this concession is so well stated in the case of *Simpson v.*

Willard, 14 S. C. 206, that we quote it in full. First, however, we should state that, prior to this decision, the same court had held that whenever one is elected to fill a casual vacancy in the office of clerk of the court of common pleas, he holds, not for the unexpired term, but for a full term of four years, because it must be controlled by the imperative mandate of section 13 of article 4 of the constitution of South Carolina, which declares that such clerk, when elected, shall hold his office for a term of four years, and there was no other provision bearing upon the question. The language of the court as to the point now before us is: "But in the case of a casual vacancy in the office of justice of the supreme court, whether chief or associate, the rule is different, because the provision fixing their term of office at six years must necessarily be qualified by that other provision in the same section which requires that they shall be so classified as that one of them must go out of office every two years; otherwise this latter provision would be entirely defeated. Hence, in filling a casual vacancy in the office of justice of the supreme court, it must be so done as not to disturb this essential feature of classification stamped upon that tribunal by the constitution. Manifestly this can only be effectually preserved by filling casual vacancies for the unexpired term only." The same reasoning applicable to such a vacancy in the office of a district judge under our constitution is equally pertinent. Section 15 expressly provides that the term of office of all district judges who are elected shall expire on the same day. This provision cannot be preserved unless district judges who are elected to fill a vacancy created by the resignation of an incumbent of an existing office, or those who are appointed to fill a newly-created office, or who are elected at the first election after the creation of a new office or a new district, in the one case, hold for an unexpired term, full or fractional, as the case may be, and, in the other, for a fractional term only.

3. By counsel on both sides much learning has been displayed, and many fine distinctions drawn, as to the meaning of "term," "office," "incumbent," "term of office," and "vacancy," but we consider the discussion neither very important nor helpful. It is sufficient to say that "term of office," as used here, means the period or limit of time during which the incumbent is permitted to hold. "Vacancy" applies not to the incumbent, but to the term, or to the office, or both, whether to the term, or to the office, or both, depending generally upon the context. In this connection the position assumed by relators as to this branch of the case is as follows:

(1) Where, as counsel express it, a new office is created by the legislature, and there is given in the act creating the office authority for the filling thereof by an appointment at the hands of the governor, to hold until the next general election, when the governor

makes the appointment he acts as the agent of the legislature, and not by virtue of the authority vested in him by amended section 29 of the constitution, which latter provision gives him the power only to fill "vacancies" in the office of a district judge. The office, say relators, exists as soon as the act takes effect, but, as elective offices (except only in case of designated vacancies) are to be filled by election by the people, the term of the office does not begin until an incumbent occupies it under an election. The holding of the appointee is no part of the term of the office, but a sort of nondescript.

(2) If, however, the time between the taking effect of the act, when the existence of the office begins, and the first election is a vacancy to be filled by the governor under his constitutional prerogative, then, when he makes the appointment, the vacancy is completely filled, and the first election thereafter is to fill the office for a regular or full term thereof.

Under the conclusion reached by us upon the third general proposition, it does not become necessary fully to discuss or determine these somewhat metaphysical questions. It really is not material what appellation should be given to the holding of one who is appointed to fill an office empty by the resignation or death of a former incumbent, or to the holding of one elected to the office at the first election after a new office has been established, as the successor of, and at the expiration of the holding of, an appointee. Whether such be, in the first instance, the filling of a vacancy (in the strictest sense) in a regular term, or an unexpired term, or, in the second instance, the filling of a fractional or a partial term, the result, in so far as the time which such an incumbent holds is concerned, is just the same; because, by our conclusion heretofore reached, that section 15 is to be construed along with section 12, the effect of the two sections together creates a regular or full term, and a fractional term in the office of a district judge. The tenure of office or the holding of such appointee and such incumbent under election is necessarily fixed by such conclusion. The holding of the appointee by the express provisions of the act creating the office is limited to the next ensuing election, and the holding of the one elected thereat as a successor of such appointee, by the construction which we have placed upon amended sections 12 and 15, is only until the next ensuing sexennial election; so it is immaterial what designation is given to such holding, so long as the length of the term of both is necessarily fixed for such length of time, as we have elsewhere herein declared. In amended section 29 there is no specific provision as to the character of the holding of one elected to succeed an appointee to fill a vacancy; but, as we have said, the construction placed upon amended sections 12 and 15 necessarily gives rise to a full and fractional term in the office of a district judge, and

makes such holding of the appointee a portion of a fractional term, and the holding of the one elected to succeed the appointee a holding for the balance of such fractional term, or a holding of the entire portion of such fractional term, whenever such election is not the regular sexennial election. But, if necessary, it might well be established, in the absence of the construction which we have placed upon amended sections 12 and 15, that the term of the appointee in such case is the filling of a vacancy, under the principle established in the case of *People v. Rucker*, 5 Colo. 455, and that the holding of an incumbent under the first election is for an unexpired fractional term, the first part of which has been filled by the appointee; just as where one duly elected for a full term of six years resigns his office less than one year prior to the next ensuing sexennial election, and the governor makes an appointment to fill the vacancy, this full term of six years is made up of the holding of the elected incumbent, which holding is for a fractional term, or part of a term, and the holding of the appointee which is the filling of the vacancy in an unexpired full term.

At the risk of some repetition, which cannot well be avoided, our position can be made clearer by a comparison of the status and tenure of office of judges of the supreme and county courts with those of the district courts. Precisely the same provision exists in amended section 29 for filling vacancies in the office of supreme and county judges as for district judges, and the appointee in such case holds for the same time, and under the same conditions, and there is the same absence from the section of any designation of the holding of judges elected as successors of the appointee. If, however, the vacancy in the one case is completely filled by the appointee at the hands of the governor, the same result follows as to each of the other two. The section reads that vacancies in all of the offices shall be filled by appointment. But relators wish to confine this language to the one office of district judge, but say that it is inapplicable to the office of supreme judge or county judge because, in the former case, of another provision of the constitution, viz. section 8 of article 6, which provides for a classification of the office of the supreme court judges, so that one judge shall go out of office every three years; and, in the case of county judges, by reason of section 22 of article 6, which provides that at the general election in 1877, and every three years thereafter, there shall be elected at the general election a county judge, except as otherwise provided in article 6; which sections, relators contend, necessarily restrict and limit this particular provision of amended section 29 so that it may comply with said sections 8 and 22, and, amended section 29 being thus limited, these two sections will thus be permitted to stand. We think this is true, and we think it equally true that the same limitation is put upon this same provision of

amended section 29 by reason of that part of section 15 which requires that the terms of all the judges of the district court elected in the several districts throughout the state shall expire on the same day; and that in each case, if amended section 29 is to be taken with the limitations imposed by sections 8 and 22, so that the fractional or unexpired terms, as the case may be, still exist in the case of supreme and county judges, so section 15 still operates and has that effect necessarily upon the term of office of a district judge, which by section 12 is fixed at six years. But, say relators, while we concede that, were it not for amended section 29, section 15 would have that effect upon original section 12, yet, as sections 12, 14, and 29 have been amended, they must be taken as the latest expressions of the will of the people; and if, to give them, and each of them, full effect, some of the provisions of the constitution as originally adopted must yield, then such construction must be placed upon them by this court. We concede the rule of construction urged, and that, if there is a necessary conflict between these sections as amended and section 15 of the constitution as originally adopted, the latter must yield. There are, however, other rules of construction equally as binding, one of which is that each provision of the constitution, both original and amended, should, if possible, be so construed as to avoid any conflict between the different parts of the constitution. Another rule is that effect must be given to every provision and every clause and all of the language of a constitution, if possibly this can be done. If harmony can be preserved, that construction which will accomplish that result is to be preferred to that construction which will necessarily bring conflict.

We submit, in the first place, that if amended section 29 destroys fractional or unexpired terms in the office of a district judge, and enables all who are, at any election, elected to such office to hold for a full term of six years, such a result is accomplished by the omission of the words "unexpired term" in the amended section. If the effect of such omission, therefore, thus operates as to the office of a district judge, it applies equally to that of a supreme or county judge. If the presence of these words in the original section was what made fractional and full terms in the office of a district judge, so their presence had the same effect as to the office of a supreme and a county judge. But we hold that these words do not, in either case, produce the result contended for by relators. As heretofore shown, their presence in the original section merely recognized a condition which existed in the term of office of a supreme judge by reason of section 8 of article 6, which classified the judges first elected into three classes, and in the term of office of a district judge, which exists by reason of section 15 limiting section 12; and their presence in original section 29, or omission in the amended section, neither in the one case

creates nor in the other destroys the fact of the existence of fractional and full terms, which fact existed independent of the provisions of either original or amended section. But relators concede that amended section 29 does not repeal by implication either section 8 or section 22 of article 6, and we hold, for a reason equally potent, that it does not in that regard affect, or by implication repeal, section 15. In the case of an appointee to a vacancy in the office of supreme or county judge he holds only till the next ensuing general election. At that election, if not the regular election recurring in the one case once every nine years and in the other every three years, the one elected holds, not for the full period of nine years in the one case or three years in the other, but only till the expiration of that term during which the vacancy occurred. If the vacancy, however, in the office of a district judge, is thus filled, the relators still insist that the one elected holds for the full period of six years, because, in the first place, the vacancy is completely filled by the appointee, and no part of an unexpired term thereafter remains; and, secondly, because section 12 absolutely fixes the term at six years. If that is so as to a district judge, a similar result must follow as to a supreme judge and county judge, in so far as the provisions of amended section 29 bear upon this question. But if it is inapplicable to the case of a supreme judge or county judge, it is so by reason of the provisions of sections 8 and 22; and the same result may also ensue in the case of a district judge, if there are other provisions of the constitution applicable; and we hold that section 15 does necessarily produce such a result as applicable to amended section 12. The supreme judges cannot retire one every three years unless section 7 is made to yield to or harmonize with section 8 (and neither section 8 nor section 22 has ever been amended); or, to be more accurate, sections 7 and 8 should be so construed that there may not be any conflict between them. The terms of all the district judges cannot expire on the same day unless amended section 12 is construed in harmony and in connection with section 15, so that only district judges elected at the sexennial election shall hold for six years, and those elected at any other election hold for a fractional or unexpired term. If, however, we concede that amended section 29, being later in time, repeals section 15 in so far as the latter purports to limit the full term of six years provided for in amended section 12, so, also, does it repeal sections 8 and 22 in so far as concerns the requirement in the former section that supreme judges shall retire one every three years, and in the latter section that a county judge shall be elected once every three years; but we hold that neither section 8, 22, nor 15 is thus repealed by implication. These four sections of article 6 can be made to harmonize, and neither of the other three can be said to be

repealed by implication by amended section 29. Repeals by implication are not favored; and we must not presume, unless the language imperatively demands it, that the people intended to repeal by implication these important sections of article 6, especially when all the sections of the same article may at the same session of the legislature be submitted to the people for amendment, and the people could have expressly repealed or amended these other three sections of this article, had such been their purpose, at the same time that they amended section 29. It is as rational and as logical thus to harmonize amended sections 12 and 29 with section 15 as it is to harmonize amended section 29 and section 7 with sections 8 and 22. If amended section 29 conflicts with section 15, it certainly does with sections 8 and 22, and, being the latest in time, sections 15, 8, and 22 must give way in so far as they are inconsistent with the later expression of the will of the people.

But, we repeat again, relators disavow any such contention as to such effect of amended section 29 upon sections 8 and 22, and we hold that there is no such conflict with section 15. Again, the relators urge with much earnestness that this court should not put upon section 15 a construction that will in any conceivable case be a limitation of the term of office of a district judge therein fixed at six years, even though such limitation would not affect the length of the term when the election comes at the regular sexennial election. They strenuously insist that no construction shall be made that would qualify or limit this clause, "whose term of office shall be six years;" which, they assert, is the strongest in the whole group. Just why it is the strongest we are not told, except the mere fact of the assertion. Possibly it is the strongest in the section; but we certainly can perceive no reason why it is any stronger than that portion of section 15 which declares that the terms of all district judges elected shall expire on the same day; or of section 7, which provides that the term of supreme judges shall be nine years. But while we are asked not to place any limitation upon the full effect of these words in amended section 12 in their application to one whenever he is elected by the people, we are asked in the same breath to hold for naught, and entirely disregard in every conceivable case, the words which are found in section 15 that require the term of all district judges to expire on the same day. Evidently we are thus strongly admonished because, unless section 15 shall be disregarded by us, and held to be repealed by implication, relators appreciate the fact that the necessary effect of such words will be to limit the term of office of district judges to less than six years whenever the election comes other than at the time of the regular sexennial election. But giving to the respective arguments equal merit as abstract propositions,

it is the duty of the court to give to these different sections that construction which will most nearly produce that harmony and uniformity in the election of district judges, which appears throughout article 6 to have been the desire of the framers of our organic act. The least friction will ensue by holding that the provisions of amended section 12 as to the length of the term must give way to section 15 in all cases where the election of a district judge occurs at any other election than at the one or ones at intervals of six years beginning with the first general election in this state for district judges. In other words, after, as well as before, the adoption of the three amended sections named, the term of office of a district judge is—First, for the full term of six years, whenever he is elected at the so-called "sexennial election," and thus section 12 is given full expression; second, when he is elected at any other election he holds only till the next sexennial election, and section 12 is restricted by section 15.

In this connection we deem it fitting to notice one argument most ably and skillfully urged upon us at the hearing. We were reminded that to the federal courts judges are appointed by the president to hold for life, or during good behavior. In many of the older states at first, and in some of them still, judges are appointed by the governor or the legislature with the like tenure of office. When the members of our constitutional convention came to the judiciary article, two methods of selecting the judges confronted them,—one by election, the other by appointment. We must suppose that the relative merits of these two systems were thoroughly discussed and investigated by the members of that body, and, while they were mindful of, and fully impressed with, the advantages which many of our statesmen and publicists think are in favor of the method by appointment, still, for reasons which were deemed satisfactory at the time to those upon whom rested the duty to select, there was adopted into our constitution the method of selecting judges by the vote of the people. When this method was adopted and the other rejected, some of the advantages which attended long terms secured by appointment were preserved by inserting in the constitution provisions for a reasonably long term of office, and this notion, we are told, doubtless actuated the framers of our constitution, as appears from their address to the people: "Experience having shown frequent changes of the judiciary to be unwise and detrimental to the public interests, long terms are prescribed for the judges of these courts. The judges of the district courts will be elected for six, and those of the supreme court for nine, years; and after the first election they may be elected on a different day from that on which an election is held for any other purpose, thus taking judicial elections out of the arena of party politics." (It will be observed that this address refers

to six years for district judges and nine years for supreme judges; and, while the discussion would be more appropriate elsewhere in this opinion, the insertion of this extract here gives us the opportunity to reply to the argument of relators that when the address speaks of the term of district judges as six years this is an additional reason for supposing that it was intended to apply to a district judge whenever elected. The address, however, speaks of the term of a judge of the supreme court as nine years, but even relators would concede that this language cannot be taken to support the contention that in every case where a supreme judge is elected he holds for nine years.) We realize the potency of this argument as to the duty of courts to execute the intention of the people in adopting a constitution, and recognize that in case of serious doubt extrinsic aids of different kinds—the condition of affairs existing at the time of the adoption of the constitution, the practice theretofore prevailing, and even arbitrary rules—may be resorted to in construing a constitution; but where, on consideration of the language of the various parts of the instrument, the interpretation is plain, or the construction imperative, we must exclude all such extrinsic aids, even though in a given case the construction may be in some respects different from what we believe may have been the intention of the people in adopting it. But we do not have to go to any such length in this case. We must suppose, if the intention of the people was to interfere with the harmony and uniformity in the election of district judges,—which even a casual reading of article 6 reveals must have actuated them,—that such intention would have been clearly manifested by language unambiguous and explicit, and that they would not deliberately have destroyed such harmony and uniformity, which they had evidently been at such pains to create, by providing that a district judge, whenever elected, should hold for a term of six years, when, if so holding, it is impossible for any effect to be given to the provisions of section 15. They certainly would not have left to doubtful inference so important a manifestation of that intention, and we cannot believe that any such effect, in any case, should be given to any provision of amended section 20, in the absence of a clause coupled containing an express repeal of that portion of section 15 in question. We are not concerned with the wisdom of this desire for uniformity, nor with its alleged unimportance as compared with the advantages of a reasonably long term of office. The intention is present in the constitution, and we must respect it, and carry it out, if possible.

Thus far we have endeavored to answer the arguments of relators' counsel by the application of those sound and wholesome canons of constitutional construction recognized by many respectable courts and many leading text writers, to show that the construction which they ask us to place upon those sections of the con-

stitution which they claim apply to the facts of this case cannot be recognized by this court. The many authorities from *People v. Green*, 2 Wend. 266, down to the latest case cited upon the main question involved, we do not wish to question, or intimate that they are not good law under the facts of those cases, and in the states where they arose. They may be disposed of not summarily, but briefly, by stating that they hold that where a term of an elective office is fixed by the constitution of a state at a certain period, and no beginning or ending of the term is established by the constitution, and where there is no other clause in the constitution providing to the contrary, and no authority exists in the legislature for so fixing the beginning or ending of the term, or where such authority does rest in the legislature, and the legislature has not exercised it, then, whenever there is an election to that office, the incumbent holds for the full term of that office, whether he is elected to fill a vacancy or otherwise. In no case brought to our attention, except in *Mississippi* and *Virginia*, does there exist in the constitution of any state a provision the same as, or even similar to, the clause in section 15 of article 6 of our constitution, which we have mentioned, and there the decisions are in harmony with our conclusion here. So that, without reviewing those cases, and thereby prolonging this opinion, already too long, and with full recognition of such cases as declare a doctrine different from that which we announce in this case, and conceding their applicability in the states and under the constitutions where they were promulgated, at the same time insist that they cannot be recognized as authority in this state, for the reason that our own constitution must be our guide, and it essentially differs from the constitutional provisions construed in the cases cited.

4. But, in addition to what we have already said, there remains to be considered last, but of great importance, what was referred to in the beginning of this opinion. The court in the case *In re Election of District Judges*, 11 Colo. 377, 18 Pac. 292, in principle has passed upon the very question at issue here. We are not unmindful of the rule that the maxim *stare decisis* is applicable in its fullest sense only where property rights are involved. The doctrine, however, applies to constitutions as well as to statutory law, or to any other kind of law. The only question is as to what extent in a given case shall the doctrine be allowed to prevail. The following from *Thompson on Negligence* (volume 2, p. 1005) substantially accords with our view of the rule: In the case of *Schultz v. Railroad Co.*, 36 Mo. 13, the court gave to the statute of that state a construction different from what it had theretofore received from the same court, and Judge Thompson, commenting on this, says: "Perhaps, on a question of this kind, a law writer ought not to say anything. We feel constrained, however, to express the

opinion, notwithstanding the deference which is due to the learned and accomplished judge who delivered the opinion in the *Schultz Case*, that when the question was before the court for the first time a contrary conclusion from that arrived at would have been more in conformity with the rule of statutory construction that the legislature will not be held to intend a repeal of the settled rules of the common law unless the language employed by it clearly imports such an intention. But a rule of construction which certainly did not do violence to the terms of the statute having been agreed upon by a unanimous bench, and acquiesced in by successive legislatures for eleven years, its abrogation by the judicial bench, by a decision which necessarily had the effect of a retroactive law, operating upon all pending suits and upon all existing injuries, was an indefensible violation of the rule of *stare decisis*. We think that the concluding observation in the dissenting opinion of Henry, J., should have had sufficient weight to restrain the action taken by the majority of the court: 'While that decision [referring to the *Schultz Case*] strictly was not made a rule of property, yet the doctrine of that case has so long prevailed as to become a recognized law of the land; and if it work any injustice, or contravene public policy, it is better for the legislature to remedy an evil by amending or repealing the law than for this court to do it by judicial construction.' 2 *Thomp. Neg.* p. 1005. While the decision in 11 Colo. and 18 Pac. is not as binding upon this court as it might be if thereby a law or rule of property had been established, yet it has been the unquestioned law of this state now for more than seven years. It is well considered, well conceived, concise, and based upon reason. Aside from this, district judges have been elected and have gone out of office according to its holding. The people in their party conventions have yielded to it their obedience. The executive and legislative departments of the government have followed it, and calls for elections have repeatedly since that time been made to comply with its rule. The relators themselves have acquired whatever rights they may have to this office long since this decision was announced, and, as evidenced by the manner in which they entered upon the discharge of the duties of their office as soon after their elections as they could conveniently qualify, have indicated, and by their retiring from office and submitting to an election before the expiration of six years from the time of their election again have recognized, its controlling authority. To be sure, relators are probably not technically or otherwise estopped to question the soundness of this decision, if it is wrong; but such recognition by them is one, among many other, circumstances to show that all classes of our people have given their assent to this case. Before as well as since this decision was announced the legislative and executive

departments of the government have recognized that the rule which it announced was the proper one to give to the constitutional provisions in question, and every act of the legislature which has come under our observation bearing in any way upon this question has been passed upon the assumption that the rule thereby established was the correct one. At the first session the general assembly (section 933, Laws 1877) enacted that a district judge should be elected in each judicial district at the general election in 1882 and every sixth year thereafter, and there could be no more expressive recognition of fractional and full terms in the office than this, when considered with section 15. In these acts, which created the offices to which relators were elected, the governor was to appoint "as in case of vacancy," clearly indicating the notion the legislature had of the term which the appointee was to hold. The same intention is also apparent in sections 935, 936, and 938 of the General Laws of 1877. Constructions of the constitution by the legislative and executive departments of government, particularly by the legislature, and when made contemporaneously with the adoption of the constitution, or soon thereafter, weigh strongly with the courts. Of course, we know that the construction of the constitution by the people and by every other department of the government is not absolutely controlling with the courts; it is only the construction which the latter themselves declare that ultimately prevails and is decisive; but all these constructions made by members of these co-ordinate departments of government, acting under oath, and from the desire, as we must assume, to do their duty, are persuasive reasons, and do have weight with the courts in reaching their conclusions, greater or less, depending upon the circumstances of the particular case.

For the reasons given above, we have no hesitation in declaring that the respondents are entitled to the office of district judges in the Second judicial district of this state, and, in accordance with such conclusion, the proceeding instituted by the relators is dismissed, at their costs.

GODDARD, J., dissents.

(21 Colo. 340)

UNION PAC. RY. CO. v. JONES.

(Supreme Court of Colorado. July 1, 1895.)

**INJURIES TO WIFE AND ADULT CHILD—LOSS OF SERVICES AND SOCIETY—DAMAGES—NEG-
LIGENCE OF RAILROAD COMPANY.**

1. A party may ask each juror on a voir dire whether he is a man of family.

2. When it was a controverted question whether defendant was operating the railroad at the time of the accident, it was proper to prove that some months before the accident an inspection of the road was made by defendant.

3. An exception to a refusal to allow certain questions to be asked on cross-examination cannot be sustained when the questions

were excluded because objectionable in form, and full cross-examination was afterwards had in response to other questions.

4. In an action for money expended for medical attendance for plaintiff's daughter, and for loss of her services, it is proper to exclude a question asked the daughter whether she had recovered for such injuries in another court, the record being the best evidence of a recovery.

5. Recovery by a husband for injuries to his wife is limited to his actual pecuniary loss, including medical attendance, nursing, and other expenses incurred in effecting a cure, and to compensation for his own loss of time in caring for his wife, and for the future expense likely to be incurred by him as a direct result of the accident, and also for the loss, past, present, and prospective, of the society and services of the wife, caused by the injuries.

6. The damages to which a husband is entitled for the loss of the society of his wife through injuries received by her are within the sound discretion of the jury.

7. When an adult daughter, who was injured on defendant's railroad, was living with her father, and rendering gratuitous services to him as a member of his family, he is entitled to recover from defendant the cost of medical attendance and such other necessary expenses as he incurred by reason of the accident.

Appeal from district court, Arapahoe county.

Action by John Jones against the Union Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was commenced by appellee, John Jones, in the district court of Arapahoe county, for the purpose of recovering for moneys expended for medical attendance, nursing, medicines, etc., for his wife and daughters, and also to recover for the loss of services of his wife and daughters, and loss of the society of his wife, occasioned by injuries received as hereinafter stated. The plaintiff was on the 4th day of September, 1890, the husband of Catherine Jones, and the father of two daughters, named, respectively, Gladys and Winifred Jones, each of these daughters being past their majority at the time. The mother and daughters were all members of plaintiff's household, the younger daughter attending school, and the elder, Gladys, assisting her mother in the household duties, and all being in good health. On the day mentioned, the mother and daughters took passage at Bailey for Denver, upon one of defendant's railroads, and, while being carried, the train was thrown from the track, and all three injured, without negligence on their part. As the result of these injuries, medical attendance was required for a long time; and the father was deprived of the assistance of his wife and daughters. It appears from the record that the wife and two daughters brought suit for damages in the United States circuit court, the cases having been heard and determined in that court before the trial of the present case in the state court. The present action was tried to a jury, and resulted in a verdict and judgment of \$5,250. The court, evidently being in some doubt as to the right of recovery based upon the injuries received by the daughters, sub-

mitted several special interrogatories, which were answered by the jury, so that these items can be readily separated, if necessary, from the general verdict. Of the total verdict the sum of \$250 only was allowed in this behalf, the jury limiting the same to the expenses incurred by the plaintiff in the care and treatment of his daughters. Judgment having been entered on the verdict, the defendant, the railroad company, brings the case into this court by appeal.

Teller, Orahood & Morgan, for appellant.
Wells, McNeal & Taylor, for appellee.

HAYT, C. J. (after stating the facts). A large number of errors are assigned, but in their consideration we think we may properly group them under five heads, as has been done in argument.

Upon the examination of the jurors upon the voir dire, each was asked by the plaintiff, against the objection of the defendant, as to whether or not he was a man of family, and the ruling of the court permitting this question is assigned for error. We think there was no error in this ruling. While the answers to the questions propounded could furnish no basis for a challenge for cause, it is customary to allow such questions to be put to the jurors, in order that counsel may advisedly exercise their peremptory challenges. Within reasonable limits, counsel have the right to put questions to jurors, not only for the purpose of ascertaining whether or not grounds exist for challenges for cause, but also for the purpose of intelligently exercising their peremptory challenges. But, beyond this, the matter of examination must be allowed to rest almost entirely in the discretion of the trial judge.

Among the witnesses introduced by plaintiff was E. F. Arthur, chief clerk for the superintendent of the road. Arthur, among other things, testified to an inspection of the road made in the month of April, preceding the accident. This evidence was received without objection, but after its reception, it being disclosed that this inspection was made some months before the accident, the defendant asked to have it stricken out. This motion was refused by the court, and error assigned upon such refusal. We think the motion was properly overruled, for two reasons: (1) Whether or not the defendant was operating the road was a controverted question at the time the evidence was received, and it was competent upon this issue. (2) The record does not support the claim of counsel that the witness testified as to the condition of the road at the time the inspection was made. If he had given evidence as to the rotten condition of the ties six months before the accident, as contended, we think such evidence not improper for the consideration of the jury, with other evidence tending to show the condition of the roadbed at the time of the accident.

Error is assigned upon the refusal of the

court to allow certain questions to be put upon cross-examination to each of the Misses Jones. The contention of counsel for appellant in this regard is that each of these witnesses described at this trial injuries not mentioned upon the trials in the United States court, and that he was denied proper cross-examination in this case as to the testimony of the same witnesses in those actions. But a careful examination of the transcript discloses that such objections as were sustained to this character of evidence were sustained because of the objectionable form of the interrogatories, and that afterwards, in response to other questions, the witnesses were fully examined as to the testimony given by each at the preceding trials.

The following questions were also objected to, and the objections sustained: "You instituted a suit in the United States circuit court to recover damages for these same injuries, did you not? Have you recovered a verdict in that suit?" The questions were properly excluded, for several reasons, among which we need only mention the following: Where it is proper to prove a previous recovery, the record is the best evidence thereof. Again, in this case, the offer did not include proof of a judgment, and for this reason it was properly rejected. Moreover, in a number of recent cases it has been held, under somewhat similar circumstances, that the record itself should not be admitted, it being *res inter alios acta*. *Bridger v. Railroad Co.*, 27 S. C. 456, 3 S. E. 800; *Karr v. Parks*, 44 Cal. 46; *Wilton v. Railroad Co.*, 125 Mass. 130. These cases proceed upon the theory that the measure of damages in one action is based upon injury to the child, and in the other upon injury to the father. In so far as the wife is concerned, the principle in these cases applies; but the children in this instance having passed their majority at the time of the accident, in view of the peculiar circumstances of this case, we doubt its applicability; but, as we have shown, the evidence was properly excluded for other reasons, and we therefore leave this question undetermined.

Coming now to the evidence of damages and the charge of the court in reference thereto, it must be borne in mind that the measure of damages in case of the wife is necessarily different from that in case of the daughters. First, as to the wife, the court instructed the jury, in substance, as follows: "The husband can recover nothing for pain or suffering endured by the wife, nor for any mental anguish suffered by himself in consequence of her injuries. He is limited to such damages as will compensate him for the actual pecuniary loss which he has individually sustained. In case you believe from the evidence that he is entitled to recover, you should assess his damages at such sum as will compensate him for any expense incurred by him for medical treatment, or for expenses incurred in effecting, or having a tendency to effect,

her cure, including such sums as have been necessarily expended by him in nursing and caring for her during her illness from such injuries, and also for the loss of his own time necessarily expended by him in caring for his wife during the time of her illness, resulting from such injuries, at such sum as his time is shown to have been reasonably worth. If you believe from the evidence that his wife has not yet fully recovered from the injuries caused by the accident, and that such injuries are the direct and necessary result of the accident, you may estimate the future expense and loss likely to be sustained by him from further treatment and care in fixing the amount of the damages which you allow to plaintiff for such loss. He is also entitled to recover for the loss, past, present, and prospective, of the society of his wife caused directly by such injuries, if any. The law affords no criterion by which such damages can be estimated, but leaves it to your sound discretion. In particular, the court cautions the jury to carefully consider the condition of the wife prior to the happening of the alleged accident, her ability to respond to the rightful demands of her husband as a social being, and her condition since then, and the condition which is likely to follow, also how far the changed condition, if there has been a change in her condition, was brought about as a necessary and direct result of the alleged accident, and allow plaintiff therefor such sum as, in your honest and unbiased judgment, will compensate him for such loss." The jury were also instructed that if, at the time of the injuries alleged to have been sustained, his wife was not engaged in business of any kind, but was simply discharging the duties of a housekeeper to her husband, the plaintiff, without compensation, he was still entitled to recovery; and, in case a verdict should be returned for him, he should be allowed such additional sums of money as her services are shown to have been worth from the time of the happening of the alleged accident to the time of the trial; and, in case the jury believed from the evidence that she would have continued to serve him in such capacity, then for such further loss of services as he will sustain in that particular, if caused directly by such injuries. The foregoing instructions embody, in substance, the law as laid down by 3 Suth. Dam. pp. 279, 280, and we think are free from error prejudicial to the defendant.

As to plaintiff's right of recovery for damages caused to him by reason of the alleged injury to his daughters, the court instructed the jury that there could be no recovery on account of pain and suffering endured by his daughters, or either of them, nor on account of his own mental anguish and distress caused by their misfortune. The court also instructed the jury that there could be no recovery by the father for

moneys paid out in attempting to effect their cure, unless they found from the evidence that he was entitled to and was receiving their services at the time of the happening of the alleged accident. But in case the jury believed that up to the time the alleged injuries were sustained, his daughters, or either of them, were still living with the plaintiff as members of his family, and were rendering services to him without compensation, then, and in that event, he should be allowed as damages such sums as he necessarily expended in medical treatment, medicines, nursing, and such extra costs and expenses as he necessarily incurred by reason of the injuries sustained by them caused by the accident for which he sues, but that nothing could be allowed him for any loss of services nor for any loss of their society. The uncontradicted evidence shows that, at the time of the accident, the daughters were members of the plaintiff's household. In addition, it is alleged in the complaint, and the plaintiff offered to prove at the trial, that they were each entirely without the means of support, except as the same were furnished by him; but this evidence, being objected to by the defendant, was excluded by the court. It is urged by counsel that no legal obligation rested upon the plaintiff to pay the expenses incident to his daughters' injuries, and that he could not voluntarily make the railroad company his debtor by paying such expenses. The statute of this state, however, makes the father liable for such expenses in case the child is too poor to pay, and that these daughters were in this condition we must assume, in view of the offer of proof. The law casts the obligation upon the father to care for these children in their helpless condition. He would, indeed, have been an inhuman wretch if, being able, he had failed to provide for them in their unfortunate condition. The fact that a child has attained its majority does not, ipso facto, work the emancipation of the child, although it does give either the child or the parent the right to renounce the relation, and avoid the duty and liability incident thereto; but where the child still continues to live with the father, and the latter continues to provide it support, we think the father is justified in discharging the necessary expenses incurred, as in this case, by reason of the defendant's negligence, and that the defendant is responsible to him therefor. By the special findings of the jury, the recovery allowed for the daughters was limited to physicians' bills and other expenses incurred by the father in the care and treatment of the daughters, the total amount being only \$250. The instructions of the court and the action of the jury in this regard, we think, afford no ground of complaint on the part of the defendant.

For the reasons given, the judgment of the district court will be affirmed. Affirmed.

(6 Colo. App. 423)

**BOARD OF COM'RS OF PITKIN COUNTY
v. FIRST NAT. BANK OF ASPEN.**

(Court of Appeals of Colorado. June 10, 1895.)

**COUNTY COURT—ADVANCEMENT OF JURY FEES—
CONSTITUTIONALITY OF ACT—REPEAL OF FORMER
ACT—ACTION FOR JURY FEES—SUFFICIENCY OF
COMPLAINT.**

1. Sess. Laws 1891, p. 248, § 9, providing that in actions pending before the county court of any county of the second, third, or fourth class either party may have a jury summoned to try the same by advancing fees for the payment of such jurors, and that in actions in counties of the first class either party shall be entitled to a jury without advancing the fees therefor, is in conflict with Const. art. 6, § 28, providing that all laws relating to courts shall be general and of uniform operation throughout the state.

2. As Sess. Laws 1891, p. 248, § 9, providing that in actions pending before the county court of any county of the second, third, or fourth class a party may have a jury summoned to try the same by advancing jury fees, but that in counties of the first class a party shall be entitled to a jury without advancing such fees, is unconstitutional, it did not repeal Gen. St. § 504, to take the place of which it was enacted, and which provides for the advancement of jury fees in all counties, though the act of 1891 contains a provision repealing all acts and parts of acts in conflict with it.

3. Gen. St. § 504, providing that one may have a jury trial in the county court by advancing the jury fees, applies only to causes to be heard when no regular panel is in attendance, and does not affect the right to have a cause tried by a jury impaneled under Sess. Laws 1891, p. 248, § 2, providing that when a jury is required in a county court the clerk shall so notify the clerk of the district court, who, with the sheriff, shall draw the names of the jurors from the persons certified to him by the board of county commissioners to act as jurors, and shall certify such names to the clerk of the county court, who shall issue a venire for such jurors.

4. A complaint in an action against county commissioners for jury fees which fails to show that in the selection of the jurors the statutory requirements were observed does not state a cause of action.

Appeal from district court, Pitkin county.

Action by the First National Bank of Aspen against the board of county commissioners of Pitkin county to recover the fees of jurors. A demurrer to the complaint was overruled, and defendant appeals. Reversed.

Robert G. Withers, for appellant. Charles R. Bell, for appellee.

THOMSON, J. The complaint alleges that on March 8, 1893, there issued out of and under the seal of the county court of Pitkin county a special venire, addressed to the sheriff, and commanding him to summon 24 good and lawful persons of the county to appear before the court on that day, to serve as jurors for the term; that the sheriff afterwards, and on the same day, made return of the venire that he had, in obedience to the command, summoned certain persons to serve as jurors; that, after the jurors summoned had served as such during the term, the court issued to them its certificate, showing the number of days of service, the mileage traveled, and the amount due from the county for their services; that certain of the

jurors, after receiving their certificates, for a valuable consideration sold and assigned them to the appellee, who presented them to the board of county commissioners for allowance and payment, which was refused. Judgment is demanded for the amount due upon them. The board of county commissioners, defendant, demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, the defendant declining to plead further, judgment was rendered for the plaintiff, from which the defendant prosecutes an appeal to this court. The question in controversy is whether, upon the allegations of the complaint, the county is liable for the fees of these jurors. On the 6th day of April, 1891, an act of the general assembly was approved, relating to jurors. Sess. Laws 1891, p. 248. The first section divides the counties of the state into four classes, based upon population, and makes it the duty of the board of county commissioners of any county, 60 days or more before the time appointed for holding a district court in that county, to select from its inhabitants having the proper qualifications such number of competent persons to serve as jurors as is prescribed for the class to which that county belongs, the names selected to be certified by the clerk of the board to the clerk of the district court. The second section provides that the clerk of the district court shall write the names so certified to him on ballots, one name on each ballot, and place such ballots in one compartment of a two-compartment box, provided for the purpose; and that, 30 days before the term, and afterwards as often as the court shall order, he shall call the sheriff to his assistance, and in his presence draw by chance from the compartment a sufficient number of names, placing the ballots drawn in the other compartment. This section concludes with the following provision: "In case a jury is required in the county court, to try either civil or criminal cases, the judge of the county court shall so notify the clerk of the district court in writing, stating in such notice the number of jurors desired, whereupon the clerk of the district court shall call to his assistance the sheriff, and shall draw from the box the requisite number of jurors, and shall certify their names to the clerk of the county court, who shall then issue a venire to the sheriff to summon the jurors so drawn, and make it returnable, as the said county court may order, which court shall, so far as possible, fix the trials of jury cases for some definite time, and shall try them successively by the same panel of jurors, so far as is practicable, and when the trials are over he shall discharge such jury from further attendance. Talesmen may be secured in the county court in the same way as they are in the district court. After said jurors are drawn and their names certified to the clerk of the

county court, as provided in this section, all laws, proceedings and practice applicable to jurors in district courts, shall apply to jurors in county courts." The construction of the foregoing sections, disconnected from the remaining portions of the act, does not seem to us to be a matter of difficulty. Section 1 devolves certain duties upon the board of county commissioners preparatory to furnishing the district court with jurors for the purposes of its succeeding term. Section 2, after prescribing the method of their selection for trials in that court, provides for supplying the county court, out of the list certified to the district court, with a panel of jurors to serve during the term. The intention was to furnish the county court with a regular panel for the trial of all jury cases, and to place the jurors composing it upon the same footing with jurors in the district court. It is provided that, after the jurors are drawn and their names certified to the clerk of the county court in the manner prescribed by the section, all laws applicable to jurors in district courts shall apply to them. Among these laws is the following: "The clerk shall without fee, furnish to each juror who shall attend at any term of court, a certificate showing the number of days that such juror shall have attended at such term; and upon presentation thereof to the county commissioners, they shall issue to such juror their warrant upon the county treasury for the amount of the per diem and mileage of such juror." Gen. St. 1883, § 1922. Unless there is something further in the act under consideration, by which the provisions we have recited are modified or controlled, it seems perfectly clear that regular jurors in county courts, where these provisions have been observed, are entitled to certificates showing the time of their attendance, upon presentation of which to the board of county commissioners, warrants upon the county treasury must be issued to them for their per diem and mileage.

The objection which is made in argument to this view of the law is based upon section 9 of the same act, which reads as follows: "In any action pending before the county court of any county of the second, third, or fourth classes, as established by this act, either party may have a jury summoned, to try the same by advancing fees for the payment of such jurors, and when judgment shall be rendered in favor of the party demanding the trial by jury, such party shall recover the fees paid by him for such jurors, of the adverse party, and have the amount thereof taxed as part of the costs in the case. In any such action pending before the county court of counties of the first class, as established by this act, either party shall be entitled to a jury, without advancing the fees therefor." The entire argument of counsel on both sides is devoted to the question of the constitutionality of this section. We think it is clearly repugnant to section 28, art.

6, of the constitution, which is as follows: "All laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally, shall be uniform." The meaning of this constitutional provision is apparent upon its face. Every law affecting the manner in which justice shall be administered in courts of a given class must apply equally to all of such courts, and their powers shall be the same. All county courts in the state belong to the same class. By the terms of section 9, conditions are imposed in some of these courts, upon the right of a litigant to have his cause tried by a jury, which are not imposed in others. In counties of the first class, the court is given the power to order a jury in a civil action without the advancement of their fees. In all other counties such power is withheld. The language of the constitution upon the subject is unequivocal and mandatory, and section 9 is in direct conflict with its provisions. In *Woods v. Tanquary*, 3 Colo. App. 515, 34 Pac. 737, we had occasion to consider this section. That case was tried in the county court of Arapahoe county, a county of the first class, and the defendant had demanded a jury, which was denied him, for the reason, among others, that he had not advanced the fees for their payment. We held this to be error, because, by the terms of the section, in counties of the first class, a party was entitled to a jury in the county court without the prepayment of their fees. But the question of its constitutionality was not raised, nor was the attention of the court in any manner called to it. It was, therefore, not passed upon.

We do not think, however, that section 9 was intended to apply to jurors summoned as a regular panel, or that it is in any particular inconsistent with section 2. It contemplates an independent summoning of a jury, upon the demand of a party, to try his own particular case. The regular jury, if one has been duly summoned, is in attendance for the term, for the trial of all jury cases. It has already been summoned, and its impaneling is all that is necessary for the purposes of a trial. Section 9 does not provide that a party may have a jury "impaneled" to try his cause by advancing their fees. "Summoned" is the word used, and it is used with reference to the trial of a single case, so that evidently the jury meant is not the regular panel. By reason of the failure of the commissioners, or of the judge of the county court, to comply with the law, a jury may not have been provided for the term, or there may be reasons why a special jury is required; and the design of the section was to provide for such contingencies, and supply a method of obtaining a special jury when necessary. The section was evidently intended to super-

sede section 504 of the General Statutes. Except that section 504 applies to all county courts alike, whereas section 9 discriminates between them, the provisions of the latter section are copied from the former; and as section 9, for the reasons which we have given, is invalid, section 504 is in force; and, where the necessity exists, a jury may be obtained in pursuance of its provisions. It is true that the act contains a provision repealing all acts and parts of acts in conflict with it, but the only portion of the law with which section 504 can be said to be in conflict is section 9. It conflicts with no valid portion of the act, and was therefore not repealed. A general clause in a statute repealing all laws in conflict with it does not repeal provisions which are inconsistent only with portions of the statute which are void. *Campau v. Detroit*, 14 Mich. 276; *Devoy v. New York*, 35 Barb. 284; *Tims v. State*, 26 Ala. 165; *Harbeck v. Mayor, etc.*, 10 Bosw. 366. Where the requirements of the act in relation to regular juries have been observed, the fees of the jurors are chargeable to the county; but where they have not, and a jury is required for the trial of an individual cause, it must be summoned in that cause, and the fees must be advanced by the party demanding it. But the demurrer should have been sustained. The complaint contains no allegation of any selection by the commissioners of persons to serve as jurors, or certification of their names to the clerk of the district court, or any proceeding by which the county court became entitled to a jury for the term in the manner prescribed in the act. Observance of the statutory requirements is necessary to empower the county court to cause a jury to be summoned for the term, and there is no liability against the county for the fees of jurors who may be otherwise summoned. Upon what authority this jury was summoned the complaint does not advise us; and, inasmuch as no facts upon which a liability of the county can be based are set forth, there is no cause of action stated. The judgment will be reversed, with leave to the plaintiff to amend its complaint. Reversed.

(55 Kan. 615)

PARKS et al. v. HONEYWELL.

(Supreme Court of Kansas. July 6, 1895.)

APPEAL—PARTIES.

Where, in an action to foreclose a mortgage, a receiver was appointed at the instance of a mortgagee, and was afterwards discharged on the application of a person who claimed to be and was recognized by the court as guardian of the mortgagor, alleged to be an insane person, such guardian is a necessary party to a review in this court of the order discharging the receiver; and a petition in error, making the mortgagor alone defendant in error, must be dismissed.

(Syllabus by the Court.)

Error from district court, Harper county; G. W. McKay, Judge.

Action by William F. Thayer against Albert

Honeywell, Clarence A. Parks, trustee, and others. From the judgment, Clarence A. Parks, trustee, and another, bring error. Dismissed.

Francis M. Hayward, Frederick W. Griffin, and F. H. Foster, for plaintiffs in error. Sankey & Campbell, for defendant in error.

ALLEN, J. This case comes here on a petition in error to reverse an order of the district court discharging a receiver. W. F. Thayer was plaintiff, and Albert Honeywell, the Colonial & United States Mortgage Company, Limited, Phelps & Bigelow Windmill Company, and E. Howland were defendants, below. Howland and the windmill company both filed cross petitions, claiming liens on the lands covered by the plaintiff's mortgage. Afterwards the plaintiffs in error were made parties defendant, and answered, setting up a mortgage on the same lands. Afterwards, on the 8th day of January, 1891, on their application a receiver was appointed to take charge of the mortgaged property, who filed a bond, and entered on the discharge of his duties. On the 12th day of June, 1891, a motion was made by W. E. Groves, as guardian for Albert Honeywell, in which it was stated that on the 10th day of June, 1891, Honeywell was declared a person of unsound mind, and Groves duly appointed his guardian, asking that the receiver be discharged. This motion was heard by the court on the 12th day of June, over the objections of the plaintiffs in error, one of which was that Groves had not been made a party to the action. The court thereupon ordered that he be made a party, proceeded to hear the motion, and made an order removing the receiver. Various errors are alleged in the proceedings of the court. A motion is made on behalf of the defendant to dismiss the petition in error because of a want of proper parties. This motion must be sustained. The order complained of was made at the instance of Groves, who claimed to be the duly-appointed guardian of Honeywell. Whatever errors the court may have committed were at his instance, and he is a necessary party in this court. Groves was recognized by the court as guardian. It is unnecessary to inquire whether the other incumbancers, who were made parties below, are also necessary parties here, as the absence of the guardian is fatal to the jurisdiction of this court. The petition in error is dismissed. All the justices concurring.

(55 Kan. 617)

THAYER v. HONEYWELL.

(Supreme Court of Kansas. July 6, 1895.)

Error from district court, Harper county; G. W. McKay, Judge.

Action by W. F. Thayer against Albert Honeywell. From an order discharging a receiver, complainant brings error. Dismissed.

Cook & Gossett, for plaintiff in error. Sankey & Campbell, for defendant in error.

PER CURIAM. The same defect of parties exists in this case as in that of *Parks v. Honeywell* (just decided) 40 Pac. 896, and the petition in error must, therefore, be dismissed.

(55 Kan. 628)

JACKSON TOWNSHIP, IN RILEY COUNTY, v. WOOD, County Clerk.

(Supreme Court of Kansas. July 6, 1895.)

TOWNSHIP TAXATION—CITIES OF THIRD CLASS.

A city of the third class, having property of the assessed valuation of only about \$50,000, is not excluded from the township in which it is situated, but is subject to taxation therein for all township purposes.

(Syllabus by the Court.)

Application for mandamus by Jackson township, in Riley county, against Charles G. Wood, county clerk. Peremptory writ allowed.

R. S. Hick, for plaintiff. F. L. Irish, for defendant.

ALLEN, J. This is an action brought by Jackson township to compel the county clerk of Riley county to charge township taxes against the property situated in Randolph, a city of the third class, included within the boundaries of the township. The sole question presented is whether a city of the third class, having real and personal property of an assessed valuation of less than \$150,000, remains a part of the municipal township in which it is situated, and is subject to township taxes. Paragraph 925 of the General Statutes of 1889 is singularly ambiguous, and, if we were compelled to decide this case solely by its provisions, we might have great difficulty in reaching a satisfactory result. But, when construed in connection with the next succeeding paragraph, and also with paragraphs 5489, 5515, 5520, 6885, 7121, and in view of the fact that there is no provision for the assessment of the property of such a city except by the township trustee, and that there is no provision for the participation of the residents of the city in the general elections except as a part of the township, and that no provision is made for separating the taxes required for the purpose of building bridges from those levied for other purposes, we reach the conclusion that it is still a part of the township. By paragraph 7121, it is provided that no city of more than 2,000 inhabitants shall be included within the corporate limits of any township, and such cities are constituted townships for the election of justices of the peace and constables. Provision is also made in other places in the statute for city assessors in such cities, and the other township officers are dispensed with; their functions being performed by city officers. The concluding portion of paragraph 925 provides for making cities of the third class having more than 1,000 population, and an

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assessed valuation of more than \$150,000, separate townships. In the absence of any legislation excluding such cities as Randolph from the municipal townships in which they are situated, and providing for their assessment and taxation, we must hold that they still remain included in and parts of the townships in which they are situated, and subject to all township taxes. A peremptory writ will be awarded commanding the county clerk to enter township taxes against the property in the city of Randolph. All the justices concurring.

(55 Kan. 55.)

REEDER v. GORSUCH et al.

(Supreme Court of Kansas. July 6, 1895.)

DEED ABSOLUTE—WHEN A MORTGAGE.

In order to establish that a deed absolute on its face is in fact only a mortgage, it must be shown, either by direct evidence or by the circumstances of the case, that it was the intention and understanding of the grantor and the grantee that it should so operate. It is not enough that one of the parties so considered it. Both must concur; otherwise, the deed will be treated according to its import, unless tainted by fraud or the result of accident or mutual mistake.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by Mary Gorsuch and others against Benjamin Reeder. Judgment for plaintiffs, and defendant brings error. Reversed.

John T. Little and A. Smith Devinney, for plaintiff in error. I. O. Pickering, for defendants in error.

MARTIN, C. J. On September 27, 1889, the defendants in error, being the widow and children the heirs at law of Luke E. Gorsuch, deceased, commenced their action to have a certain deed for 640 acres of land in Johnson county declared and decreed to be a security merely, and for damages in the sum of \$4,000. A trial before the court without a jury, at September term, 1890, resulted in a judgment October 4, 1890, in favor of the plaintiffs below, decreeing that the deed of date December 10, 1888, from Luke E. Gorsuch and Mary E. Gorsuch, his wife, to Benjamin Reeder, the defendant below, was and is in equity a mortgage, and not a deed of conveyance; and also that the plaintiffs below should be restored to the immediate possession of the lands, and that they have and recover of and from the defendant below the sum of \$1,880 damages and costs of suit. At and before the time of the execution of said deed, said land was heavily incumbered by mortgage indebtedness to several persons, one of the principal mortgagees being Mary J. Hughes, the daughter of the defendant below. She resided in Indiana, and he transacted her business, and also some of his own in her name. The subject of the indebtedness of

Luke E. Gorsuch, and as to devising some plan whereby he might be relieved of it, and still save something for his family, had been talked of for some time before the transaction in question. On December 8, 1888, Luke E. Gorsuch being quite ill, and not expecting to recover, the defendant below called at his house, and an agreement was reached, and he went to Olathe and had a deed prepared, and also a contract. He went back to the Gorsuch residence, taking with him a notary public, and the deed was executed and acknowledged by said Gorsuch and wife, and the contract was signed by Gorsuch and Reeder. The contract was taken by Mrs. Gorsuch, and placed in a drawer with her husband's papers, and, after his death, which occurred December 24, 1888, was given to her attorney, who produced it upon the trial. For some reason the deed was not satisfactory, and it was destroyed, and another one was executed to take its place on December 10, 1888. The deed was of the usual form, with covenants of warranty and against incumbrances; but in the latter covenant was inserted the following clause: "Except \$8,000 and interest, to Lombard In. Co., K. L. & T. Co., and J. L. Pettyjohn & Co., and \$160 due for taxes, which Reeder assumes to pay; and Reeder also assumes to pay to M. J. Hughes the sum of \$8,720, leaving a balance of \$9,351.47 due to M. J. Hughes, which sum Reeder does not assume to pay, and a mortgage sum due to M. G. Miller, which Reeder does not assume to pay, or any judgments." The body of the contract executed on December 8th reads as follows: "Witnesseth that said Gorsuch has this day sold to Reeder the east half of section 29, and S. E. $\frac{1}{4}$ of section 20, and N. E. $\frac{1}{4}$ of section 22, all in township 14, range 24, Johnson county, Kan. Now, if the said Luke Gorsuch shall sell all of said land in eighteen months from this day, and pay off all the liens which are now on said lands, with interest to day of sale, then said Gorsuch to have all the money arising from the sale of said lands over and above the payment of all the liens aforesaid. But said lands shall not be sold for less money than will pay all the demands from the day of sale aforesaid. Reeder to make deed to purchaser. If said lands shall not be sold within the time herein specified, and on the time herein specified, then this agreement to be null and void." The defendant below claimed that the deed and the contract together fully stated the agreement, while the plaintiffs below contended that Reeder agreed to hold the deed simply as a mortgage, and that whenever the debt was paid he would reconvey the premises. Reeder further claimed that he paid off all the indebtedness which he had expressly assumed in the deed, and that he had delivered the notes to Luke E. Gorsuch in his lifetime, although he had not caused satisfaction to be entered of record, supposing that to be unnecessary until all the indebtedness had been paid. But the plaintiffs below con-

tended that Reeder had not paid any of the indebtedness nor surrendered any of the notes. The court found that the amount of indebtedness assumed by Reeder was \$17,200, and that the land was worth, on December 10, 1888, \$20,800. The finding of the court as to payment of the incumbrances by Reeder is not clear, being as follows: "(5) That said Reeder has not released or procured to be released any of the lands in controversy from any of the mortgage incumbrances as assumed by said Reeder in said instrument purporting to be a deed of December 10, 1888, but the same remain subsisting incumbrances on all the said lands." In view of the evidence, and the language of this finding, we cannot be certain whether the court meant to say that Reeder had not paid any part of the indebtedness, or only that he had not caused satisfaction of any of the incumbrances to be entered. The court further finds that the written contract of December 8, 1888, was entered into between Benjamin Reeder and Luke E. Gorsuch, and that before and at the time of the execution of said deeds of December 8th and December 10th, respectively, Luke E. Gorsuch and Mary E., his wife, "believed, understood, and intended that each of said instruments, although purporting to be a deed, was in fact a mortgage, and was to be considered and treated as a mortgage, and not a deed." There is no finding as to the belief, understanding, or intent of Reeder, the grantee. In order to establish that a deed absolute on its face is in fact only a mortgage, it must be shown, either by direct evidence or by the circumstances of the case, that it was the intention and understanding of the grantor and the grantee that it should so operate. It is not enough that one of the parties so considered it. Both must concur; otherwise, the deed will be treated according to its import, unless tainted by fraud or the result of accident or mutual mistake. *Beach*, Mod. Eq. Jur. § 414; 1 *Jones*, Mortg. § 335; *Douglass v. Moody*, 80 Ala. 61, 63; *Vincent v. Walker*, 86 Ala. 333, 336, 5 South. 465; *Holmes v. Fresh*, 9 Mo. 200, 208, 209; *Jones v. Brittan*, 1 Woods, 667, 673, Fed. Cas. No. 7,455; *Andrews v. Hyde*, 3 Cliff. 516, Fed. Cas. No. 377. And expressions in some of the opinions of this court are in harmony with this view. *Bennett v. Wolverton*, 24 Kan. 284, 289; *McDonald v. Kellogg*, 30 Kan. 170, 172, 2 Pac. 507. The special findings of the court alone being insufficient to warrant the conclusion that the deed was in fact a mortgage, it is necessary to take into account the evidence on that point; and, from a careful consideration of it, we are constrained to differ with the learned trial judge. It should be remembered that Reeder was not a mortgagee, and it is not shown that he had any interest in any of the incumbrances, except as the agent of his daughter. By the deed, he expressly assumed the greater part of the indebtedness, so that he was personally liable thereon, and he took the land subject to all

other incumbrances. The instrument of writing signed by Gorsuch and Reeder was intended to be taken, in connection with the deed, as defining the rights of the parties outside of it. Reeder testifies that he never agreed to hold the deed as a mortgage. Aside from the written instrument, the preponderance of the evidence on this point would seem to be against him. It is a matter of dispute whether this contract was read in the presence of Mr. and Mrs. Gorsuch and some of the children, or not. The matter of its execution was talked over with Mrs. Gorsuch before Reeder went to Olathe to have the papers drawn up, and she knew that it was executed. Her husband was not illiterate, nor was she especially so. She took charge of the contract after it was executed, and turned it over to her attorney among the papers, in order to inform him as to the evidence in the case, and we think that the deed and the contract together are controlling, on the well-established principle that all prior and contemporaneous oral negotiations should be considered as included in or concluded by the written contract of the parties resulting from them. Of course, there are exceptions to this rule in cases of fraud, accident, imposition, or mutual mistake, but the findings and the evidence do not bring the case within any of these. Taking the deed and the contract together, we think that they constitute a sale of the lands by Gorsuch and wife to Reeder, the consideration being that Reeder assumed a certain part of the indebtedness and agreed to take the land, subject to all the incumbrances, and to hold the same for a period of 18 months, on condition that Gorsuch might sell it within that time if he could do so for the amount of the incumbrances or more, and that he should have the benefit of any excess, Reeder to make deed to the purchaser; and that, if the land should not be sold within the time specified, then this contract to be null and void, in which case the deed alone would govern the rights of the parties. There is no suggestion of the inability of Reeder to carry out his part of the contract. This suit was brought before the expiration of the 18 months, and without any attempt, so far as appears, either by Luke E. Gorsuch or his widow or children, to sell the property, as might have been done under the agreement of December 8th, if a purchaser could be found at a price which would be equal to or in excess of the amount of the incumbrances. In this respect, the case bears a close analogy to *Elston v. Chamberlain*, 41 Kan. 354, 356, 357, 363, 21 Pac. 259. After the expiration of the 18 months without any action under the agreement of December 8th, we think the deed of December 10, 1888, became absolute. Entertaining these views, it is unnecessary to consider other questions presented by counsel, and arising upon the record. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(56 Kan. 525)

MISSOURI PAC. RY. CO. v. WICHITA
WHOLESALE GROCERY CO.

(Supreme Court of Kansas. July 6, 1895.)

COMMON CARRIER OF GOODS—WHAT CONSTITUTES
—DELIVERY OF GOODS TO CONSIGNEE—BURNING
OF WAREHOUSE—LIABILITY OF CARRIER.

1. A railroad company, taking loaded cars from its connection with another railroad, and transferring them, by means of a switch engine, over a portion of its own track, to a spur of its own, and receiving its compensation from the connecting road, acts as a common carrier, and is liable as such for the safety of the goods transported, no matter how short the distance from the place of receipt to that of delivery.

2. The rule declared in the case of *Railroad Co. v. Maris*, 16 Kan. 333, that "the extraordinary liability of a railroad company as carrier of goods extends, not merely to the termination of the actual transit of the goods to the place of destination, but also until the consignee has a reasonable time thereafter to inspect the goods, and remove them in the usual hours of business, and in the ordinary course of business," reaffirmed, and held to apply to the facts in this case.

3. A railway company, which seeks to be relieved from liability as a common carrier by reason of a special contract made by a connecting carrier, must plead such special contract, and cannot, under an answer denying generally the averments of the plaintiff's petition, which alleged liability as a common carrier, introduce evidence showing a special contract with the connecting carrier, especially where it maintains throughout the trial that it never assumed the relation of a carrier to the property for the loss of which the plaintiff seeks to recover.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; J. M. Balderston, Judge.

Action by the Wichita Wholesale Grocery Company against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On the 26th of September, 1889, the Wichita Wholesale Grocery Company commenced its action against the Missouri Pacific Railway Company, alleging, among other things, that on the 20th of April, 1889, the railway company was a common carrier, operating a railway in and through the city of Wichita, in this state; that it received on that date two car loads of sugar, of the value of \$6,252.50, from the St. Louis & San Francisco Railroad Company, in the city of Wichita, at the point of intersection of that railroad with the railway of the defendant, to be transported and delivered to the grocery company in Wichita, for a valuable consideration, paid by such company; that the railway company failed and neglected to transport and deliver the sugar to the grocery company as it undertook and agreed to do, and that thereby the grocery company lost the sugar, to its damage in the sum of \$6,252.50, for which the grocery company demanded judgment. Trial had before the court with a jury April 28-30, 1890. The jury returned a verdict for the grocery company for \$6,531.25, and also made special findings of fact.

The following, among other, facts were proved upon the trial: On or about the 26th of July, 1889, the two car loads of sugar for

which this action was brought were transported to the city of Wichita by the St. Louis & San Francisco Railroad Company. This sugar was consigned by the Louisiana Sugar Refining Company to the Wichita Wholesale Grocery Company, and was transported from New Orleans to Paris, Tex., over the Texas & Pacific Railroad, and from that point to Wichita over the Frisco Railroad. Under the contract for the shipment of this sugar, the two roads named were to transport it from New Orleans to Wichita, and deliver it to the Wichita Wholesale Grocery Company. The building occupied by the grocery company at Wichita fronted upon Water street, and extended from Water street west to an alley. About two years prior to the loss of the sugar complained of, a spur track had been constructed by the Missouri Pacific Railway Company in the alley at the rear of the building occupied by the grocery company. This track connected with a switch of the railway company. Upon the spur track at the rear of the store all cars containing goods for the grocery company were placed, when delivered at the building or store of the company. At the intersection of the Santa Fe Railroad and the Missouri Pacific Railway at Wichita a Y had been constructed. The Frisco road at Wichita was connected with the Santa Fe road, and had the use of the Y. The place of business of the grocery company was about a mile distant from the Frisco road, and it was the practice of that railroad company, when it brought goods to Wichita which it was to deliver to the grocery company at its building or store, to place the cars upon the Y in question, and then notify the agent of the Missouri Pacific Railway Company that the cars were on the Y to be placed on the spur track. The switch engine would then be sent to the Y, where it would get the cars, and place them upon the spur track at the rear of the building or store of the grocery company, the St. Louis & San Francisco Railroad paying the switching charges. The cars containing the sugar arrived at Wichita on Saturday afternoon, the 27th of July, 1889, over the Frisco Railroad. After the cars reached Wichita, the agent of the Frisco road notified the grocery company that the cars were there, and was instructed by that company to place them on the Y. The cars were placed upon the Y late Saturday night. The Missouri Pacific Railway Company was notified that the cars were on the Y, and within the usual time sent its switch engine to the Y, and switched the cars upon the spur track at the rear of the building of the grocery company. This was on the afternoon of Sunday, the 28th of July. The cars were placed upon the spur track at exactly the same point they had always been placed under similar circumstances. The grocery company was in the habit of permitting the cars to stand on the spur track from one to three days before unloading. The Missouri Pacific Railway Company never unloaded the cars or broke

the seals. Cars had been placed in the same manner on the same spur track on a previous Sunday, but it does not appear that the plaintiffs ever broke the seals, unloaded any freight, or exercised any actual control over such cars, except during business hours of business days. Some time on Monday morning of the 29th of July, the store building of the grocery company and the two car loads of sugar were burned. It is not claimed that the Missouri Pacific Railway Company was in any manner responsible for this fire, or that it was in any manner negligent concerning the same. Subsequently judgment was rendered upon the verdict in favor of the grocery company and against the railway company for \$6,531.25, with costs. The railway company excepted, and brings the case here.

J. H. Richards and C. E. Benton, for plaintiff in error. J. D. Houston and W. E. Stanley, for defendant in error.

ALLEN, J. (after stating the facts). Three principal questions are presented by the record, which include all the various matters discussed in the briefs, and will be all it will be necessary for us to consider.

1. Did the defendant company incur the liability of a common carrier under the facts of this case? The sugar was consigned by the Louisiana Sugar Refining Company, at New Orleans, to the plaintiff, at Wichita, and transported over the Texas & Pacific and St. Louis & San Francisco Railroads to Wichita. It was there placed on the Y, and switched by the Missouri Pacific road over its track to the spur track at the rear of plaintiff's warehouse. For these services the defendant was paid by the St. Louis & San Francisco Railway Company two dollars per car load. All railway corporations are by statute made common carriers, and required to transport persons and property, as such, for all persons alike. Gen. St. 1889, par. 1212. The distance over which freight is hauled, whether in car-load lots or in less quantities, whether in its own cars or those belonging to connecting carriers, can make no difference with the capacity in which the company acts. A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensation for this particular service was paid by the St. Louis & San Francisco Railway Company, while it might render that company also responsible, could not relieve the defendant company from its liability as a carrier. The defendant company was bound to receive and transport this merchandise as a common carrier, and there is nothing in the facts of the case showing that it did receive it in any other capacity.

2. Did the defendant deliver the sugar to the plaintiff? It is earnestly insisted that

when the railroad company placed the cars at the rear of the plaintiff's warehouse, at the exact place where the plaintiff was accustomed to receive and unload its freight, it had performed its whole duty, and that from the time it uncoupled its engine from the cars the property was in the possession of the plaintiff, and at its risk. It is shown that the plaintiff was accustomed to break the seals of the cars so placed, and remove the freight without the presence of, or special permission from, any employé of the railway company. And it is claimed that under these circumstances the defendant had fully performed all the services it undertook to perform, and was discharged from all further liability. There are authorities which give some support to this contention. *Gregg v. Railroad Co.*, 147 Ill. 550, 35 N. E. 343; *Peoria & P. U. Ry. Co. v. United States Rolling-Stock Co.* (Ill. Sup.) 27 N. E. 59; *Independence Mills Co. v. Burlington, C. R. & N. R. Co.* (Iowa) 34 N. W. 320. We think, however, the facts of this case fail to show a delivery of the sugar to the plaintiff. It is true that the cars were placed in the proper position for unloading, and that the plaintiff was privileged to proceed to take out the sugar as soon as it pleased to do so. But the cars were so placed on Sunday. They were consumed by fire before business hours on Monday morning. The plaintiff was under no obligation to work on Sunday, nor was it bound to receive goods in the nighttime, especially as it is not shown that it was accustomed to do so. The property remained in the custody of the railroad company until the plaintiff could reasonably be required to receive it. In the case of *Railroad Co. v. Maris*, 16 Kan. 333, it was held that "the extraordinary liability of a railroad company, as a carrier of goods, extends not merely to the termination of the actual transit of the goods to the place of destination, but also until the consignee has a reasonable time thereafter to inspect the goods, and remove them in the usual hours of business, and in the ordinary course of business." In the opinion in that case the cases holding a different doctrine are referred to, but the court declined to follow them, deeming the better rule to be the one announced, and also that it was best supported by authority. We still adhere to the rule laid down by this court, and think it sustained by the best-considered recent cases. *Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. 1073; *Pindell v. Railway Co.*, 34 Mo. App. 675; *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 8 Sup. Ct. 266. At the time the sugar was burned, it was in the cars in which it was placed by the consignor, on the track belonging to the defendant, where it was placed by its employés. The plaintiff had never in any manner taken actual charge of it, nor would it, in the usual course of business, open its warehouse, or be ready to receive it, until some hours after it was de-

stroyed. It is not claimed that the defendant did actually deliver the sugar out of the cars to the plaintiff. It cannot make a constructive delivery, except at a time when the plaintiff might reasonably be required to receive it, and that could only be during business hours of a business day, where there was no custom or agreement to receive at any other time.

3. Original bills of lading issued by the Texas & Pacific Railway Company to the consignor, under which it is claimed that not only the receiving company, but all connecting carriers, were exempted from liability for loss by fire, were offered in evidence by the defendant. The court excluded them. We think they were inadmissible under the pleadings in this case. The allegations of the petition were that the sugar was delivered to the defendant by the St. Louis & San Francisco Railway Company at the point of intersection of the railroads at Wichita, to be transported to the plaintiff at Wichita, and that the defendant failed to deliver. The answer consisted—First, of a general denial; and, second, of an allegation that the plaintiff's loss, if any, occurred by reason of its own negligence. The contract for shipment from New Orleans to Wichita was not mentioned in the pleadings, nor drawn in issue in the case. It was, therefore, irrelevant, and inadmissible. There is much comment by counsel on the instructions, but we think no other substantial question is presented in the case. Although there would seem to be a very great hardship in imposing on the defendant, which has received but \$4 for its services, a liability for a loss of \$6,531.25, that liability arises from a rigid, but well-established, rule of the common law governing the transportation of property by common carriers, which we are not at liberty to abolish or modify. The judgment is affirmed. All the justices concurring.

(55 Kan. 510)

ARNOLD v. WEIKER.

(Supreme Court of Kansas. July 6, 1895.)

DEDICATION OF HIGHWAY—VACATING ORDINANCE—RIGHT TO QUESTION VALIDITY—ALLOWANCE OF DAMAGES.

1. It sufficiently appears by the plat and dedication of the town site of Peace (now the city of Sterling) that the strip lying next south of the Atchison, Topeka & Santa Fe Railroad depot grounds, and extending from the west line of Broadway to the east line of Tenth street, was designed for public use as a street or highway.

2. If compensation is allowable on the vacation of part of a street in a city of the third class, the validity of a vacating ordinance not providing for the assessment and payment of damages, which is treated as valid by the city and the owners of property immediately abutting on such vacated part of the street on both sides, cannot be successfully challenged by a person not shown to have an interest in any real property abutting on the street.

3. The evidence examined, and held, that the court did not err in the assessment of the amount of the recovery of Weiker against Coul-

ter so as to prejudice the plaintiff in error as the junior mortgages.

(Syllabus by the Court.)

Error from district court, Rice county; Samuel Jones, Judge pro tem.

Action by Rachael Arnold against Elias Welker, to which J. R. Coulter and J. W. Oliver and wife were made parties. Judgment was rendered for said Welker, and plaintiff, Arnold, brings error. Affirmed.

This action, as originally tried before Hon. Samuel Jones, judge pro tem., at January term, 1890, was quite complicated. Seven mortgages had been executed upon the premises known as the "International Roller Mills," in Sterling, or upon different parts of or interests in said property. Rachael Arnold brought her action in the first place to recover upon a promissory note, and to foreclose a mortgage securing the same; both being executed by J. O. Stow, a part owner, and Mary J. Stow, his wife. This indebtedness was settled before the trial of the cause, but numerous lienholders having been brought in as parties, the plaintiff filed a pleading called an "answer and cross petition" for the purpose of recovering upon a promissory note executed by J. R. Coulter and J. W. Oliver and wife for \$1,175, with interest at 12 per cent. per annum from April 16, 1889, the date of said note, and to foreclose a mortgage of even date, executed to secure the same; said J. R. Coulter and J. W. Oliver being part owners of the mill property. It was admitted in this answer and cross petition that all the mortgages were prior to the plaintiff's, except those of Elias Welker, and that his was superior as to lots 114 and 116, Jackson street, but inferior as to the residue of the property. Elias Welker answered, counting on the last two of a series of four promissory notes for \$1,374.50 each, executed by H. L. Millard, July 15, 1884, and payable in one, two, three, and four years, respectively, from date, with interest at the rate of 8 per cent. per annum from date, payable annually; it being alleged that there was due on said two promissory notes the sum of \$2,749, with interest on the same from July 15, 1886, at 8 per cent. per annum. These notes were secured by two mortgages of the same date, said H. L. Millard being then a part owner of the property. One of these mortgages was upon lots 114 and 116, Jackson street, and the other upon a leasehold interest of a tract north of said lots, the lease being under the Atchison, Topeka & Santa Fe Railroad Company. On March 10, 1886, Millard and wife conveyed all their interest to J. R. Coulter and J. W. Oliver, said J. R. Coulter expressly assuming in the deed the mortgage indebtedness owing to Elias Welker, it being recited that it was upon three notes, amounting to about \$4,000. Millard had paid one of the four notes before the conveyance to Coulter and Oliver; and after the conveyance Coulter paid another, leaving two only remaining at the time that Welker filed his answer and cross petition.

Millard and wife were not made parties, but Welker asked judgment direct against J. R. Coulter on his assumption of the indebtedness of Millard, and he sought to foreclose the mortgages against Coulter and Oliver and their wives. Judgment was rendered in favor of Welker against J. R. Coulter for \$3,543, and decree of foreclosure was entered against Coulter and Oliver and their wives, and the mortgages of Welker were held to constitute liens superior to that of the plaintiff. The case was brought to this court by Rachael Arnold, J. R. Coulter, and J. W. Oliver, but afterwards Coulter and Oliver caused the petition in error to be dismissed, and the judgment affirmed as to themselves, leaving Rachael Arnold the sole plaintiff in error, and the contest here is mainly as to the priority of these mortgage liens. The controversy between the parties grows primarily out of the status of a certain platted strip of ground about 60 feet in width, lying between the north end of lots 114 and 116, Jackson street, and the right of way and depot grounds of the Atchison, Topeka & Santa Fe Railroad Company, on which strip the International Roller Mills and elevator and a dump are mostly located, the remaining part being on said lots; the plaintiff claiming that this strip was private property, and that it had been mortgaged to her by J. R. Coulter and J. W. Oliver, who had obtained title to it from the Arkansas Valley Town & Land Company, which had procured its deed direct from the Arkansas Valley Town Company, the original proprietor of the town site; while Welker contended that the disputed ground was platted as a street or way; that it had been vacated, one-half thereof reverting to the owners of said lots 114 and 116 and the other half to the railroad company; and that these interests were all covered by the mortgages of Millard to him; the indebtedness upon which had been assumed by J. R. Coulter. The town site of Peace was platted by the Arkansas Valley Town Company September 9, 1874, on section 21, township 21, range 8 west. It was stated in the dedication that the "avenues and streets and alleys are laid out parallel with and at right angles to each other," and that "the width of all avenues, streets, and alleys and the length and width of lots and blocks are marked in feet on the map." The central or business street, running north and south, is Broadway; the other north and south streets are numbered, unless it be a strip on each side of the town site, not uniform in width, and being neither numbered nor named. The central thoroughfare east and west is Main street; the other east and west streets are named for certain of the presidents, unless it be strips on the north and south sides respectively of the town site, not uniform in width, and neither numbered nor named. The railroad is marked as running in a straight line from a point about 400 feet north of the southeast corner of the section and extending diagonally to a point a lit-

the north of the quarter corner on the west side. The depot grounds are platted as being 300 feet in width, and extending from the west side of Broadway to the east side of Tenth street, and across Seventh, Eighth, and Ninth streets, which are represented as stopping on either side; these grounds also cutting off and interfering with Monroe street on the north and Jackson street on the south. On the plat these depot grounds are inclosed with solid lines at the sides and at both ends. On each side is a strip opening into Broadway at the east and into Tenth street at the west, 65½ feet in width, there being no lines across these strips at the ends. It is unnecessary to further describe the strip on the north side, nearly corresponding with that on the south of the depot grounds. Seventh, Eighth, and Ninth streets, running north and south, open into the south strip, there being no lines on the south side of the strip except those bounding the lots and blocks. Jackson street, running east and west, also opens into this strip. At a point near said lots 114 and 116 the strip is marked as only 60 feet wide. Some of the lots would not have access to any street unless this strip be so considered, although such lots would have an outlet by an alley. The length of the strip is not marked, and could not be ascertained from the plat except by scaling. It is not named nor numbered as a street. The numbering of the lots is by streets, and not by blocks, and no lots are numbered as fronting on this strip. The lines of lots 114 and 116, Jackson street, which run north and south, are shortened by the diagonal course of the strip. The town site of Peace was incorporated as a city of the third class by order of the district judge dated April 18, 1876, published April 27, 1876. By Ordinance No. 136, which went into effect by publication September 27, 1883, the mayor and council assumed to vacate all that part of this strip lying north of lots 114 and 116, it being designated therein as Railroad street. There is no provision in the ordinance for the ascertainment or payment of damages by reason of such vacation.

A. M. Lasley, for plaintiff in error. John N. Ives, for defendant in error.

MARTIN, C. J. (after stating the facts). 1. The first and principal question in this case is whether by the platting of the town site of Peace the strip of ground lying next south of the depot grounds was shown to be intended for sale, or to be reserved for public purposes, or for further platting or use by the original proprietor. We think it quite clear that it was devoted to public use, although not named as a street, nor crossing the other streets and alleys at right angles. It was evidently designed to furnish access as a street or highway to the depot grounds, not only for the owners of property abutting on the strip, but for all the people of that part of the town site lying south of the railroad and be-

tween Broadway and Tenth street, and also as the means of ingress to and egress from Broadway and Tenth streets for the property on Jackson street, and also that abutting upon the strip between Seventh street and Broadway; and we think that this sufficiently appears without the use of any evidence other than that furnished by the plat and the dedication, and therefore the question as to the admissibility of evidence of dedication by user and acquiescence will be immaterial. A contrary construction would be inconsistent with sections 1, 5, 6, 7, c. 78, Gen. St. 1868, concerning the plats of cities and towns, and also with the case of Hitchcock v. City of Oberlin, 46 Kan. 90, 94, 95, 26 Pac. 466, and the authorities there cited. It seems incredible that a town-site proprietor, intending a strip rhomboidal in form for sale, or for further platting or private use, would not inclose it by lines on both sides and at each end, as in the case of the depot grounds. In the present instance there is but one solid line and this is necessary to mark the southern boundary of the depot grounds. The lines on the south side of the strip are fragmentary, being only the northern boundaries of lots and blocks, and the strip opens into Broadway at the east and Tenth street at the west, and Seventh, Eighth, Ninth, and Jackson streets open into it from the south. Under these circumstances no purchaser of a lot abutting on the strip could reasonably anticipate that all these streets were blockaded, and access cut off on the north side by a private reservation extending across the streets and the ends or sides of the lots.

2. The plaintiff challenges the validity of Ordinance No. 136 on the ground that no provision was made for the assessment and payment of damages to property owners by reason of the vacation of said strip lying north of said lots 114 and 116. But whether damages are recoverable or not in such case, or the assessment and payment thereof conditions precedent to the taking effect of the vacation, we think it unnecessary to decide. See paragraphs 578, 579, 580, 582, 811, 980, Gen. St. 1889, as to vacation of streets and alleys by cities of the first, second, and third classes, respectively. The ordinance was passed and approved in 1883. The city, the owners of lots 114 and 116 on one side, and the railroad company on the other, treated it as valid. The railroad company let and leased its part of the vacated ground to Millard, and the improvements were made, and Millard's interests mortgaged to Welker, in 1884. In 1886, Millard conveyed to Coulter and Oliver, and Coulter assumed the mortgage indebtedness then owing by Millard to Welker. In 1888, Rachael Arnold, J. O. Stow, J. R. Coulter, and J. W. Oliver, partners as J. O. Stow & Co., obtained a quitclaim deed for the strip from the Town and Land Company, which had neither title nor possession to convey. In 1889, Coulter and Oliver mortgaged their interest to said Rachael Arnold, but it does not

appear that Coulter had any interest except what he obtained from Millard in 1886, and that was subject to the payment of Millard's indebtedness to Welker, as before stated. So far as shown, Rachael Arnold has no standing whereby she may contest the validity of the ordinance. If it were conceded to be void, we do not see how she could profit by the concession.

3. It was claimed by Coulter in his answer that the title to the strip of ground had failed, and there was no consideration for his assumption of Millard's indebtedness to Welker, and he prayed judgment against Welker for \$1,615.55, alleged to have been paid by him on the indebtedness. The plaintiff interposed no plea of payment, but she claims the right to make any defense which Coulter might have made as to the amount due, and that she was precluded by the rulings of the court from so doing. The grounds upon which the court below sustained objections to some of the questions asked Coulter as to payments made are not apparent, but the trial was by the court, and, notwithstanding the adverse rulings, Coulter did testify to the several payments, showing that they amounted to \$1,800, which was more than he had alleged, and we think it sufficiently appears by admissions and by Coulter's testimony that he had paid one of the notes, and two years' interest on the other two, being \$439.84 interest, or \$1,814.34 in the aggregate; and the court seems to have taken all this into consideration, and therefore the judgment against Coulter is not too large, and the plaintiff, as the holder of the junior mortgage, has no legitimate grievance. Holding these views, we deem it unnecessary to discuss the motion of the defendant to dismiss for want of necessary parties. The judgment of the district court will be affirmed. All the justices concurring.

(55 Kan. 518)

RISSE et al. v. HOPKINS PLANING-MILL CO. et al.

(Supreme Court of Kansas. July 6, 1895.)

MECHANICS' LIENS—CONTRACTOR'S BOND FOR PAYMENT OF CLAIMS—LIABILITY OF SURETY—MISREPRESENTATIONS BY PRINCIPAL.

1. A bond given by a contractor under the statute relating to mechanics' liens, and in accordance with section 13 of chap. 168 of the Laws of 1889, conditioned for the payment of all claims which might be the basis of liens, or which might arise or grow out of the contract, and the performance and completion of the work thereunder, is a substitute for the statutory liens, to which laborers and material men are entitled where no bond is given; and where such bond is given, no lien can thereafter attach, and any which may have attached or have been filed is discharged.

2. A slight departure from the plans and specifications of the work, without the knowledge of the sureties upon the bond, where alterations are authorized by the contract the performance of which the bond was given to secure, will not relieve the sureties from liability upon the bond.

3. The fact that the principal procured the

signature of a surety upon the promise that the principal would afterwards obtain the signature of another surety, which was not done, will not relieve the surety from obligation on a bond delivered, approved, and filed as the law requires. (Syllabus by the Court.)

Error from district court, Wyandotte county; N. J. Loomis, Judge pro tem.

Action by the Hopkins Planing-Mill Company against John Risse and others upon a bond given by a contractor. There was a decree adjudging certain claims to be liens on the property of said Risse, and he and others bring error. Reversed.

E. J. Wall, for plaintiffs in error. Scroggs & McFadden and McGrew, Watson & Watson, for defendants in error.

JOHNSTON, J. On October 5, 1889, P. T. Bolinger entered into a written contract with John Risse to construct a building upon certain lots belonging to Risse in Kansas City, Kan., and to furnish all the material and labor therefor. The work was to be done according to certain plans and specifications prepared by an architect, which were made a part of the contract, and it was provided that the architect was to determine all questions of doubt as to the meaning of the drawings or specifications, and that his decision should be final and conclusive. There was a further provision that if any alteration of the work was required a fair and reasonable valuation of the work added or omitted should be made by the architect, and the sum agreed to be paid for the work should be accordingly increased or diminished; and, in case they were unable to agree as to the valuation, arbitrators were to be chosen, and their decision with reference to the valuation of the work added or omitted was to become final and binding. It was agreed that the sum to be paid for the material and labor should be \$3,275, subject to additions or deductions on account of alterations. On the same day, and in pursuance of the mechanics' lien law of 1889, Bolinger, as contractor, executed a bond to the state of Kansas, with A. J. Hibbs and F. G. Husson as sureties, which bond was on October 11, 1889, duly approved by the clerk of the district court of Wyandotte county. The bond recited that it was given in pursuance of the mechanics' lien law, and to secure compliance with the provisions of the contract between Bolinger and Risse; and provided that if Bolinger "shall pay all claims which might be the basis of liens upon said described real estate and improvements, for materials furnished, labor, or otherwise arising, or which may arise or grow out of said contract and the performance of and completion of said work thereunder or connected therewith, under the provisions of said act, then this obligation is to be null and void, otherwise to be and remain in full force and effect." Material was furnished and labor performed, in pursuance of the contract, for which payment was not made by Bolinger, and several of the par-

ties who had furnished material and labor endeavored to obtain mechanics' liens upon the premises; and, among others, Hibbs and Husson, who were sureties upon the bond, sought to obtain a lien upon the premises as subcontractors for material furnished by them. The Hopkins Planing-Mill Company, which had an unpaid claim for material furnished, brought an action upon the bond, making the contractor and the sureties thereon parties defendant; and it also asked that it be adjudged to have a lien upon the premises in the event that the court should hold that it could not recover upon the bond. Other persons who had claims for material and labor were also made defendants, who set up other claims under the bond and upon the premises for labor and material furnished by them. On the trial, testimony was offered to the effect that during the construction of the building some alterations were made and some work done not provided for in the plans and specifications, and that the added work and material were of the value of about \$300. The court found that by reason of these changes and alterations, without the knowledge and consent of the sureties upon the bond, such sureties were discharged from any liability thereon. The unpaid claims of the several claimants amounted to \$2,103.46, and they were adjudged to be liens upon the property and improvements of Risse, and a foreclosure of the same was decreed. The statute under which the bond was given is as follows: "The contractor or owner mentioned in section 1 of this act may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens; which bond shall be in a sum not less than the contract price, and with good and sufficient sureties, whose qualifications shall be verified in accordance with section 723 of the Code of Civil Procedure, such surety as shall be approved by the clerk of the district court in the county in which the property is situated, and may file such bond in the office of said clerk; and when such bond is so approved and filed no lien shall attach under this act, and if when such bond is filed liens have already been filed, such lien shall be discharged. Suits may be brought on said bond by any person interested." Gen. St. 1889, par. 4745. While this bond runs to the state, it is given for the protection of those who contribute labor or material to the building or improvement contracted to be built or made, as well as for the benefit of the owner of such building or improvement. When the bond is given as the statute prescribes, no lien can attach, and any lien which may have been filed is discharged. It takes the place of the statutory liens to which laborers and material men are entitled when no bond is given. When it is given the material men and laborers may rely upon the same, and thus avoid the trouble and expense of perfecting liens, and the owner is relieved from any care as to whether the

money advanced by him upon the contract is applied upon the claims for material and labor furnished under the contract. A bond given for such purpose should not be lightly set aside by any act or omission of the contractor, who is the principal obligor upon the bond, or by the owner, who is not a party to the same.

The sureties claim to be released from liability, by reason of the alterations and additions that were made in the plans and specifications, and the increase of the contract price without their knowledge and consent. This contention cannot be sustained, for the reason that the contract itself contemplated that changes and additions might be made which would increase or diminish the amount to be paid for the complete work. It has been held that "the sureties on a bond to secure the performance of a building contract are discharged by any substantial change or alteration of the plan of the work, unless the right to make such change or alteration is expressly given in the bond itself or the contract which it secures." *Morgan Co. v. McRae*, 53 Kan. 358, 36 Pac. 717. As the contract specifically provided that changes might be made, with the concurrence of the architect, the sureties cannot claim a release because the alterations were made without their knowledge or consent. The provisions of the contract did not require that the consent of the sureties upon the bond should be obtained, and as the owner had reserved the right to make changes, and which was expressly provided for in the contract, the sureties who signed the bond for the performance of the contract are not in a position to complain of the changes made. The departures from the original plan and specifications were not very important, nor were the alterations expensive. The location of a window was changed. Two of the rooms that were to have been separated by a partition wall were connected by an opening or archway. One of the rooms was celled with lumber instead of being plastered. An inexpensive ventilator was put in the roof. And some other minor changes, not particularly mentioned in the specifications, were made. And these alterations were made with the concurrence of the architect, the owner, and the contractor. It is not easy to have plans and specifications so prepared that some changes will not be found necessary as the work progresses, and it appears that no more changes were made in this instance than are likely to be required in the construction of a building of the character described in the plans. We think the changes were made substantially as the contract contemplated, and that there was no such departure as will release the sureties from liability upon the bond. *McClennan v. Wellington*, 48 Kan. 756, 30 Pac. 183; *Association v. Fitzmaurice*, 7 Mo. App. 283; *Bohn v. McCarthy*, 29 Minn. 23, 11 N. W. 127; *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302; *Abbott v. Morrisette*, 46 Minn. 10, 48 N. W. 416; *Robinson v. Hagenkamp*, 52 Minn. 101, 53

N. W. 813; *Swift v. Martin*, 20 Ill. App. 515; *Martin v. Swift*, 120 Ill. 488, 12 N. E. 201; *Moore v. Fountain* (Miss.) 8 South. 509; *Dorsey v. McGee* (Neb.) 46 N. W. 1018.

It is contended that because the principal upon the bond represented to one of the sureties that if he would sign the bond he would obtain the signature of another party, and upon such representation he signed the same, relying upon the promise that the name of the other surety would be obtained, and that, as this was not done, the surety was relieved from liability thereon. The judgment of the court below was not based upon this contention, nor can it be sustained. *Carter v. Moulton*, 51 Kan. 9, 32 Pac. 633.

An objection was made to a review of the case, on the ground that Bolinger, the principal contractor, was not a party to the proceeding in this court. We are unable to see, however, that he is a necessary party to the proceeding, or that the sureties will necessarily be affected by his absence. He was not held to be discharged from liability upon the bond, and a judgment for the full amount of the claims was rendered against him. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(55 Kan. 562)

FARM LAND MORTGAGE & DEBENTURE CO. v. ELSBREE et al.

(Supreme Court of Kansas. July 6, 1895.)

NEGOTIABLE INSTRUMENTS—ACTION BY TRANSFEREE—BURDEN OF PROOF—SUBROGATION.

1. Where an action was brought upon a promissory note, and to foreclose a mortgage securing the same, and where it was alleged that the payee of the note duly indorsed the same to the plaintiff, and the copy of the note attached to and filed with the petition showed that there was no indorsement thereon, the unverified denial of the defendant put in issue the title and ownership of the note, and the burden of proof to establish the same rested upon the plaintiff.

2. The state of the public records respecting the title or ownership of a mortgage upon land at a particular time should be established by the public records, and not by the original mortgage.

3. Where a man takes a mortgage upon land with the understanding that it shall be a first lien upon the same, and the money advanced is used in discharging prior incumbrances upon the same land, he will, where, under the circumstances, it is just and equitable to do so, be subrogated to the rights of the prior incumbrancers whose debts have been paid by the money which he has advanced upon the mortgage.

(Syllabus by the Court.)

Error from district court, Marion county; Frank Doster, Judge.

Action by Manson Elsbree against the Farm Land Mortgage & Debenture Company and others. From the judgment rendered, defendant company brings error. Reversed.

This was an action brought by Manson Elsbree to recover upon a promissory note for \$1,000 executed by Ferdinand Wahl and Loulee Wahl, and payable to the order of

Joseph M. Young five years after its date, to wit, May 6, 1886. The petition averred that at the same time the makers of the note executed and delivered to Young a mortgage upon a tract of land which they owned in Marion county, to secure the payment of the promissory note. The mortgage was duly recorded upon the same day. Copies of the note and mortgage were attached to the petition, and it was alleged that the note was duly indorsed by Young to the plaintiff before maturity, who was now the legal owner and holder of the same, together with the mortgage securing the same. It was further alleged that default had been made in the payments, and the plaintiff, in exercise of his option, had declared the whole sum of money mentioned in the note due and payable. In addition to the makers of the note, C. A. Grimes, N. C. Elsbree and the Farm Land Mortgage & Debenture Company were made defendants, because they claimed to own an interest in the mortgaged land. N. C. Elsbree, one of the defendants, filed an answer or cross petition, setting up a promissory note executed by Wahl and wife to Joseph M. Young for \$900, on March 6, 1886, due in five years, and which was secured by the mortgage already referred to. He further alleged that the note, a copy of which is attached to his pleadings, was duly indorsed by Young to him before maturity, and that he was then the owner and holder of the same. The written indorsement upon the note as shown by the copy is as follows: "For value received, I hereby assign and transfer the within note and coupons, together with all my interest in and rights under the mortgage securing the same, to N. C. Elsbree, and guaranty the payment. Jos. M. Young." It is alleged that there is still due and unpaid on the note the sum of \$533.29, with interest from January 19, 1880, at 12 per cent. per annum. The Farm Land Mortgage & Debenture Company filed answers, and also a cross petition, denying generally the averments of the Elsbrees, except that there was an admission of the execution by the Wahls of the note and mortgage to Young on March 6, 1886. There was an averment that on January 19, 1889, Wahl and wife procured an actual loan from them of \$6,000, and on that day executed a note for that amount, payable January 1, 1894, with interest at the rate of 9 per cent. per annum, payable semiannually, and that, to secure the payment of the note, they executed a mortgage upon the land previously mortgaged to Young, which was duly recorded. Copies of the note and mortgage were set forth. It was further alleged that, at the time of making this loan, and before the payment of the money, Joseph Young, to whom the other note and mortgage were given, agreed in writing with the company in consideration of the sum of \$848.10, then and there paid out of the \$6,000 loan,

to discharge of record the \$1,900 mortgage, before referred to, and to make it subsequent and subordinate to the \$6,000 mortgage, and that the \$848.10 should be used as a part payment of the \$1,900 mortgage. It is alleged that Young did discharge the mortgage of record, in accordance with his agreement, and also by indorsing upon the margin of the record of the \$1,900 mortgage the following words: "I, J. M. Young, the within-named assignee and mortgagee, for a valuable consideration, do hereby consent that the mortgage of \$6,000 in favor of the Farm Land Mortgage & Debenture Company shall become the first and superior lien on section 8, town 19, range 5 E., in Marlon county, Kan. J. M. Young. Jan. 19, 1889. Attest: Ferd. J. Funk, Register of Deeds." It is alleged further that it had no notice, at the time of making the loan, that the Elsbrees had or claimed any right or interest in the mortgage of \$1,900, or the notes secured thereby, but dealt with Young as the owner and holder thereof. It is alleged that Young is the real owner and holder, and was at the time of the negotiation of the loan, and that the transfer of the notes to plaintiff is a sham and subterfuge, made for the purpose of cheating and defrauding the company. There is a further averment that the mortgage is fraudulent, without consideration, and that it has been paid and satisfied. It is averred that the mortgage of the company is a first and superior lien upon the premises mortgaged, and judgment is asked against the Wahls for the amount of the loan, with interest thereon, and also that it be decreed a first and superior lien upon the mortgaged premises, and that they be sold in satisfaction of the judgment and lien. At a trial had on September 18, 1890, judgment was given in favor of the plaintiff, Manson Elsbree, in the sum of \$1,544, and a judgment in favor of N. C. Elsbree in the sum of \$480.60, and it was decreed that the mortgage to secure their claims should be foreclosed and declared a first lien on the mortgaged premises, and that the premises should be sold, and the proceeds should be applied to the payment of costs and taxes, and then in payment of the judgment of the Elsbrees in proportion to the amounts of each, respectively. No judgment was awarded in favor of the Farm Land Mortgage & Debenture Company, nor was it allowed a lien upon the premises. The company excepted to the rulings and judgment of the court, and brings the case here for review.

Wm. R. Hazen, for plaintiff in error. Keller & Dean, for defendants in error.

JOHNSTON, J. (after stating the facts). When the trial was begun the court ruled that as there was no verified denial of the execution of the notes upon which the Elsbrees were seeking to recover, nor of the indorsements thereon, the burden of proof rest-

ed upon the Farm Land Mortgage & Debenture Company. In this we think there was error. While it was alleged in the petition that the note upon which Manson Elsbree sought to recover was duly indorsed by Joseph M. Young, a copy of the same was set out in the petition, and upon it there was no indorsement. Under the Code, a copy was required to be attached to and filed with the pleading, and the one which was attached to the petition in this instance purports to be true and complete. It plainly contradicted and overcame the allegation of indorsement. In such a case, the statement that the note was duly indorsed cannot be regarded as a fact, nor any more than a conclusion of law, and hence the unverified denial of the company put in issue the title and ownership of the note. The mortgage securing the Elsbree notes was given to Joseph M. Young in May, 1886; and, nearly three years later, Wahl, the owner of the land, desired to obtain a \$6,000 loan, to be used in discharging maturing liens upon the same land that was mortgaged to Young, and, through the aid of Young, the loan was obtained from the Farm Land Mortgage & Debenture Company. The company being unwilling to place the loan unless they could have a first mortgage upon the land, Young agreed, for a consideration of \$848.10, to postpone the \$1,900 mortgage to the one securing the \$6,000 loan. He was in possession of the notes, and claimed full control of the same. For the purpose of subordinating the mortgage for the one about to be given, a writing was executed, which was probably sufficient for the purpose, if Young had been the owner of the notes, or had had sufficient authority from the owners to make the agreement and release that were made. The Elsbrees claimed that there had been a bona fide transfer of the note and mortgage to them, and that Young was without the authority to make the agreement which he had attempted to make. On the other hand, the company contended that the alleged transfer from Young was a sham and subterfuge, and that it had dealt with Young as the owner of the mortgage, without notice of any adverse right in the Elsbrees. In the trial, it was an important question whether the company had actual or constructive notice that there had been a transfer of the note and mortgage, and as to what transfers of title or interest in the land were shown by the public record at the time the last mortgage was executed. The burden of proof having been placed upon the company, it offered proof of what the records showed as to the \$1,900 mortgage at the time the \$6,000 loan was made by the company. This was excluded, upon the ground that the original mortgage was in court, and was available to the company for the purposes of evidence. The production of the original, however, was not competent evidence of what the public records disclosed respecting the title or ownership of the mortgage at the time Young at-

tempted to postpone that mortgage to the later one. This testimony should have been admitted, but whether its exclusion constitutes a sufficient ground for a reversal we need not now determine.

There is considerable dispute in the evidence as to the authority of Young to represent and bind the Elsrees, and much is made of the fact that their money was invested, and, when collected, was reinvested, by him as he thought best to do,—and also of the fact that he had possession of the notes. There is some contention as to the authority of one Cammon, a local agent, who acted for the company; but these conflicts must be determined by the trier of the facts. If it should finally be held that Young was not authorized to subordinate the \$1,900 mortgage to the later one, and that the attempt was ineffectual, then we would think that the company should be subrogated to the rights of the holders of the incumbrances and liens which were discharged with the money obtained from the company. The \$6,000 loan was obtained for the purpose of discharging accrued and accruing incumbrances upon the land, and the proceeds appear to have been devoted to that purpose. It seems that there was a prior mortgage of \$4,000, which, with accrued interest, amounted to \$4,952.50, that was paid from that fund. There was a claim of \$186.70 for unpaid taxes, which was paid out of the money received from the company, and then there was \$848.10 paid to Young to secure the release and postponement of the \$1,900 mortgage to that of the company, which was actually paid to Elsree, and the amount so paid was credited upon his note. From the facts developed in the present trial of the case, it appears to be highly equitable that subrogation should be made, if the agreement of Young proves to be abortive. The money was advanced by the company upon the understanding and belief that they had obtained a first lien upon the premises, and was used, as it was intended, for the payment of prior incumbrances. If the company succeeds to the rights of the prior incumbrancers, it will not change the position of the \$1,900 mortgage nor depreciate the security of the same. The Elsrees, if they own the notes and mortgage, could lose nothing by the substitution. Their mortgage security is just as good after payment and substitution as it would have been if the \$6,000 mortgage had not been executed and payment of the prior incumbrances had not been made. In fact, they occupy a more favorable position, because \$848.10 was paid upon their mortgage from the proceeds of the \$6,000 loan. After deciding that the Elsrees had a first lien, the court did not allow the Farm Land Mortgage & Debenture Company to take the places of the incumbrancers whose debts and securities had been paid and discharged from the money advanced by the company. No personal

judgment was awarded to the company, nor was it decreed to have a lien of any rank upon the mortgaged premises. We are satisfied, from an examination of the record, that the case should be retried, and for that purpose the judgment will be reversed, and the case remanded. All the justices concurring.

(55 Kan. 569)

MORRIS et al. v. DERR.

(Supreme Court of Kansas. July 6, 1895.)

VENDOR AND PURCHASER—RIGHT OF PURCHASER TO RECOVER PARTIAL PAYMENT AFTER DEFAULT.

Plaintiffs and defendant by parol entered into an agreement in pursuance of which the defendant and wife executed a deed to the plaintiffs for 40 acres of land for the price of \$6,000. The plaintiffs paid \$2,000 down, and executed two promissory notes for \$2,000 each, due in 6 and 12 months, respectively. The deed and notes were deposited in escrow in the First National Bank of Arkansas City, the deed to be delivered on the payment of the notes. It was also agreed that the plaintiffs should have possession of the land, which they forthwith took. After the first note matured, the time of payment on both notes was extended six months. No payment nor tender was ever made on either note. After the first note matured in accordance with the extension, the defendant retook possession of the land, without resistance from the plaintiffs. The deed and notes still remained in the possession of the bank under the original arrangement. *Held*, that the mere taking possession of the land by the defendant after plaintiffs' default in payment of the notes did not of itself operate as a rescission of the contract, nor give to the plaintiffs the right to recover the \$2,000 paid.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by G. S. Morris and L. J. Tally against Horace C. Derr. Defendant had judgment, and plaintiffs bring error. Affirmed.

The parties to this action entered into a parol agreement for the purchase and sale of 40 acres of land belonging to the defendant near Arkansas City. The price agreed on was \$6,000, \$2,000 of which was paid down, and the balance was to be paid in two equal installments in 6 and 12 months. The defendant and his wife executed and acknowledged a deed conveying the land to the plaintiffs. The plaintiffs executed two promissory notes, bearing 8 per cent. interest, for the deferred payments. The deed and notes were deposited in the First National Bank of Arkansas City with instructions to deliver the deed on payment of the notes. The plaintiffs, in accordance with the agreement of the parties, then took possession of the land, and harvested the crops raised thereon during the following season. These papers were executed on the 29th of March, 1887. About the time the first note became due an agreement was made between the parties by which the defendant was to convey to the plaintiffs 16 acres off the north side of the tract for the money already paid, and to retain the balance of

the land, but the defendant's wife refused to sign the deed and this arrangement was abandoned. It was then verbally agreed between the parties that the time for payment of the notes should be extended six months. On the 9th of April, 1888. No payment having been made on either note, the defendant took possession of the land, which joined a tract on which he then resided, and has held possession ever since. The deed and notes still remain in possession of the First National Bank. This action is brought by the plaintiffs to recover the money paid. The trial court rendered a judgment for the defendant, and the plaintiffs allege error.

Asp, Shartel & Cottingham and Pollock & Love, for plaintiffs in error. McDermott & Johnson, for defendant in error.

ALLEN, J. (after stating the facts). The pivotal question in this case is, did taking possession of the land which was the subject of the contract between the parties by the defendant operate as a rescission of the contract? Very many authorities are cited in brief of counsel for the plaintiffs in error, showing what acts, conduct, and declarations of a party have been held to amount to a rescission. Notwithstanding the very commendable industry of counsel, none of the cases cited fit closely the facts of the one under consideration, and those that come nearest it are opposed, rather than favorable, to the plaintiffs' claim. At the time the contract was entered into, a deed was executed by the defendant and wife, conveying the lands to the plaintiffs. The plaintiffs executed two promissory notes for \$2,000 each, due, respectively, in 6 and 12 months from date. The deed and notes were deposited in the First National Bank of Arkansas City, where they all remained at the time this suit was brought, without any change or attempted change of the terms under which they were so deposited. There was no written contract or memorandum showing the terms on which the papers were so deposited. The deed, however, evidenced the defendant's contract to convey, and the notes evidenced the plaintiffs' agreement to pay for, the land. Beyond this there appears to have been a parol agreement, under which the plaintiffs took possession. They did not pay the first note at maturity. An agreement was then made, which we shall treat as valid, to extend the time of payment on both notes for six months. After the first note had become due under the terms of the extensions, the plaintiffs still failing to pay either note, the defendant took possession of the land. The whole claim of a rescission rests on this one act. In most of the cases cited by the plaintiffs some act was done by the vendor which placed it out of his power to perform the contract, or else he had in some unequivocal manner refused to perform. Nothing of the kind appears in this case. There

is nothing whatever showing, or tending to show, that the plaintiffs, on payment of the money due, would not have received the deed to the land; that it would not have passed to them a good title, or that on such payment the defendant would have denied them possession. He had not conveyed the title, nor transferred the possession, to a stranger. We think the evidence in the case fairly shows that the defendant took possession of the land under the belief that he had a right to do so because of the plaintiffs' default; that, if they withheld the balance of the purchase money, he had a right to the possession of the land. The statement of the defendant on the witness stand, commented on by counsel, amounts to no more than that he thought he had a right to keep the land, and the money, too, if the plaintiffs failed to pay the balance, and that he retook possession under that claim. Whether he was right or wrong in his view of his legal rights we need not determine. We are satisfied that he did not intend to render himself liable to repay the moneys he had already received from the plaintiff, nor to prevent the delivery of the deed on payment of the balance due. The plaintiffs claim to have been ready and able to pay the amount of their notes, but they offered no satisfactory explanation for failing to do so. No claim is made that they ever paid or offered to pay any part of their notes. The most reasonable explanation of the transaction would seem to be that the plaintiffs did not care to complete their purchase, but themselves desired a rescission of the contract which they were unwilling to carry out, and the return of the money they had advanced. It is hardly necessary to consider the question whether the delivery of the deed and notes in escrow to the bank amounted to a valid contract within the statute of frauds, and whether the defendant had a right to withdraw the deed, and prevent its delivery, for he did not do so, and at no time objected to delivery on payment of the balance due. We think the plaintiffs, being clearly in default themselves, and manifesting no disposition to enforce the contract, are in no position to maintain this action. If the action of the defendant in retaking possession of the land was wrongful, they have another ample remedy for all the injuries they sustained thereby. The judgment is affirmed. All the justices concurring.

(55 Kan. 503)

CHICAGO, K. & W. R. CO. v. PROUTY.

(Supreme Court of Kansas. July 6, 1895.)

ACTION AGAINST RAILROAD COMPANY—INJURY AT CROSSING—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—DEPOSITION OF WITNESS—WHEN ADMISSIBLE.

1. The testimony in the case reviewed, and upon it the court is unable to say, as a matter of law, either that there was no negligence on

the part of the defendant, or that there was contributory negligence on the part of the plaintiff.

2. It is error to admit the deposition of a witness who resides outside of the county where the trial is had, but who is present at the court, ready and willing to testify in the case; but where such witness is afterwards called by the party against whom the deposition has been used, and testifies to the same facts, without substantial variation, the error is rendered immaterial.

3. In an action to recover damages for injuries resulting in death, where it is claimed on the part of the defendant that the injuries resulted from the negligence of the injured person himself, and where such negligence, if any, is clearly proximate, and directly contributory to the injury, it is error to charge the jury that, if the negligence of the deceased was the remote cause of the injury, the plaintiff might still recover. *Railroad Co. v. Plunkett*, 25 Kan. 188, followed.

(Syllabus by the Court.)

Error from district court, Ness county; V. H. Grinstead, Judge.

Action by C. T. Prouty, administrator of Frank M. Dole, deceased, against the Chicago, Kansas & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. A. Hurd and William Osmond, for plaintiff in error. S. I. Hale, for defendant in error.

ALLEN, J. This action was brought by the administrator of the estate of Frank M. Dole, deceased, to recover \$10,000 as damages for causing the death of said Dole by the negligence, as it is claimed, of the railroad company. There were but two eyewitnesses who testified with reference to what occurred at the time Dole was killed. It appears that he was riding in a spring wagon, drawn by a team of horses, going from his home to Beeler. The road on which Dole was traveling was on the south side of the railroad, running nearly parallel with it for some distance, then turning and crossing to the other side of the track. An east-bound mixed freight and passenger train approached, running at the rate of about 30 miles an hour, as he neared the crossing. The whistle was sounded at the whistling post, which was distant about a thousand feet from the crossing, but appears not to have attracted Dole's attention. When the engine was in the neighborhood of 700 feet from Dole, the engineer saw him, and sounded the whistle again. The team thereupon became excited, and started to run. The engineer testifies that at the time he first saw Dole he was sitting with his head thrown forward, and he thought the lines must have been resting on his knees. When the horses started he tried to control them, but was unable to do so. The testimony of the engineer was to the effect that he appeared to be holding his lines too slack. It is clear from all the testimony that Dole tried to control his team, but was unable to do so, and it ran forward, turned, and crossed the track. The engine struck between the horses and the wagon, throwing the horses to the north and

the wagon and Dole to the south, causing the death soon afterwards both of Dole and the horses. The only testimony as to what was done by the engineer towards stopping his train prior to the accident is that of the engineer himself. He testified that he shut off the steam, and applied the air brakes, as soon as he determined that the team was going to cross the track; that he came to this conclusion when it turned towards the track, and that he did all he could after that to avoid the injury. The road along which the deceased was traveling was unfenced, and the ground on the south side of the road was smooth, and offered no obstruction to the passage of a team at any point in the opposite direction from the railroad. The jury rendered a verdict in favor of the plaintiff for \$10,000. In answer to a special question they find that the negligence of the engineer consisted in not using the appliances for stopping the train in time. The plaintiff in error strenuously insists that under the testimony there is an utter failure of proof of negligence; that the engineer had a right to rely on the ability of Dole to keep his team away from the track, it appearing conclusively that there was no obstacle preventing him from turning his team away from the railroad onto the prairie, and that he had a perfect right to proceed without stopping until something indicated that it was likely to cross the track; that as soon as he had any reason to believe that it would cross the track he in fact did everything he could to prevent the accident, and is, therefore, not chargeable with any negligence whatever. It is also contended that Dole was himself negligent; that he knew the time when the train would be due; was familiar with the road; that he could have seen the train approaching for nearly a mile, yet does not appear to have kept any lookout; and that he did not keep watch of his team, and such hold of the reins, as a prudent man would when about to cross a railroad track at the time a train was due. The defendant in error contends, however, that the evidence fails to show culpable negligence on Dole's part, and that it was the duty of the engineer, as soon as he saw that Dole's team was unmanageable, to have at once applied the brakes, and slackened, at least, the speed of the train; that, if he had done so, and retarded its progress, even to a very slight degree, the team and man would have passed in safety; that the movements of a frightened team cannot be foretold, and that the engineer could and ought to have applied the brakes, and, if necessary, reversed the engine, before it became certain that the team was about to cross the track. The time intervening between the starting of the team to run and the accident was so very brief that there was no time for deliberation by any one, yet in the management of a train of cars, running at a high rate of speed, promptness of decision and rapidity in using the proper appliances to avoid danger and prevent accident are neces-

sarily exacted of an engineer. Whether he ought to have applied the brakes as soon as he saw that the team was unmanageable, or might properly wait until it was evident that it was about to cross the track, is a question as to which differences of opinion may perhaps be entertained. If so, the question should be submitted to the jury. Though the question appears to us not wholly free from doubt, we are unable to say, as a matter of law, that the engineer was free from fault; nor can we say, as a matter of law, that negligence on the part of the deceased is established. That question also was one proper for the consideration of the jury.

Error is alleged in the admission of the deposition of the engineer, George T. Craig, because it appears that Craig was in the county at the time of the trial, and had already been sworn as a witness on behalf of the defendant, and excluded from the courtroom during the examination of the other witnesses by order of the court. These facts were shown before the deposition was read, but the objection was overruled on the ground that the witness was a nonresident of the county. In this the court erred. *Fullenwider v. Ewing*, 30 Kan. 22, 1 Pac. 300. The cases of *Walte v. Teeters*, 36 Kan. 604, 14 Pac. 146, and *Eby v. Winters*, 51 Kan. 777, 33 Pac. 471, differ from this in the important particular that it did not appear in those cases that the attendance of the witnesses could be procured at the time the deposition was offered, while in this he was actually in attendance, had been sworn, and afterwards testified. The witness, however, was called by the defendant, and testified orally, and more at length than by the deposition. There is little, if any, conflict between the deposition and the oral testimony, and on the whole Craig's testimony on the witness stand is rather more favorable to the plaintiff, because more full and explicit than his deposition. This renders the error in the admission of the deposition immaterial, and especially so in view of the fact that the oral testimony was given at the instance of the defendant, and the repetition of his statements resulted from placing him on the witness stand.

The seventeenth instruction given by the court, and excepted to by the defendant, reads as follows: "If the negligence of the deceased, Frank M. Dole, was only slight, or the remote cause of the injury, the plaintiff might still recover, notwithstanding such slight or remote cause; and such slight negligence would not defeat plaintiff's right to recover in this case, although the same contributed to the death of the said Frank Dole." This instruction is erroneous. If Dole was negligent, it is perfectly clear that his negligence contributed directly and proximately to the injury. Under the findings of the jury the charge of negligence, either on the part of the engineer or of Dole, must be confined to a very brief period of time immediately preceding the accident. On the part of the engineer,

according to his testimony, it was only about 20 seconds from the time he first saw the deceased till the accident happened. On the part of Dole, his negligence, if any, consisted in failing to discover the train earlier than he did, or in failing to have a firm hold of the lines, or take other necessary precautions as he approached the crossing. There is no testimony indicating that he did not do his best to control the team after it became frightened. If there was negligence on his part, it was not quite as near in point of time, but was sufficiently proximate, and as directly contributory to the accident, as that of the engineer, if he was negligent. In a case of so much doubt and nicety as this under the testimony, the error in giving this instruction cannot be overlooked nor disregarded. A verdict has been rendered for the full limit of a recovery on account of death caused by the wrongful act of another. The jury ought to have considered the conduct of the deceased with the same degree of care that they did that of the engineer, and, if they determined that he failed to use ordinary care in the particulars mentioned, they should have rendered a verdict for the defendant. The error in giving this instruction is emphasized by the eighth, ninth, tenth, and eleventh special findings, in which the jury say that Dole knew the time of the passage of the train; that it was visible to a man on a wagon near the road crossing for at least a mile west of the crossing; and that, if he had taken the necessary precaution, he could have ascertained that there was a train approaching prior to the time his team took fright. In the case of *Railroad Co. v. Plunkett*, 25 Kan. 188, it was held that "it is misleading and erroneous for the court to instruct the jury that negligence remotely contributing to the injury is not material, when in fact, if there was any negligence at all, it was clearly direct and proximate, and not remote nor far removed from the injury."

Complaint is also made of the repetition at three different places in the charge of the court of the statement that "it is negligence in itself for a railroad company to fail to sound the whistle of its engine three times, at least eighty rods before crossing the public highway." By this repetition undue prominence was given to this matter, but it does not seem to have influenced the jury, as they based their verdict on other grounds. We deem it unnecessary to discuss the question as to the measure of damages, as the matter must again be submitted to another jury because of the erroneous instruction. The judgment is reversed, and a new trial ordered. All the justices concur.

(55 Kan. 559)

NORTON v. WOOD.

(Supreme Court of Kansas. July 6, 1896.)

APPEAL FROM JOINT JUDGMENT—PARTIES.

The absence of a party to a joint judgment who will necessarily be affected by a rever-

sal thereof defeats the jurisdiction of the appellate court, and prevents the review of the judgment.

(Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by James B. Wood against John Norton and others. There was a judgment against said Norton and another defendant, and Norton brings error. Dismissed.

Almerin Gillett, for plaintiff in error. E. W. Cunningham, for defendant in error.

MARTIN, C. J. The original suit was brought July 7, 1890, by said James B. Wood against said John Norton and William Muff and Henry Muff, to recover judgment upon a promissory note executed by said William Muff in favor of said Wood, and to foreclose a mortgage on real estate given to secure the same. It was alleged in the petition that, after the execution of the note and mortgage, William Muff conveyed the land to Norton and Henry Muff, "who, as a part of the consideration thereof, agreed to pay the amount due" Wood. Personal service was made on Norton and William Muff, but Henry Muff was not served. Norton and William Muff made default. On October 1, 1890, at September term, Wood obtained a personal judgment by default against William Muff and Norton for \$2,398.95, bearing interest at 12 per cent. per annum, and costs of suit; and a decree of foreclosure of said mortgage was entered, it being found by the court that the land was then owned by Norton, "who, as part of the purchase price thereof, assumed and agreed to pay the said sum found due to the plaintiff." In March, 1891, Norton appeared in court by counsel, and filed his motion for the vacation of said personal judgment as to him, on the ground that, although he had taken the title to the land subject to the mortgage, he had never assumed or agreed to pay the indebtedness, and that the allegation to that effect in the petition was untrue, but he knew nothing of the same, not suspecting that any false averment would be made for the purpose of fastening a personal liability upon him. The motion was overruled by the court, Norton excepting; and he has presented his petition in error to this court for review against Wood alone. A motion is now interposed by Wood to dismiss the case, because William Muff is not made a party.

The judgment against Norton and William Muff is joint. If, after the sale of the mortgaged property, a balance should remain unpaid, a general execution might be taken out against both for the collection of the residue. If collected from William Muff, he would have a valid claim against Norton for contribution. If we were to reverse the personal judgment, and Norton should be relieved from it, the whole weight of the residue would be cast upon William Muff. We cannot so shift the burden upon the latter in

his absence. A condition precedent to such a change of responsibility by order of this court is that he be brought into it as a party in due time. This is familiar law here. *Paving Co. v. Botsford*, 50 Kan. 331, 332, 31 Pac. 1106, and cases cited; *Steele v. Baum*, 51 Kan. 165, 32 Pac. 918; *Central Kansas Loan & Investment Co. v. Chicago Lumber Co.*, 53 Kan. 677, 37 Pac. 132. If the case were here on its merits, the result might not be more favorable to Norton. He was guilty of gross negligence in permitting judgment to be taken by default, without even knowing the nature of the claim made by Wood. He employed a lawyer at the second term after his case had been disposed of. This was very late. But the petition in error must be dismissed for want of a necessary party. All the justices concurring.

(55 Kan. 545)

BURNHAM et al. v. CITIZENS' BANK OF EMPORIA.

(Supreme Court of Kansas. July 6, 1895.)

CHATTEL MORTGAGES — PRIORITIES — RECITALS IN MORTGAGE — CONSTRUCTION.

1. The recording of a chattel mortgage does not impart constructive notice to prior mortgagees.

2. Where personal property which has been mortgaged by the owner to a creditor by an instrument valid as between the parties, but which, if properly attacked, might be avoided by other creditors or bona fide purchasers, is subsequently mortgaged to another creditor by an instrument in which the validity of the first mortgage is recognized, and such second mortgage is, in terms, subject thereto, the second mortgagee is estopped from questioning the validity of the prior mortgage.

3. The general rule in equity is that a creditor who is secured by a mortgage or mortgages on several pieces of property, who has actual notice of a junior mortgage on only a portion of the property, is bound to exhaust all his security for the satisfaction of his debt; and, if he releases any part of his security, or pays to the mortgagor the proceeds derived from a sale of any portion thereof after actual notice of the rights of the junior lienholder, he does so at his peril, and must account to the junior lienholder for any surplus realized, or which ought to have been realized, from all of his securities. This rule is subject to qualifications and exceptions, and is not to be applied in such manner as to impose risks or burdens on the senior lienholder which he has not assumed.

4. C., the owner of a stock of merchandise, mortgaged it to a bank to secure his indebtedness to it, with power to sell, and delivered possession of the property to the bank, reserving in the mortgage one-half the proceeds of sales to be made during the month of December. Afterwards he executed a second mortgage to the plaintiffs, with the following provision: "It is hereby represented, and this mortgage accepted on faith of said representation, that there are no claims or liens of any kind on the above property, but this mortgage is a first lien, except a claim in the nature of a chattel mortgage held by the Citizens' Bank of Emporia, Kansas, and subject thereto." Held: (1) That such recital recognizes the validity of the mortgage to the bank, and estops the plaintiffs from attacking it; (2) that the plaintiffs, by virtue of the second mortgage, acquired the right reserved by C. to one-half the proceeds of the December sales.

Martin, C. J., dissenting from the last clause of the fourth point of syllabus.
(Syllabus by the Court.)

Error from district court, Lyon county; C. B. Graves, Judge.

Action by Burnham, Hanna, Munger & Co. against the Citizens' Bank of Emporia and others. From a judgment for defendant bank, plaintiffs and the other defendants bring error. Reversed in part.

Burnham, Hanna, Munger & Co. brought suit against the Citizens' Bank of Emporia, Thomas Campbell, and others, to obtain an accounting for the proceeds of certain property which had been disposed of by the bank under chattel mortgages from Thomas Campbell, the plaintiffs claiming a lien under a mortgage executed by Campbell to them. Kellogg & Sedgwick, Cohn, Wampold & Co., and Bohn Bros. & Co. were also made defendants. The case was sent to a referee to take the testimony, and report on certain questions of fact. On the coming in of the report of the referee the court made findings of fact, as follows: "(1) Prior to November 29, 1887, the defendant Thomas Campbell was the owner of a stock of goods and fixtures worth several thousand dollars. At that date he was insolvent. (2) On November 29, 1887, he was indebted to the defendant the Citizens' Bank in the sum of \$5,698.18. To secure the payment of this debt he gave a chattel mortgage to said bank on his entire stock of goods and fixtures, and delivered the same to said bank. The bank immediately placed its agent, G. L. Brooks, who was a witness before the referee herein, in the actual possession of said stock of goods and fixtures, who remained in possession thereof from the said 29th day of November, 1887, until December 18, 1888, engaged in selling the same at retail. By the conditions of said mortgage the bank was authorized to sell said goods either at public or private sale, as by it might be deemed most advantageous, and, if sold at retail, it was authorized to use the proceeds, from time to time, as might be necessary to purchase staples with which to replenish the stock so as to facilitate the sale of the other goods. It was also stipulated in said mortgage that said Campbell should receive one-half of the proceeds of the first months' sales, to be used in the payment of other of his debts. A copy of said mortgage is attached to the petition herein as Exhibit B, and is made a part hereof. Said mortgage was filed for record on December 2, 1887. (3) On December 1, 1887, and while the defendant's said agent was in the possession of said store, the said Campbell gave a mortgage on the same stock of goods, not including the fixtures, to the plaintiffs to secure the sum of \$888.93, which mortgage was filed for record December 3, 1887. A copy of said mortgage is attached to the petition herein as Exhibit A, and is made a part hereof. (4) On January 9, 1888, said

Campbell gave a mortgage on said stock of goods, not including the fixtures, to the defendants Kellogg & Sedgwick, in trust to secure the debts due from the said Campbell to the defendants Cohn, Wampold & Co. and Bohn Bros. & Co., aggregating the sum of \$1,933.46. Said mortgage was filed for record on the same day it was given. A copy of said mortgage is attached to the said defendants' answer herein as Exhibit A, and is made a part hereof. (5) On January 20, 1888, said Campbell gave another mortgage to the defendant the Citizens' Bank on all of the notes and accounts then owned by him which were due and uncollected. Said mortgage was by its terms given to secure the sum of \$1,700, and any and all indebtedness then existing between said Campbell and said bank, or that might thereafter arise between them. Said mortgage was filed for record on the same day it was given. A copy thereof is attached to the petition herein as Exhibit D, and is made a part hereof. (6) The bank received as the proceeds of the property covered by its two mortgages aforesaid the aggregate sum of \$9,373.13. It received as the proceeds of the property covered by its first mortgage the aggregate sum of \$6,332.26. Of this amount it paid for staple goods put in the stock and for expenses in running the business the aggregate sum of \$3,357.43. It received from all other sources the total sum of \$3,040.87, in which amount is included cash which had been collected by it on notes and accounts after the date of the first mortgage; and before the date of the last one, which aggregates the sum of \$1,092.39, which amount is included in the total of \$9,373.13, set out in finding 6. The bank also paid out the following additional amounts for goods purchased by Campbell before November 29, 1887: \$850.94 for taxes and interest; for Campbell the sum of \$159.24; cash paid to Campbell, the sum of \$989.57; total, \$1,999.75. The total amount of sales made during the month of December, 1887, was \$1,448.06. (7) The bank had no actual knowledge of the mortgage given to the plaintiffs until after the cash payments of \$989.57 to Campbell had been made. But the agent of the bank, Brooks, was present when the mortgage was executed, and was a witness thereto, and knew the contents thereof. (8) When this case was ready for trial, the parties, by consent, had six specific questions of fact sent to a referee, who heard the evidence, and found conclusions thereon, which evidence and conclusions of fact were returned into court, and, no objections or exceptions being made to either, the case was submitted to the court upon said findings and evidence, all of which are referred to and made a part hereof. (9) The plaintiffs and the defendants are each entitled to a personal judgment against the defendant Campbell as prayed for." As a conclusion of law the court found that the bank was

entitled to judgment for costs against the plaintiffs and their codefendants.

L. B. Kellogg and T. N. Sedgwick, for plaintiffs in error. E. W. Cunningham, for defendants in error.

ALLEN, J. (after stating the facts). It is contended that the provision in the mortgage from Campbell to the bank, allowing him to check out half the proceeds of the December sales, renders the whole mortgage void. We shall assume that, if attacked by a creditor who had done nothing to estop him, it would be void. The plaintiffs, however, claim under a mortgage which contains the following provision: "It is hereby represented, and this mortgage accepted on faith of said representation, that there are no claims or liens of any kind on the above property, but this mortgage is a first lien, except a claim in the nature of a chattel mortgage, held by the Citizens' Bank of Emporia, Kansas, and subject thereto." The plaintiffs, by accepting a mortgage containing this clause, recognized the validity of the mortgage to the bank, and are estopped from now questioning it. Jones, Mortg. § 744.

It is contended by the plaintiffs, however, that they must recover, even if the validity of the plaintiffs' mortgage is conceded, because it appears from the findings of the court that the bank realized from the securities it held more than enough to pay all of Campbell's indebtedness to it, and actually paid over to him \$1,999.75, out of which the plaintiffs' claim should of right have been paid. The mortgage to the bank being a prior lien, it was not bound to account to the plaintiffs for any surplus realized from a sale of the mortgaged property without express notice of the plaintiffs' rights. The recording of plaintiffs' mortgage subsequent to that of the bank did not, under the authorities, impart constructive notice to the prior mortgagee. 1 Jones, Mortg. § 562; McLean v. Bank, 4 McLenn, 430, Fed. Cas. No. 8,889; Meacham v. Steele, 93 Ill. 135; Dewey v. Ingersoll, 42 Mich. 17, 4 N. W. 179. The findings of the court as to actual notice we think not in accordance with the evidence. The case comes to us just as it did to the trial court, on written evidence reported by the referee. Brooks, the agent of the bank, in charge of the stock of goods, testified that he knew of the mortgage to Burnham, Hanna, Munger & Co. at the time it was given; that he informed his principal that Campbell had given another mortgage on the stock of goods right away by writing; that he knew of the terms and conditions contained in the mortgage. D. W. Eastman, the cashier of the bank, testified: "Q. When did you first learn of the mortgage to Burnham, Hanna, Munger & Company? A. I do not know. Some time after it was given. Q. How long, would you say, after it was given? A. I don't think we knew of it until

one time Mr. Brooks come up here, some time after it was given." This witness also testified that he had made search, and failed to find any letter informing them of the plaintiffs' mortgage. This testimony, we think, fairly shows that the bank had actual notice of the plaintiffs' mortgage while it still held securities sufficient to satisfy both its own claims mentioned in the findings of the court and that of the plaintiff. The indebtedness due the bank was secured, not only by mortgage on the stock of goods, prior to the plaintiffs' mortgage, but also by a mortgage on the fixtures, notes, and accounts, which were not covered by the plaintiffs' mortgage. The general rule enforced in equity is that, where one creditor is secured by mortgage on several pieces of property, while another creditor is secured by a junior mortgage on only a part of the property, the prior creditor, when chargeable with actual notice of the rights of the junior creditor, is bound to exhaust his security on the property not covered by the junior lien, and that he must account to the junior lienholder if he releases his security on, or pays over to the mortgagor the proceeds of, the property not covered by the lien of the junior mortgagee after actual notice of the junior lien. 2 Jones, Mortg. § 1268 et seq.; 2 Ping. Mortg. § 1929; McLean v. Bank, supra. Judging from the findings of the trial court alone, we should infer that the indebtedness of Campbell to the bank had been satisfied, and that a surplus remained of \$1,999.75, which was paid over to Campbell, but in the evidence of Eastman we find a statement that Campbell was still indebted to the bank on account of debts of himself or of the firm of Campbell & Johnson, or Campbell & Bros., between \$1,500 and \$1,600. Whether these claims were otherwise secured does not appear. It would seem quite remarkable that the bank should pay over a portion of the proceeds of the mortgaged property to Campbell while a portion of its claim still remained unpaid. But if the indebtedness to the bank secured by its mortgages were sufficient to exhaust the entire proceeds of the mortgaged property the plaintiffs could not complain of its doing so. The trial court held, not only that the provision in the mortgage for the payment to Campbell, the mortgagor, of one half of the proceeds of the December sales did not render the mortgage void, but that the acceptance by the plaintiffs of a mortgage recognizing the validity of the mortgage to the bank recognized as well the provision for this payment to the mortgagor. The mortgage to the plaintiffs in terms conveys to them all the interest Campbell had in the goods. It represents "that there are no claims or liens of any kind on the above property, but this mortgage is a first lien, except a claim in the nature of a chattel mortgage, held by the Citizens' Bank of Emporia." Can it be said that Campbell still reserved an interest in the goods, altogether indefinite in

amount, and on which Burnham, Hanna, Munger & Co. acquired no lien by virtue of their mortgage? The reservation in the mortgage to the bank of the proceeds to an amount not to exceed one-half the sales during the month of December, 1887, was to be used for the purpose of payments on his other indebtedness. He was then indebted to the plaintiffs. The amount of sales to be made in December was altogether indefinite, and depended entirely on the action of the bank. It might be nothing or it might be the whole stock. Campbell had an undoubted right to mortgage every interest he had in the property not already conveyed to the bank, including as well the proceeds of sales to be made in December as of those made at a later day. There is no reservation to himself of any interest in the property by the terms of the mortgage to the plaintiffs, except the ultimate surplus after the payment both of the claims of the bank and the plaintiffs. The bank was not bound to make any sales in December, but, having done so, one-half of the proceeds inured to the benefit of the plaintiffs. The judgment is reversed, and a new trial ordered between Burnham, Hanna, Munger & Co. and the Citizens' Bank. We find no evidence that the Citizens' Bank had actual notice of the mortgage to Kellogg & Sedgwick, and the judgment as to the other plaintiffs in error is affirmed.

JOHNSTON, J., concurs.

MARTIN, C. J. I dissent from the last clause of the fourth point of the syllabus and the corresponding part of the opinion. In all else I concur.

(55 Kan. 600)

CARRUTHERS v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Kansas. July 6, 1895.)

INJURY TO RAILROAD EMPLOYE—DEFECTIVE APPLIANCES—COMPANY'S KNOWLEDGE OF DEFECT.

In an action against a railway company to recover damages for the death of an employe resulting from personal injuries, where the negligence alleged is the furnishing of a defective appliance, in the use of which the employe was injured, it is necessary to allege and prove, among other things, that the defendant knew of the defect, or that it was of such a nature or had existed for such a length of time that, in the exercise of ordinary care, it should have been discovered by the defendant, in which case notice ought to be presumed; and, where there is no evidence of such notice or its equivalent, a demurrer to the evidence is properly sustained.

(Syllabus by the Court.)

Error from district court, Brown county; R. C. Bassett, Judge.

Action by Nora M. Carruthers, administratrix of John T. Carruthers, deceased, against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Grant W. Harrington, F. M. Webb, and A. F. Martin, for plaintiff in error. M. A. Low and W. F. Evans, for defendant in error.

MARTIN, C. J. The only question argued in this case is whether the court erred or not in sustaining the demurrer of the defendant to the evidence introduced on the part of the plaintiff. That evidence shows that on or about January 10, 1889, John T. Carruthers was a freight conductor in the service of the defendant company; that he started from Horton southward with a train of about 35 cars, bound for Herington via North Topeka and Topeka; that his train stopped at the roundhouse in North Topeka, and also at the registering station some distance north of the railroad bridge spanning the Kaw river; that as the train started from there, between 1 and 2 o'clock in the morning, he got on somewhere in front of the caboose, and then walked a distance forward on the tops of the cars; that, before the train got across to the south end of the bridge, he uttered a cry of distress, which was heard by a brakeman named Foley in the cupola of the caboose, and who, getting down quickly, and looking out, saw that the wheels of the caboose were passing over a man afterwards ascertained to be the conductor; that the train was stopped, and he was found lying across the west or right-hand rail, his head outward, and the lower part of his body and limbs between the rails, with the appearance of having been run over by several cars; that he was badly crushed about the hips, and died from his injuries in about an hour. It further appears that in the train were two flat cars loaded with telegraph poles, and next behind them, and about the ninth car ahead of the caboose, a Missouri Pacific car, of unusual height, being about two feet above the other box cars in the train, and called in the evidence a "hay car," which was coupled to the flat car next ahead of it with a long crooked link; that a short time after the injury, the train having been backed to North Topeka, another freight conductor, named Sylvester, climbed upon the top of said hay car, for the purpose of giving a signal, and, when he descended at the south end on the west side, he found that the iron rod on the top of the car used for a hand hold in going up or down the ladder on the side was loose, and projecting outward at the south end, the screw fastening that end of the iron rod to the wooden roof of the car not being in its place either in the wood or the iron. Sylvester further testified that he noticed on the flange of the front wheel of the south end of the west side of the hay car a clot of blood, and a little piece of flesh about the size of the end of his thumb, and a little fuzz or piece of woollen cloth corresponding with the material in the coat and vest worn by Carruthers at the time. The tops of the cars were frosty and slippery that night. Three or four car inspectors are employed by the defendant at

Horton, whose business it is to examine all cars going out, to see if they are in good and safe condition; and as many more are kept at Topeka, with duties on both sides of the river; but there is no evidence, unless this be such, whether this car was examined or not at Horton or North Topeka. It was usual for freight conductors, on leaving the North Topeka registering station, to go forward on the tops of the cars while crossing the bridge, so they might get off and register at the Y on the south side of the river, and get on again, and thus avoid stopping the train entirely on a considerable curve. Nora M. Carruthers, the widow of said John T. Carruthers, was duly appointed as administratrix of his estate, and, having qualified, she sues in that capacity. The deceased left also a daughter surviving him.

The plaintiff's theory of the disaster is that, when the ill-fated conductor reached the south or front end of the hay car, he could not get to the flat next ahead loaded with telegraph poles without descending to the level of the platform; that, in doing so, he caught hold of the iron rod which was loose or defectively fastened and out of repair at its south end; that it gave way, and, by reason thereof, he fell, and was run over. The blood, the small piece of flesh, and the fuzz on the flange of the wheel near the ladder are relied on as sufficiently indicating that the primary cause of the injury was the defective hand hold. The position in which the conductor was afterwards found, and the nature of his injuries, would render it more probable that he fell not only between the cars, but between the rails, for he was caught on the west rail, nearly midway of his body. As it is a matter of common knowledge that freight cars extend out considerably beyond the rails, it would seem that he would not be likely to get under the wheels in falling from the side of this high car by the giving way of the hand hold on its top, and therefore that this defect had no relation to the injury. In *Asbach v. Railway Co.*, 74 Iowa, 248, 37 N. W. 182, the court held that a theory cannot be said to be established by circumstantial evidence, even in a civil case, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can reasonably be drawn from them, and that it is not sufficient that they be consistent merely with that theory. In the case now under consideration, the blood, flesh, and fuzz on the flange of the front wheel of the hay car may indicate that the conductor was first struck by that wheel; but it is at least as probable that he fell between the hay car and the flat and between the rails as that he was precipitated from the side of the car by the giving way of the hand hold. Still, it may be that these theories and others suggested by counsel ought to have been submitted to the consideration of the jury, if no other serious objection had become apparent.

In the amended petition it is averred that the defendant knew, or by the exercise of ordinary care might have known, that said hand hold on the hay car was loose, unfastened, unsafe, insecure, and dangerous, and that it was negligence to admit the car into the train, or to permit it to remain after it had been taken in; and an averment of this nature is essential as a basis of recovery in this class of cases, as settled by repeated decisions of this court, supported by the general current of authority. A careful examination of the record fails, however, to disclose any evidence tending to justify this allegation of negligence against the defendant, unless it be the mere fact that the hand hold was found to be out of repair a short time after the injury. If the conductor attempted to descend by its aid, it is most probable that it was then in place, and seemingly safe; otherwise he would have been negligent in using it. The screw may have suddenly pulled out of the wood by reason of slight decay around it and under the end of the fastening of the iron rod. But this is speculation only. It does not appear where the car came upon the defendant's road beyond Horton, and we have no account of it further than North Topeka and the bridge. If it had been shown that the rod was loose, or out of order, or the wood so decayed at the place of fastening as to render it unsafe, and this was discoverable by ordinary inspection at Horton or at the North Topeka roundhouse, then it would be a matter for the jury to determine whether the defect was known, or by the exercise of ordinary care ought to have been known, by the defendant in time to remedy or call attention of employees to it before the occurrence of the casualty. But, in the absence of any such proof, the district court was right in sustaining a demurrer to the evidence. The law is settled by *Railroad Co. v. Wagner*, 33 Kan. 680, 7 Pac. 204; *Railroad Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. 411; *Harter v. Railroad Co.* (Kan.) 38 Pac. 778; and the numerous cases there cited. The case of *Guthrie v. Railroad Co.* (Me.) 18 Atl. 295, is cited by counsel for the plaintiff as tending to establish the proposition that if a car with defective appliances is taken into a train, and an injury to an employee results from it, the company will be liable, without proof of notice of the defect or its equivalent. But we do not think that case will bear such a construction, for there the drawbar and bumpers of the car which was the instrument of the injury had been broken off before the casualty complained of, and this was a patent defect, of which the railroad company was bound to take notice. We are also referred to *Railroad Co. v. Kneirim*, 39 N. E. 324, decided by the supreme court of Illinois; but in that case it appeared that, although the car had just been inspected, "the nut which held the wheel on the brakestaff was off, and, from the rusted appearance of the threads of the staff (they being filled with

rust), had been off for several weeks," and the absence of the nut was the cause of the injury.

The judgment of the district court must be affirmed. All the justices concurring.

(55 Kan. 574)

DOUGLASS v. LOWELL et al.

(Supreme Court of Kansas. July 6, 1895.)

SALE OF LAND FOR TAXES—REDEMPTION BY MINOR—COMPUTATION OF INTEREST—VALIDITY OF DEED—ADMISSIONS IN PLEADING.

1. In an action of ejectment under section 595 of the Civil Code, the defendants set up in their answer, among other things, that the land was subject to taxation for 1874, and, the taxes duly assessed and levied thereon being delinquent for that year, the same was duly sold at tax sale therefor in 1875, on which sale a deed was duly executed to the defendant M.; and allegations of a similar nature were made as to the taxes of 1882; and the plaintiff by her reply admitted that the land was subject to taxation for 1874 and 1882, that it was sold for said taxes, and that deeds were issued on said sales, and denying generally all other averments. Held that, notwithstanding said admissions, the plaintiff had a right to assail and avoid said tax deeds by showing that illegal taxes were included therein, and that the land was not duly sold, and therefore the defendants were not entitled to judgment in their favor on the pleadings.

2. Where lands owned by a minor under an unrecorded deed were sold in 1875 for the taxes of 1874, and said deed was recorded in 1877, and the tax deed was issued and recorded in 1878, held, that such minor is not cut off by section 21, c. 22, Gen. St., 1868, relating to conveyances, from redeeming the land, nor from asserting her right thereto by action in due time.

3. Under section 105 of the tax law of 1868, providing for the redemption of land from tax deed by minors, interest must not be computed on the several payments to the date of the deed, and the amount taken as a new principal on which to reckon interest thereafter; but interest must be calculated upon each payment from its date up to the time of redemption.

4. Except where the taxes have been paid or the land redeemed, section 141 of the tax law of 1876 (Gen. St. 1889, c. 107) limits the right of action against the holder of a tax deed for the recovery of the land to five years from the recording of the tax deed, and this time is not extended by reason of the minority of the plaintiff; but where such minor plaintiff has offered to redeem, and made a sufficient tender thereof within five years next before the commencement of her action, such minor is not too late, and she is also entitled to the benefit of the one year saving provided for by section 23 of the Code.

(Syllabus by the Court.)

Error from district court, Jackson county; Robert Crozier, Judge.

Action by Hattie R. Douglass against James H. Lowell and others. Judgment for defendants, and plaintiff brings error. Reversed.

John C. Douglass, for plaintiff in error. James H. Lowell and Hayden & Hayden, for defendants in error.

MARTIN, C. J. This was an action of ejectment commenced March 5, 1890, by the plaintiff in error for the recovery of the N. E. $\frac{1}{4}$ of section 33, township 8, range 16, together with rents and profits. It was alleged in the

petition that a prior action had been commenced on June 10, 1887, by the plaintiff, for the recovery of the same land, from the same defendants, except G. L. Reid, and that said action was dismissed by her without prejudice on March 22, 1889. The defendants, including G. L. Reid, filed a joint answer in the present action, alleging numerous defenses; the second being to the effect that the plaintiff's only claim of title was by a tax deed to John C. Douglass and a deed of John C. Douglass and wife to the plaintiff, made without consideration, and with the fraudulent intent to hinder and delay the collection of the taxes assessed against the land, and to frustrate the due execution of the laws providing for the assessment and collection of taxes; and that said tax deed was null and void by reason of a failure to comply with the laws regulating the assessment and taxation of lands and their sale for delinquent taxes. The third defense was the bar of the statute of limitations; and the fourth was to the effect that said land was subject to taxation for 1874; and the taxes duly assessed and levied thereon being delinquent for that year, the same was duly sold at tax sale for said taxes, on September 7, 1875, on which sale a deed was executed to the defendant Luther M. Myers, the holder of the tax-sale certificate, on October 12, 1878, which was filed for record on the same day; and that by mesne conveyances the title of said Luther M. Myers had been vested in the defendant George L. Reid. The fifth defense was of the same nature as the fourth, except that the sale was on September 4, 1883, for the taxes of 1882, S. K. Linscott being the purchaser of the N. E. $\frac{1}{4}$ of said quarter section for the taxes on the entire tract; and on September 7, 1886, the said S. K. Linscott obtained a deed therefor, which was recorded in September, 1886; and that by mesne conveyances the said title had been vested in George L. Reid. The reply was a general denial of the second and third defenses, and a general denial of all the other defenses, excepting it was admitted that the land was subject to taxation for 1874 and 1882; that it was sold for said taxes at the tax sales for said respective years; that a deed was issued to said Myers on said sale of 1875, and to said Linscott on said sale of 1883; and that by certain mesne conveyances these claims of title had been vested in the said George L. Reid, who was in the actual possession of said premises.

1. After introduction of the evidence on the part of the plaintiff, the defendants demurred thereto. This demurrer was overruled, and the defendants then offered their evidence, upon the close of which, on request of the defendants, the court instructed the jury to return a verdict in their favor. The case being brought here by the plaintiff, the defendants now claim that they were entitled to judgment on the pleadings. There was no attack upon them by motion, demurrer, or ob-

jection to the introduction of testimony, and the defendants did not ask for judgment on the pleadings. Under these circumstances, they must be liberally construed in favor of the plaintiff. It is urged that the two tax titles of the defendants having been specially pleaded in the answer, and the plaintiff admitting by her reply that the land was subject to taxation, that it was sold for nonpayment of taxes, that tax deeds issued on such sales, and no defect being pointed out in the reply,—their validity must be taken as admitted. The plaintiff did not admit, however, by her reply, that the taxes had been duly assessed and levied upon the property, nor that the land was duly sold for delinquent taxes; and her general denial was sufficient to raise an issue as to said facts; and, in the absence of attack by any of the methods hereinbefore indicated, this was a sufficient basis for the testimony offered on the part of the plaintiff, showing, among other things, that some of the taxes of 1874 and subsequent years up to the date of the tax deed of 1878 were illegal, which proof was fatal to the tax title, unless saved by the bar of the statute of limitations. As to the tax deed of 1886 upon the N. E. $\frac{1}{4}$ of the tract in controversy, the plaintiff introduced no evidence whatever; and if a demurrer to the evidence or motion for verdict and judgment as to that portion alone had been interposed, we think it ought to have been sustained.

2. The claim of the plaintiff was under a tax deed to John C. Douglass, recorded September 8, 1868, and embracing the taxes of 1862 to 1867, inclusive, admitted to be prima facie valid, and a quitclaim deed from said John C. Douglass and wife to the plaintiff, of date April 13, 1874, duly executed and acknowledged the same day, in consideration of five dollars and of love and affection, and by way of advancement to the plaintiff, who was born August 5, 1868. This deed was not recorded until April 28, 1877. The first deed under which the defendants claim was upon a sale made September 7, 1875, for delinquent taxes of 1874, the same being bid off by the county treasurer, and the sale certificate on October 27, 1876, assigned to said L. M. Myers, the taxes being paid until October 12, 1878, when the deed was executed, acknowledged, and recorded, and when the said Myers went into possession of the land, the same having ever been, prior thereto, vacant and unoccupied, and the defendants have ever since been in actual possession thereof, and they also paid the taxes for 1878-1881. It is claimed by the defendants that the failure of the plaintiff to place her deed from John C. Douglass and wife on record from the time it was executed, April 13, 1874, until April 28, 1877, operated to give priority to the defendants' title, which was inchoate during that period; and that by force of section 21, c. 22, Gen. St. 1868, relating to conveyances, the plaintiff's claim to the land is void as against the defendants.

On the other hand, it is contended by the plaintiff that the rule of caveat emptor applies to purchasers at tax sales, and that said section 21 has no application to those who claim under an independent title not derived from the grantor in the unrecorded deed. The precise point has never been settled by this court, perhaps the nearest approach to it being the cases where the contest has been between attaching creditors and the claimants under unrecorded deeds or mortgages. *Holden v. Garrett*, 23 Kan. 98; *Lee v. Birmingham*, 30 Kan. 312, 1 Pac. 73; *Forwarding Co. v. Mahaffey*, 36 Kan. 152, 12 Pac. 705. But the analogies between that class of cases and the one now under consideration are not close, and we must decide the point as of first impression. Section 92 of the tax law then in force (Gen. St. 1889, c. 107) was as follows: "When any lands or town lots are offered for sale for any taxes, it shall not be necessary to sell it as the property of any person or persons; and no sale of any land or town lot for taxes shall be considered invalid on account of its having been charged on the roll in any other name than that of the rightful owner; but such land must be, in other respects, sufficiently described on the tax roll, and the taxes for which it is sold be due and unpaid at the time of such sale." And, by the form of the deed prescribed by section 112 of the same act, the title was made subject "to all rights of redemption provided by law." This clause was sufficient to save all the redemptive rights of minors under section 105 of the act. The plaintiff was the owner of this land by unrecorded deed before the taxes of 1874 were levied. The taxes, although a lien upon the land, were in no sense a personal charge against her. Purchasers at tax sales must look entirely to the real estate for their security. The tax roll may or may not show the name of the owner, and this court has held that the omission of the name of the person to whom a tract of land is assessed from the notice of the tax sale, and from the notice of the expiration of the time for redemption, will not invalidate the title conveyed by the tax deed. *Shoup v. Railroad Co.*, 24 Kan. 547. Prior to the transfer act, being chapter 145 of the Laws of 1877, the statement of the names of the owners of land on the assessment rolls must have been very defective, and we presume little attention was paid to such names by purchasers at tax sales. The security being upon the land, and the owner bound to pay the taxes, penalties, and a high rate of interest in order to redeem, investors at tax sales were not likely to go to the records in the office of the register of deeds to ascertain the ownership before making their investments. Under these circumstances, we think a minor, who owned the land by deed unrecorded when the taxes were levied, and sale made, but recorded, before the execution of the tax deed, would not be cut off by said

section 21 of the act relating to conveyances from redeeming the land, nor from asserting her right thereto by action.

The defendants further contend in their brief that the plaintiff was not the owner at the date of the tax sale of 1875, because, although the quitclaim deed was executed in 1874, yet there was no proof of delivery of it at any time prior to the placing of it on record; but we think it sufficiently appears that the deed was delivered on the date of its execution. At least counsel for defendants so treated it in their objection to its introduction, wherein they stated that said deed was "dated and delivered on the 13th day of April, 1874, and not recorded until the 28th day of April, 1877."

3. It appears that on June 14, 1882, John C. Douglass, as agent for the plaintiff, made an offer to said L. M. Myers, then county treasurer, to redeem the land, and tendered to him \$223.70 in lawful money for that purpose, the tender being made on behalf of said minor child, and the treasurer so informed at the time; but he refused the tender. The defendants claim that the amount of the tender was insufficient, under section 105 of said tax law of 1868; and this is based upon the assumption that interest on the amount paid at the tax sale and on subsequent taxes should be computed up to the date of the deed, and that this should form a new principal on which interest should be reckoned thereafter. The words of the statute do not, in our opinion, authorize this construction; and, failing to do so, we would not feel warranted in giving the language an interpretation which would allow interest upon interest. Computing interest upon each payment down to June 14, 1882, including the cost of deed and recording the same, we find that the tender was sufficient in amount.

4. The plaintiff was a minor until August 7, 1886. This land was conveyed to her April 13, 1874. It was sold for taxes September 7, 1875. The certificate was assigned to L. M. Myers October 27, 1876, and the tax deed was executed October 12, 1878, when the said L. M. Myers entered into possession of the land, which had theretofore been vacant and unoccupied. Although a minor, her right of action would have been barred within five years thereafter, if no offer to redeem had been made, or had the tender been insufficient in amount. *Goodman v. Wilson*, 54 Kan. 709, 39 Pac. 704, and cases cited. But a sufficient offer to redeem, with tender of payment, was made June 14, 1882, and the first action was commenced June 10, 1887, which was in time, under section 141 of the tax law; and, as she commenced the present action within less than one year after the dismissal of the first, we must hold that her rights are saved by section 23 of the Code.

Some other questions are raised in the case, but the record is not entirely satisfactory thereon; and we deem it unnecessary to de-

cide the same at this time. The judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

(55 Kan. 481)

ATCHISON, T. & S. F. R. CO. v. HUGHES.

(Supreme Court of Kansas. July 6, 1895.)

CARRIERS—DEATH OF PASSENGER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DAMAGES.

1. It is negligence on the part of a railroad company for those in charge of a passenger train to induce a passenger to leave the train while in motion, and a gross disregard of the duty it owes to him not to stop the train entirely, and give the passenger ample time and opportunity to alight.

2. It is not contributory negligence per se for a passenger to alight from a moving train; but the question as to whether the act constitutes negligence depends upon whether the danger was so obvious that a prudent person would not under the circumstances have made the attempt, and is to be determined by the jury upon a consideration of the rate of speed the train had acquired, the place, the conduct of those in charge of the train, and all the circumstances connected with the act of alighting.

3. The mere fact that the passenger acts upon the advice or command of the conductor would not justify him in attempting to alight from the train when it was obviously dangerous to do so, and the fault of the conductor in this respect will not relieve the passenger from the consequences of his own reckless acts. But if the train is moving very slowly, and the passenger, upon the suggestion or request of those in charge of the train, attempts to alight, and is injured, it is a proper question for the jury whether it was a prudent or ordinarily careful act, or whether it was a rash and reckless exposure to peril and hazard.

4. A slight inattention to duty, which is not the proximate cause of the injury, does not bar a recovery for injury to a passenger resulting from the ordinary or gross negligence of the railroad company.

5. While mortality tables are admissible in evidence to assist the jury in estimating the expectancy of life, they are not indispensable, and the jury may make their estimate from the age, health, habits, and the physical condition of the person at the time of his death; and, upon the testimony in this case, it is held that the verdict cannot be disturbed on the ground that excessive damages were allowed.

(Syllabus by the Court.)

Error from district court, Osage county; William Thompson, Judge.

Action by Margaret Hughes against the Atchison, Topeka & Santa Fé Railroad Company. Plaintiff had judgment, and defendant brings error. Affirmed.

This action was brought in the district court of Osage county by Margaret Hughes against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for the death of her husband, John Hughes. The petition alleges, among other things, "that on or about one o'clock of the morning of March 20, 1890, the said John Hughes, in company with his relatives and friends, being at the station of Scranton, on the line of defendant's railroad, and being desirous of going to the station of Peterton, also on the line of defendant's railroad, purchased and paid for, from the ticket agent of defendant at Scranton,

ton, a ticket authorizing and empowering him to ride and journey upon a passenger train of the defendant's then about to arrive at Scranton, on its journey to Peterton and points beyond; that in a short time thereafter said train arrived, and the said John Hughes went on board said train, and took passage for said station of Peterton; that said train proceeded on its journey towards Peterton; that the conductor of said train and in charge thereof took up the ticket of the said John Hughes, and was advised of the fact that said John Hughes and those with him were to get off at Peterton; that, as the train approached the station of Peterton, the conductor informed and gave said John Hughes and his friends who were with him to be informed that the train would not stop at Peterton, but would slack up speed so that they might leave the train at the station in safety, and that they must do so; that the train slackened its speed, and, in obedience to the commands, request, invitation, and solicitation of the said conductor, all the persons in company with the said John Hughes left the train at a place which the said conductor gave all of them to be informed and understand was the station of Peterton; that the said station of Peterton was unlighted; that the train had run past the station and platform, and was then, notwithstanding the speed had been slackened, running at a dangerous rate of speed to leave the train; that the said John Hughes, having but little experience in railroad traveling, and relying upon the said commands, requests, invitation, and solicitation of the said conductor, with all the others of his party, left the train, being deceived by the said conductor as to the place where they should alight, and by the darkness of the place, and as to the speed of the train; that the said John Hughes was the last to alight; that the conductor knew that they all intended to alight, and while alighting from the train, and then knew that it was dangerous to life and limb, and which the said John Hughes did not know, nor did he have reasonable means to know; that the whole party were hurried off the train by the conductor; that one of the party was severely injured, and the said John Hughes then received fatal injuries, from which he died in a few moments afterwards; that the said John Hughes was in the exercise of care at the time; and that his death was caused and produced by the negligence and carelessness of said conductor in not stopping said train at the platform and station of Peterton, and his criminal and willful negligence in compelling, commanding, requiring, inviting, and soliciting the said John Hughes to leave the train in the nighttime at an unlighted station ground, at a speed known to be dangerous to him, and represented to be safe to said John Hughes to leave the train, and in the further negligence and carelessness of the defendant in not requiring the train to stop, in not by rule

and order compelling its conductors to not put off passengers while trains were in motion, and in keeping an unlighted station at Peterton, and for all which negligence and carelessness the defendant is by law responsible and liable; that, at the time of his death, said Hughes was 40 years of age, the head of said family, supported wholly by his labor; and that, by reason of his death, his said next of kin and heirs at law have suffered and sustained pecuniary damage and loss by his death to the extent of \$10,000; and that this action is brought to recover the same for their exclusive benefit and use, as well as the sum of \$5,000 for vindictive damages and smart money by reason of the gross acts of negligence of defendant heretofore recited, and for costs." The answer of the defendant was a general denial and an averment of contributory negligence. In the second defense, it is alleged that the injuries sustained by Hughes were wholly the result of his attempt to leave the train while the same was in motion, and while he was under the influence of intoxicating liquor, and in a condition produced by the use of intoxicating liquor, such as to render him unable to safely alight from a train in motion. No reply was filed. The case was tried at the April term, 1890; and, upon the testimony, the jury found that John Hughes came to his death by reason of the negligence of the conductor and brakeman in failing to stop the train at the station of Peterton, and see him safely off. It was found that they required him to get off near the depot while the train was in motion and running at a dangerous rate of speed. It was further found that he was 40 years of age; that his occupation was a coal miner; that he was capable of earning \$42 per month; and that he might be reasonably expected to earn such wages for a period of 25 years. The general verdict was in favor of the plaintiff below, and the damages awarded were \$7,830. The railroad company brings the case here for review.

A. A. Hurd and W. Littlefield, for plaintiff in error. Henry B. Hughbanks and Frank A. Hay, for defendant in error.

JOHNSTON, J. (after stating the facts). The first contention of the railroad company is that, upon the pleadings, judgment should have been given in its favor. The basis of this claim is that contributory negligence was set up as a defense in the answer of the railroad company, and that, as there was no reply or denial of the averment of contributory negligence, it must be taken as true. The petition alleged that the deceased was in the exercise of care when he attempted to alight from the train upon the order of the conductor, and the answer of the company contained a general denial of all the averments of the petition. If any reply was necessary to close the issue, it appears to have been overlooked and waived by the parties, and to

have been regarded as unnecessary by the court. The parties evidently proceeded upon the theory that an issue had been fairly raised as to whether Hughes was in the exercise of due care when the fatality occurred. A great part of the testimony produced at the instance of the parties bore upon that question, and no objection was made by the railroad company that the pleadings were insufficient, nor that the absence of a reply entitled it to a judgment. At the commencement of the trial, an objection was made to the admission of any testimony, but the ground of the objection was that the petition failed to state sufficient facts to constitute a cause of action; and, at the end of the testimony offered to sustain the allegations of the petition, a demurrer to the evidence was interposed, which was overruled. Neither of these objections called the attention of the court to the necessity or omission of a reply. In view of the conduct of the parties in the course of the trial, the objection that there was no reply comes too late, and cannot be heard for the first time in the supreme court.

The next contention of the railroad company is that the conduct of the deceased in attempting to alight from the train on a dark night, when it was in motion, was reckless negligence, although he may have been invited or commanded by the conductor to do so, and therefore the court erred in refusing the request of the defendant to instruct the jury to return a verdict in its favor. On the night of March 19, 1890, John Hughes, his boy, who was about 11 years old, James O'Mella, his father-in-law, who was about 68 years old, and Alex O'Mella, his brother-in-law, about 26 years of age, boarded a regular passenger train of the railroad company at Scranton, for the purpose of riding to Peter-ton, a station about 12 miles away. Hughes and the elder O'Mella took seats near together, in the front end of a coach, while the younger O'Mella and the boy found seats in the rear end of the same coach. Alex O'Mella had procured the tickets for the party, and they were taken up by the conductor shortly after the departure from Scranton. The testimony of the plaintiff below tended to show that, before reaching Peter-ton, the conductor told Alex O'Mella that the train would not come to a full stop at Peter-ton, but would only slow up for them to get off, when Alex responded that the train ought to be stopped, to enable the two older men, who were sitting at the front end of the coach, to get off, and in reply the conductor advised him to take care of himself, and let the others take care of themselves. It tended to show that after the whistle had been sounded for the station, and as they approached the station of Peter-ton, Hughes and James O'Mella were told that this was their station, and to get up and get off, which they proceeded to do. Alex O'Mella and the boy went out on the rear platform of the coach; and when they arrived at the station, and the train was running slowly,

Alex took the boy in his arms, and jumped upon the platform. The conductor was on the platform of the next car, and inquired if all were off, when Alex told him that they were not. Nevertheless, the conductor gave a signal, and the train commenced to run faster. Alex walked a few steps along the platform, and found his father lying on his face and hands, and a little further along, and beyond the platform, the body of Hughes was found in a mangled condition. The arrival of the train was after midnight, when it was very dark, and the station was not lighted, nor was there any one in charge of the same. It is true that the testimony offered in behalf of the railroad company is to the effect that the train came to a full stop at Peter-ton, and that they remained at the station between two and three minutes, giving ample time for passengers to leave the train. Testimony was offered to show that Hughes had been sleeping, and remained on the train until after they departed from Peter-ton, and that he jumped from the train after it had left the station, and while it was in motion. An effort was also made to show that he was somewhat intoxicated at that time.

Some of the circumstances developed in the case strongly tended to sustain the theory of the plaintiff, but the conflict in the testimony has been settled by the jury, and we must assume that, upon all disputed questions, the facts are as the testimony of the plaintiff below would show. Accepting that offered in her behalf as true, the company was clearly guilty of culpable negligence. It is well settled that it is negligence on the part of a railroad company for those in charge of a passenger train "to induce a passenger to leave the train while in motion, and a gross disregard of the duty it owes to him not to stop the train entirely, and give the passenger ample time and opportunity to alight." *Filer v. Railroad Co.*, 49 N. Y. 51; *Bucher v. Railroad Co.*, 98 N. Y. 128; *Beach, Contrib. Neg.* 160; 2 Am. & Eng. Enc. Law, 761. It is not contributory negligence per se for a passenger to leave a train which is in motion. Of course, a passenger must exercise ordinary care; and if he voluntarily places himself in a perilous position, and incurs a danger so obvious that an ordinarily prudent man would not encounter it, there can be no recovery. Whether the act of Hughes in leaving the train while it was in motion constitutes contributory negligence barring a recovery depends upon whether the danger was so patent that a prudent man, under the circumstances, would not have made the attempt. We think it was clearly a question of fact for the jury to determine. According to the testimony of the plaintiff, the train was running slowly, and at such a diminished rate of speed the motion of the train may have been hardly perceptible. From the testimony it would appear that James O'Mella was unable to determine whether the train was actually in motion when he attempted to

alight. The fact that there was no light at the station made it the more difficult to decide as to the motion of the train and the danger of leaving it. Then he would naturally think that the train would be brought to a stop, and the conductor would not invite him to leave the car when it was unsafe to do so. Of course, the mere fact that he acted upon the advice or command of the conductor would not justify him in attempting to alight from the train when it was obviously dangerous, and the fault of the conductor would not relieve the passenger from the consequences of his own reckless acts. "When, however, the passenger, under the encouragement or instruction of the company's servants, makes the leap, and suffers an injury therefrom, such an act on the part of the passenger is not generally held contributory negligence; but when the passenger leaves the train voluntarily, even though at the suggestion of the conductor or other trainmen, while the train is in motion, it is a question for the jury whether he acted as a prudent man under the circumstances." Beach, Contrib. Neg. § 148. In the Filer Case, already cited, the following language is used: "That there was more hazard in leaving a car while in motion, although moving ever so slowly, than when it is at rest, is self-evident. But whether it is imprudent and careless to make the attempt depends upon the circumstances; and where a party, by the wrongful act of another, has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for the jury whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard." See, also, Railroad Co. v. Crunk, 119 Ind. 542, 21 N. E. 31; Nichols v. Railway Co., 68 Iowa, 732, 28 N. W. 44; Carr v. Railroad Co. (Cal.) 33 Pac. 213; Odom v. Railroad Co. (La.) 14 South. 734; Carruth v. Railroad Co., Id. 736; Cousins v. Railroad Co. (Mich.) 56 N. W. 14; 2 Am. & Eng. Enc. Law, 762, and cases heretofore cited.

If the conductor hustled Hughes and the other passengers from the cars at Peterton, in the darkness, as the witnesses for the plaintiff below have stated, he was certainly guilty of gross negligence, when it was his duty to exercise the highest degree of reasonable care in safely setting them down at the station; and, under the authorities which have been cited, it was clearly a question for the jury to determine whether Hughes was in the exercise of ordinary care when he obeyed the order of the conductor, and attempted to alight from the train.

Some objections are made to the answers given by the jury to the special questions submitted, but we find nothing substantial in them. In response to one question, the jury answered that the body of Hughes was found from 60 to 90 feet below the south end

of the depot, while most of the testimony fixed the point at about 120 feet from the depot. We do not deem the answer to be of much importance, but an examination of the testimony shows that the witnesses only estimated the distance, and did not undertake to give the exact measurement. We think there was testimony to sustain the findings that were made, and we can see no such inconsistency in the findings as will justify a reversal.

It is next insisted that the court erred in its instructions to the jury by requiring the application of the rule of comparative negligence, instructing in regard to gross negligence, and in other respects in the giving and refusing of instructions. The court in its charge stated the rules which govern where there is mutual or concurring negligence. It also recognized different degrees of negligence, and, in doing so, to some extent seemed to place the gross negligence of the company against the slight negligence of the deceased. Evidently, the trial court had in mind some of the decisions of this court where it is held that a slight inattention to duty, which is not the proximate cause of the injury, does not bar a recovery for injury resulting from the negligence of another. Although some of the language employed was objectionable, it is clear that the court did not indorse the doctrine of comparative negligence, nor give the jury to understand that, if Hughes was guilty of ordinary negligence contributing to his death, there might be a recovery, because the company was guilty of greater negligence. The passenger is required to exercise ordinary care, and his failure to exercise the highest or extraordinary care will not preclude a recovery for an injury caused by the gross or ordinary negligence of the railroad company. It is conceded that extraordinary care is not required of a plaintiff who brings an action of negligence, and that slight negligence on his part will not defeat a recovery. In the case of Railway Co. v. Peavey, 29 Kan. 180, cited by plaintiff in error, it is said that "It is settled in this state that a party may recover for injuries done to him or his property caused by the negligence of another, even if his negligence is slight." While this view was adopted, and degrees of negligence were recognized, at the same time the court plainly instructed the jury, and kept it before them throughout the charge, that, if Hughes failed to exercise ordinary care and prudence in jumping from or leaving the train, there could be no recovery for his death. Taking all the instructions together, we think the jury was not misled by the language of the court which is complained of, and that, under the decisions, it cannot be held that prejudicial error was committed in charging the jury as to the care required of the company and of the deceased. Railroad Co. v. Rollins, 5 Kan. 167; Sawyer v. Sauer, 10 Kan. 406; Railway Co. v. Pointer, 14 Kan. 37; Railway Co. v.

Young, 19 Kan. 488; *Railway Co. v. Richardson*, 25 Kan. 331; *Railway Co. v. Peavey*, 29 Kan. 170; *Railway Co. v. Henry*, 36 Kan. 565, 14 Pac. 1. The testimony which was introduced warranted the court in stating the rule of gross negligence to the jury, and, after an examination of the entire charge, we are satisfied that the remaining objections to the rulings upon the instructions given and refused are not substantial, nor can error be predicated on them.

The final objection is that the damages allowed are excessive. According to the testimony, Hughes was 40 years of age, a man of good habits, with good health and a sound body. He was an industrious man, who had been engaged in mining, and who had earned wages as high as \$5 per day; and the jury found that in his usual vocation he was capable of earning \$42 per month, and his earnings were computed for a period of 25 years. It is said that no mortality tables were introduced to show the probable duration of the life of the deceased. Such tables are admissible in evidence, to assist the jury in estimating the expectation of life, but they are not indispensable. The jury may make their estimate from the age, health, habits, and the physical condition of the person at the time of his death. The court cannot interfere with the verdict of the jury upon the ground of excessive damages, unless they are so great as to appear to have been given under the influence of partiality or prejudice. Although the amount awarded was liberal, we cannot disturb the judgment on the ground of excessive damages. The judgment of the district court will be affirmed. All the justices concurring.

(55 Kan. 582)

CHICAGO, K. & W. R. CO. v. FRAZER.

(Supreme Court of Kansas. July 6, 1895.)

CARRIERS—LIABILITY FOR DEATH OF PASSENGER.

1. As the conductor in charge of a construction train is the representative of the railroad company, and the manager of the train, his action in receiving passengers upon such train and collecting fare from them ordinarily entitles them to the rights of passengers, and to such care and attention as can be reasonably given to them upon such a train.

2. The fact that the conductor may have carried passengers without authority from the company, and contrary to instructions given him, will not relieve the company from liability for the failure to exercise due care towards those so received as passengers, unless they knew they were riding in violation of the rules of the company, and had willfully joined with the conductor in committing a wrong against the company.

3. Where the railroad company is engaged in the construction of a railroad, and a person is received as a passenger by the conductor of a construction train, to be carried over the newly-built portion of the road, and which had not yet been opened for public traffic, and where such person has been safely carried to his destination, and to a point which was then the end of the railroad, and had been afforded almost half an hour to leave the train, the company no longer owed him any duty as a passenger, nor was it under any obligation to him as such.

4. Where it is not claimed that there was any omission of duty towards such person until after he had reached his destination, nor until after his right as a passenger had terminated, an instruction by the court upon the duty of the company towards passengers, holding it to the use of the utmost care and skill within the scope of human foresight, and liable for the slightest negligence on the part of its servants and agents, is misleading and erroneous.

5. Where a person takes passage upon a construction train to run over an unfinished railroad, and is aware of its incomplete condition, and that the track had just been laid to the point of destination, and there had not been sufficient time to build a depot or to provide station facilities at that point, the company does not owe him the duty to have a suitable depot and platform at the end of the line, and the absence of the same cannot be regarded as negligence towards him.

6. The testimony examined, and held to be insufficient to sustain some of the special findings returned by the jury.

(Syllabus by the Court.)

Error from district court, Scott county; V. H. Grinstead, Judge.

Action by Susanna Frazer against the Chicago, Kansas & Western Railroad Company. Plaintiff had judgment, and defendant brings error. Reversed.

A. A. Hurd and J. G. Egan, for plaintiff in error. Travis Morse and E. E. Hubbell, for defendant in error.

JOHNSTON, J. Susanna Frazer brought an action against the Chicago, Kansas & Western Railroad Company to recover for the death of her son, J. H. Frazer, who, she alleges, was killed while a passenger on a railroad train of the defendant, by reason of the company and its servants running their train in a careless, reckless, and wanton manner, and with gross negligence, into an obstruction which was upon the railroad track. On July 13, 1887, the Chicago, Kansas & Western Railroad was in process of construction and had been completed from Great Bend to Dighton. Construction work was going on beyond Dighton, and the railroad track was then laid as far west as Scott City, but the road had not been opened by the company for either freight or passenger business beyond Dighton. The only trains in operation from Dighton to Scott City were construction trains, used for carrying employes and material, and those in charge of these trains were directed not to receive or carry any passengers upon them. Notwithstanding this direction, those in charge of the construction trains sometimes received passengers and collected fares, but the money so received was never accounted for nor paid to the company. On the evening of July 13, 1887, J. H. Frazer boarded what is called the swing or construction train, loaded with material, at Dighton. He rode in a caboose which was attached to the train, and which was occupied by employes and a few passengers. He was aware of the fact that the road was unfinished, and under construction, and he was aware that the company was not operating pas-

senger trains on that part of the track, and that the railroad was not open for business further west than Dighton. About five or six days before, track had been laid as far as Scott City, but no depot had been built, nor any station conveniences provided. The Missouri Pacific Railway Company was then building a branch road through that section of the state, and it crossed the Chicago, Kansas & Western Railroad at Scott City. On the evening of July 13, 1887, a permanent crossing had not been built, but, instead, temporary provision was made for crossing on the top of the rails of the Chicago, Kansas & Western Railroad, and this temporary crossing was in charge of the Missouri Pacific employes. The construction train on which Frazer rode that evening reached Scott City after dark. It was run past the point of intersection with the Missouri Pacific Railway, up to a temporary stopping place, on the outskirts of Scott City, where the train was met by a bus and a dray for the transfer of passengers and baggage to other parts of the town. The train remained at this stopping place for 25 minutes, and most, if not all, of the passengers and employes left the train. It appears that Frazer did not ride up town on the first trip, because there was not room for him and his trunk upon the bus, and parties who were present heard the bus man agree to return for him. One of the trainmen, after examining the caboose to see whether all had left there, and finding it empty, as he said, locked the same. A different crew of men then took charge of the construction train, and started to back it down to the other side of the Missouri Pacific crossing, which appears to have been about three-quarters of a mile east of Scott City. It appears that after the construction train had first passed the intersection with the Missouri Pacific the temporary crossing had been laid down for a Missouri Pacific train, and left there, and the construction train, which was being backed at the rate of about seven miles an hour, ran into the crossing, and wrecked the train. The caboose and several other of the cars were thrown from the track, and Frazer was found dead a short distance from the wreck of the caboose. His mother, who is the next of kin, brought this action, and at the end of the trial the jury found against the company, and awarded damages to her in the sum of \$5,000.

From the testimony, it appears that the conductor, in opposition to his instructions, sometimes carried passengers upon the construction train; and in answer to a special question the jury found that Frazer paid the conductor for his ride from Dighton to Scott City. As the conductor is the representative of the company, and the manager of the train, his action in receiving passengers upon a construction train of the company, and collecting fare from them, would

ordinarily entitle them to the rights of passengers, and to such care and attention as can reasonably be given them upon such a train. The fact that the conductor may have carried passengers without authority from the company, and contrary to the instructions given him, will not relieve the company from liability for the failure to exercise due care towards those so received as passengers, unless they knew they were riding in violation of the rules of the company, and had willfully joined with the conductor in committing a wrong against the company. Where a person is received as a passenger, and pays his fare to one in charge of the train, and with apparent authority, without knowledge of any limitation of his authority, such person is justified in assuming that the company occupied the position of a carrier, and would exercise towards him such vigilance and care as the circumstances would permit. The failure of those in charge of the train to exercise that degree of care renders the company liable for resulting injuries to such persons so long as the relation of passenger and carrier exists. In this case, however, that relation only existed between the company and Frazer until the construction train reached Scott City. When he had been safely carried to his destination, and to a point which was then the end of the road, and had been afforded almost half an hour to leave the train, the company no longer owed him any duty as a passenger, nor was it under any obligation to him as such. It is not claimed that there was any omission of duty towards him until after he reached his destination, nor until his rights as a passenger had terminated; and yet the court charged the jury at length upon the duty of the company towards passengers, and held it to the use of the utmost care and skill within the scope of human foresight and human knowledge in the operation of its railroad, and liable for the slightest negligence on the part of its servants and agents. In view of the testimony in the case, instructions of this character were unwarranted, and were probably misleading. After the train had arrived, and abundant time had been given him to leave it, he could not be regarded as a passenger, nor entitled to the extraordinary care that is due to passengers. Although it was not necessary, the men in charge of the train examined, to see if all had left the train, and, finding no one upon it, the caboose was closed and locked for the night; and, although the jury found that the brakeman who made the examination knew that Frazer remained on the train, we can discover no testimony to support that finding. He was undoubtedly upon the train when the accident occurred, but on what part of the train he may have been is not shown; and the finding of the jury is that immediately prior to the wreck he was "in or about the caboose." Frazer was prob-

ably on some part of the construction train when the new crew of men took charge of the same to back it over the crossing, but there is no testimony whatever that any of them knew of his presence on the train, and the jury so found. In the absence of knowledge to the contrary, those men had a right to suppose that all passengers had left the train long before that time; and if he was upon the train without their knowledge it is difficult to find that they were guilty of any negligence towards him. If he was a mere trespasser, the company owed him no duty except that it should not wantonly or willfully injure him; but such negligence cannot be attributed to the company, unless they knew of his presence upon the train. Under the circumstances, we think the instruction was misleading and erroneous. *Railroad Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Railroad Co. v. Berry*, 53 Kan. 112, 36 Pac. 53. See, also, *Davis v. Railway Co.*, 18 Wis. 185; *Imhoff v. Railway Co.*, 20 Wis. 362; *Jenkins v. Railway Co.*, 41 Wis. 112; *Hurt v. Railway Co.*, 94 Mo. 255, 7 S. W. 1; *Railroad Co. v. Slatton*, 54 Ill. 133; *Railway Co. v. Brooks*, 81 Ill. 245. The error of the court was emphasized by another instruction that it was the duty of the company to provide a suitable depot and platform for the accommodation of passengers boarding and alighting from their trains, and any failure on the part of the defendant to provide such depot and platform if carrying passengers would be negligence on the part of the defendant. The fact that the road was unfinished was obvious to every one, and Frazer was undoubtedly aware of its condition when he took passage upon the construction train at Dighton. The track had just been laid into Scott City, and there had not been sufficient time to build a depot or provide station facilities at that point. Having knowledge of the incomplete condition of the road, the company did not owe him the duty to have a suitable depot and platform at Scott City, and the absence of the same cannot be regarded as negligence towards him. The finding that the deceased was on the train with the consent and knowledge of the brakeman Markell is not supported by the testimony, and it is difficult to find evidence to sustain some other of the special findings returned by the jury. For the errors mentioned, the judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

(55 Kan. 617)

GETTO v. BINKERT et al.

(Supreme Court of Kansas. July 6, 1895.)

PAROL EVIDENCE TO VARY NOTE.

The terms of a promissory note payable one day after date cannot be so varied as to become due only after the sale of certain lots by

evidence of a parol contemporaneous agreement to that effect between the parties.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob M. Balderston, Judge.

Action by Anton Binkert and others against Peter Getto. From the judgment for plaintiffs, defendant brings error. Affirmed.

Sankey & Campbell, for plaintiff in error. J. D. Houston and J. F. Craig, for defendants in error.

MARTIN, C. J. The original action was brought by the defendants in error against the plaintiff in error in the court of common pleas November 14, 1890, to recover upon a promissory note for \$3,075, dated July 3, 1886, and payable to the order of S. Kingsbaker & Bros. one day after date, with interest at 6 per cent. per annum. It was indorsed after maturity to the defendants in error, and the plaintiff in error paid interest upon it to July 3, 1889. Louis Kingsbaker was a traveling salesman, and a member of the firm of S. Kingsbaker & Bros., of Quincy, Ill., while Getto was a resident of Wichita; and the only defense necessary to mention was, in substance, that Getto and Louis Kingsbaker agreed to purchase certain lots in Wichita on joint account, the money to be obtained by draft upon S. Kingsbaker & Bros., and Getto was to pay 6 per cent. interest on one-half the amount borrowed, and the title to the property purchased was to be taken in the name of Getto and Louis Kingsbaker, and, when the lots were sold, the money borrowed was to be repaid, and the profits divided equally between Getto and Louis Kingsbaker, and that the note was given as a mere memorandum to show the amount received for Getto's use, and that the lots had not been sold. There are some further allegations in the answer, not supported by the evidence, and which we need not mention. The court ruled that the burden of proof was upon the defendant below, and he was the only witness examined on his own behalf. After the introduction of his evidence, a demurrer thereto was sustained, on the ground that no defense to the note had been proved; and the jury was instructed to return a verdict in favor of the plaintiff below for the amount due on the note; and on January 15, 1891, judgment was rendered on the verdict for \$3,356.85, bearing 6 per cent. interest, and costs of suit. Getto's evidence was in line with the substance of his answer as above stated. He testified that the understanding with Louis Kingsbaker that the borrowed money should be paid out of the proceeds of the sale of the property was at and before the time of the execution of the note, and that it was talked over thereafter on some of the visits of Louis Kingsbaker to Wichita, but there was no consideration for any subsequent agreement, and Getto did not really testify to any different agreement from that

which was first made. He stated that they expected to sell the lots in a short time, and in the spring of 1887 they did make sale of one lot for the sum of \$2,500, realizing a profit thereon of \$1,350; and Getto retained his half of the proceeds, being \$1,250. At the same time they were negotiating a sale at \$8,000 for the remainder of the property, for which they had paid \$5,000, and he wrote to S. Kingsbaker & Bros. that he would take up the note if they would send it to the State National Bank at Wichita. The title to the lots was taken in the name of Peter Getto and Louis Kingsbaker.

The evidence may be sufficient to raise the question whether the date of maturity of the promissory note was extended by the oral agreement between Getto and Louis Kingsbaker, made prior to or concurrently with its execution, so that it would not become due until the lots should be sold; and the plaintiff in error insists that this question ought to have been submitted to the jury on the evidence. The construction of an unambiguous written contract is, however, a matter of law for the court (*Warner v. Thompson*, 35 Kan. 27, 10 Pac. 110); and there is nothing ambiguous about the note in suit. Parol evidence is inadmissible to change the terms of a written contract. All prior or contemporaneous negotiations are presumed to be merged in or concluded by it. *Hopkins v. Railway Co.*, 29 Kan. 544, 550; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017; *Lock Co. v. Huston*, 30 Pac. 1035, 1036, 55 Kan. —, and cases cited. This rule does not exclude proof of a separate and independent parol contract made contemporaneously with the execution of the written agreement, and not inconsistent with it. *Babcock v. Deford*, 14 Kan. 408; *Weeks v. Medler*, 20 Kan. 57, 64. But the evidence does not take this case out of the general rule, nor bring it within any of its established exceptions. A contemporaneous parol agreement that a promissory note, payable one day after date, shall not become due until certain lots are sold, is not separate from nor independent of the note, but is inconsistent with it.

The decision of the court below might well be sustained on another ground. If a condition had been inserted in the note that it was payable out of the proceeds of the sale of the lots, yet it would have become due in a reasonable time. *Jones v. Eisler*, 3 Kan. 134, 139; *Palmer v. Hummer*, 10 Kan. 464; *Atchison, T. & S. F. R. Co. v. Burlingame Tp.*, 36 Kan. 623, 633, 634, 14 Pac. 271; *Smithers v. Junker*, 41 Fed. 101. And in this case, where the sale of the lots was contemplated by the next spring, and payment had often been requested, and even promised, and where part of the property was sold within the time originally contemplated, and Getto retained half the proceeds, it would be proper for the court to declare that a reasonable time had elapsed between July, 1886, and November, 1890. *Druse v. Wheeler*, 28 Mich. 189, 195, 200;

Johnson v. Whitman Agricultural Co., 20 Mo. App. 100; *Bottum v. Moore*, 13 Daly, 461. The judgment will be affirmed. All the justices concurring.

(55 Kan. 532)

STATE v. GUINNEY.

(Supreme Court of Kansas. July 6, 1895.)

CONSTITUTIONAL LAW—OFFENSES AGAINST RAILROAD PROPERTY.

Sections 1 and 2 of chapter 121, *Sess. Laws 1871*, entitled "An act to prescribe the punishment for certain offenses against railroad property and in railroad cars and buildings," are in contravention of the second clause of section 16 of article 2 of the constitution, and therefore void.

(Syllabus by the Court.)

Appeal from district court, Marion county; Lucien Earle, Judge.

At March term, 1894, the defendant was tried upon a charge of feloniously breaking and entering a certain freight car, the property of the Atchison, Topeka & Santa Fé Railroad Company, with the intent then and there to feloniously steal, take, and carry away property of the said railroad company, and that, having so entered said car, he did then and there feloniously steal, take, and carry away two pairs of shoes, six hams, one 50-pound can of lard, and one pair of gloves, of the value of \$25, and being the property of said railroad company. He was convicted of burglary and larceny, as charged in the information. Upon his motion, however, judgment was arrested on said verdict as to the charge of burglary, but he was sentenced to two years' imprisonment in the penitentiary on the verdict of conviction for larceny, and the state appealed from the order arresting judgment on the verdict of conviction for burglary. Affirmed.

F. B. Dawes, Atty. Gen., and C. M. Clark, for the State. W. H. Carpenter, for appellee.

MARTIN, C. J. The question in this case is whether the court erred or not in arresting judgment upon the conviction for burglary, and this depends upon the constitutionality of sections 1 and 2 of chapter 121, *Sess. Laws 1871*, entitled "An act to prescribe the punishment for certain offenses against railroad property and in railroad cars and buildings." The defendant claims that these sections are in contravention of both clauses of section 16 of article 2 of the constitution, the latter of which provides that "no law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed." In *Commissioners v. Bailey*, 13 Kan. 600, this court held that the first clause of this section is mandatory, and we see no reason why the second clause should receive a different construction and be treated as merely directory. One purpose of the clause was to discontinue the practice of amendments by striking out

and inserting, and another was to call specific attention to the old statute in the enactment of the new, although, when the new is properly enacted with reference to the old, the latter is repealed by the very force of the constitutional provision, without any legislative declaration to that effect. *Commissioners v. Hudson*, 20 Kan. 71, 75; *Case v. Bartholow*, 21 Kan. 301, 308. The constitutional clause in question was not intended to abolish the doctrine of repeals by implication (*Commissioners v. Shoemaker*, 27 Kan. 78; *State v. Cross*, 38 Kan. 700, 17 Pac. 190); nor to forbid the enactment of supplemental laws (*Berry v. Railroad Co.*, 52 Kan. 759, 768-770, 34 Pac. 805). And we recognize the rule that before an act of the legislature can be declared unconstitutional, its repugnance to the fundamental law must clearly appear. *Cherokee Co. Com'rs v. State*, 36 Kan. 337, 13 Pac. 558.

Are sections 1 and 2 of the act in question intended to be amendatory of sections 68 and 69 of the crimes act, or are they supplemental thereto, or are they intended to repeal them wholly or in part by implication? If these sections of the act of 1871 had only provided penalties for breaking into any "passenger coach, baggage, freight or express car or other railway carriage," "with intent to commit therein a felony or misdemeanor," they could be upheld as supplemental legislation, for prior thereto no adequate penalties were denounced against those who committed such depredations. But station houses, depots, ticket offices, and other railway buildings were already under the protection of sections 68 and 69 of the crimes act as warehouses and other buildings; and if these sections, and also sections 1 and 2 of the act of 1871, are still in force, then we have two laws on the same subject, and these inconsistent with each other; for by the crimes act the breaking and entering of such structures would be burglary in the second degree only when committed in the nighttime and with intent to steal or to commit any felony therein, while by the act of 1871, the offense would be of that degree, although committed in the daytime and with intent to commit therein a felony or misdemeanor. Under section 69 of the crimes act, the breaking and entering of such a structure in the daytime is burglary in the third degree only. The punishment for burglary in the second degree is confinement and hard labor in the penitentiary not less than five nor more than ten years, while for burglary in the third degree the term is not less than one nor more than five years. Again, under section 2 of the act of 1871, burglary in the third degree consists of a mere attempt to break and enter, while under section 69 of the crimes act there must be an actual breaking and entry. Besides, section 417 of the crimes act makes special provision for the punishment of an attempt to commit a crime. It is impossible for a trial judge to correctly instruct a jury or

properly administer the law of burglary in such cases on the assumption that sections 68 and 69 of the crimes act and sections 1 and 2 of the act of 1871 are in force. One or the other must be disregarded. And we cannot hold that said sections 68 and 69 of the crimes act are wholly or in part repealed by implication, for they are much broader in their scope than sections 1 and 2 of the act of 1871. If we are to accord to the latter legislation any force or effect, we must treat it as amendatory, and sections 68 and 69 of the crimes act as repealed, at least in part. On the whole, we think that legislation like sections 1 and 2 of said act of 1871 was intended to be inhibited by the second clause of section 16 of article 2 of the constitution; that they are inoperative and void; and that sections 68 and 69 of the crimes act are not affected thereby.

It is suggested by counsel for the state that the constitutionality of the act of 1871 has stood unchallenged for many years, and that such long acquiescence is a strong argument in favor of its validity; and they cite *Commissioners v. Higginbotham*, 17 Kan. 62, 74; *Philpin v. McCarty*, 24 Kan. 303, 405; and *State v. Cross*, 38 Kan. 696, 700, 17 Pac. 190. But in all those cases important rights and property interests had accrued under the several acts in question, and a decision adverse to their validity would disturb these rights and interests; and this was a consideration not lightly to be esteemed. But it has no application here. Entertaining these views, we hold that the district court did not err in arresting judgment on the conviction for burglary. Judgment affirmed. All the justices concurring.

(1 Kan. App. 121)

PAULUCCI v. VERITY et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1895.)

CONTINUANCE—ABSENCE OF PARTY.

It is not error to overrule an application for a continuance made on behalf of one of two defendants who are sued as copartners, when the only showing made is that the defendant so applying is a nonresident of this state, is unable to attend at that term on account of sickness, and desires to attend the trial of the case, and there is no evidence that his attendance is necessary, either as a witness or as a party to advise in making a defense in the action.

(Syllabus by the Court.)

Error from district court, Wabaunsee county; William Thomson, Judge.

Action by J. H. Verity & Co. against Joseph Paulucci and W. C. Paulucci. Judgment for plaintiffs, and defendant Joseph Paulucci brings error. Affirmed.

Hazen & Izenhart, for plaintiff in error. A. H. Case, for defendants in error.

CLARK, J. The only error assigned in this case which is urged upon the court in the brief of counsel for plaintiff in error is the

ruling of the district court of Wabaunsee county, where the case was tried, refusing the application of the plaintiff in error, one of the defendants below, for a continuance of the trial of the case. This was an action brought by Verity & Co. against Joseph Paulucci and W. C. Paulucci to recover the amount alleged to be due and owing by the defendants to the plaintiffs on account for goods sold and delivered to them by the plaintiffs. The defendants answered by separately filing a general denial to the petition. The petition was filed October 16, 1890, and the case called for trial at the February, 1891, term of court. The plaintiff in error, Joseph Paulucci, was a resident of the state of Ohio, and made application on February 5, 1891, for a continuance, on the ground of sickness and inability to attend the trial at that term of court. The only showing made on the application was by the affidavits of Joseph Paulucci, his physician in Ohio, and one of his attorneys. His alleged sickness and inability to attend is satisfactorily shown by such affidavits. The only showing made as to the necessity of his presence at the trial is the statement in the affidavit of Joseph Paulucci, as follows: "That he desires to be present at the trial of the above-entitled cause in person; * * * that, if said cause is continued to the next term of said court, he expects to be able to attend court, and will be present at the trial of said cause." And the statement in the affidavit of his attorney, as follows: "That affiant desires that said Joseph Paulucci be present at the trial of said cause; that this affiant believes from the statements made to him by the said defendant that he has a valid defense to said plaintiff's claim, sued herein." This, certainly, is no sufficient showing for a continuance. The defendants below were partners, and the action grew out of a partnership transaction. It is not claimed that Joseph Paulucci had any personal knowledge of the business, or of the correctness of the account sued upon, or that he had any information bearing on the issues to be tried that would be of importance in presenting the defense.

The mere desire of a party to a suit to be present at the trial, or the desire of his attorney to have him there present, is not a sufficient reason for a continuance of a case over a term of court. Such a desire may grow out of mere curiosity, or from the mere general interest any party to litigation has in its results, without any expectation of the party being able himself, in any way, by his presence and counsel, to give material aid in the case. No showing is attempted to be made that there was any valid defense to the action. The general denial gives the court no definite information, and all that counsel ventured to say was that from statements made to him by his client he believed he had a valid defense. Whether such defense consisted of a denial of the purchase of the goods, or a claim of payment, or other matter, is not disclosed. Motions for continuance are al-

ways addressed to the sound judicial discretion of the court, and the refusal of a continuance is not reversible error, unless it clearly appears that the court abused such discretion. *Beard v. Mackey*, 51 Kan. 131, 32 Pac. 921.

The record further shows that, on the trial of the case, counsel for the defendants below made no effort towards presenting a defense of any kind, not even cross-examining one of the plaintiffs below, who testified as a witness to the correctness of the account sued upon and amount due thereon. We think the decision of the court in refusing the continuance entirely correct. The judgment will be affirmed.

(1 Kan. App. 106)

OAKLAND HOME INS. CO. v. ALLEN.

(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1895.)

ACTION ON INSURANCE POLICY—PLEADING—REVIEW ON APPEAL.

1. The petition fails to state a cause of action, in an action brought upon a policy of fire insurance to recover for a loss, when it shows upon its face that the action was not commenced within the time limited by the policy.

2. It is error to render a judgment for the plaintiff upon a petition which does not state a cause of action in his favor. The error, being apparent from the record and inherent in the judgment, may be taken advantage of on appeal, without exceptions or motion for new trial in the district court.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thomson, Judge.

Action by J. R. Allen against the Oakland Home Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. F. Ware, for plaintiff in error. Geo. R. Smith and Hopkins & Hopkins, for defendant in error.

GARVER, J. The petition in this case is based upon a policy of fire insurance, and alleges that the fire in consequence of which the loss was sustained occurred April 30, 1890. The petition was filed November 20, 1890. The policy was attached to and made a part of the petition and contained this condition: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within six months after the fire shall have occurred." The petition contains no allegation of reason or excuse for failing to commence the action within six months next after the fire. After the overruling of the motion made by the insurance company to set aside the service of summons, no further appearance being made by the defendant, judgment by default was entered in favor of the plaintiff below for \$979.95.

The insurance company, as plaintiff, now claims that such judgment is erroneous for

the reason that the petition shows upon its face that the action was not commenced within the time limited by the policy, and therefore states no cause of action. This claim must be sustained. The stipulation in the policy limiting the time in which an action may be commenced is valid and binding on the parties. *Insurance Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479; *Insurance Co. v. Bullene*, 51 Kan. 764, 33 Pac. 467. A petition which shows upon its face that the claim sued on is barred states no cause of action. *Zane v. Zane*, 5 Kan. 134. When the petition fails to state a cause of action, or shows that the plaintiff is not entitled to the relief demanded, it does not authorize the court to render judgment thereon. The error, being apparent from the record, can be corrected in this court, although no exception was taken thereto by the party complaining, or motion for a new trial made. *Gen. St. 1889, § 4174*; *Zane v. Zane*, supra; *Mitchell v. Milhoan*, 11 Kan. 617; *Young v. Whittenhall*, 15 Kan. 579; *Wooley v. Van Volkenburg*, 16 Kan. 20; *Brown v. Tuppenny*, 24 Kan. 29; *Stapleton v. Orr*, 43 Kan. 170, 23 Pac. 100; *McKinstry v. Carter*, 48 Kan. 423, 29 Pac. 597; *Insurance Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682. We must conclude, therefore, that the court erred in rendering judgment in favor of the plaintiff upon the petition. The motion to set aside the service was, we think, properly overruled. As it was suggested in oral argument by counsel for the defendant in error that there were sufficient reasons for delay in commencing the action, and the defect in the petition may be cured by the amendment, the judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

(1 Kan. A. 103)

MOORE v. SHAW, Sheriff.

(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1895.)

CHattel Mortgage—Failure to Renew—Effect on Lien—Replevin Against Officer—JUDGMENT.

1. A chattel mortgage filed in the office of the register of deeds of the proper county, but not renewed within the year after such filing, as required by the statute, is void as to creditors after the expiration of the year. When possession under such mortgage is relied upon by the mortgagee, he must show an actual and continued change of possession in himself; and possession by the mortgagor, as his agent, is insufficient as against an execution creditor levying thereon.

2. In an action of replevin by the mortgagee under such a mortgage to recover the mortgaged goods from a sheriff, who has levied an execution thereon as the property of the mortgagor, the interest of such officer is only special; and a judgment in his favor when the plaintiff has possession, should be for their return, or the recovery of the value of such special interest when it is less than the value of the goods.

(Syllabus by the Court.)

Error to district court, Atchison county; Robert M. Eaton, Judge.

v.40P.no.13—59

Action in replevin by Albert W. Moore against Frank E. Shaw, sheriff. Defendant had judgment, and plaintiff brings error. Reversed.

A. F. Martin, for plaintiff in error. H. M. Jackson, for defendant in error.

GARVER, J. This was an action brought by Albert W. Moore against Frank E. Shaw, as sheriff of Atchison county, Kan., to recover the possession of certain personal property levied upon by the defendant under an execution against J. W. Moore. The plaintiff claimed the right of possession under a chattel mortgage made to him by J. W. Moore on September 20, 1885, and filed in the office of the register of deeds of Atchison county, on September 21, 1885, at 10 o'clock a. m. Said mortgage was given to secure the sum of \$1,500, payable in three years from its date. On September 21, 1886, at noon, the defendant, as sheriff, levied an execution upon the property included in the mortgage, the amount of such execution being then probably about \$142.90. The only renewal affidavit made was filed August 10, 1886. In his answer, the defendant justified the taking of the goods under the execution against J. W. Moore, and alleged that his interest in the property amounted to \$142.90. This answer was filed November 1, 1886, and a trial by jury was had February 3, 1890. The court below sustained a demurrer to the plaintiff's evidence. After such demurrer was sustained, the court permitted the defendant to strike out of his answer the allegation as to the value of his special interest in the property, and, without other evidence rendered judgment for the defendant for the return of the property, the plaintiff having possession thereof, or the recovery of the sum of \$1,500, the value of the property, as alleged in plaintiff's petition.

A renewal affidavit not having been filed within 30 days next preceding the expiration of the term of one year from the time when the mortgage was filed, the mortgage was void as to the creditors of J. W. Moore, the mortgagor, unless actual possession had been taken thereunder. *Gen. St. 1889, par. 3905*; *Swiggett v. Dodson*, 38 Kan. 702, 17 Pac. 594; *Farmers' & Merchants' Bank v. City Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 680. Fractions of a day are not considered in such a case, and the year after the filing expires on the last day of the year at the same hour at which the mortgage was filed. *Lockwood v. Crawford*, 29 Kan. 286. Hence this mortgage, so far as it rested upon the filing, was no protection to the mortgagee as against the creditors of the mortgagor who caused an execution to be levied on the mortgaged property, after the expiration of the year.

The plaintiff claims, however, that, at the time of the levying of the execution, he had actual possession; and, upon the trial, he and the mortgagor testified that "the plain-

iff had actual possession." Under the pleadings, this was a material fact to be proved, and it was not competent for the witnesses to state their mere conclusions as to what constituted possession. *Express Co. v. Anthony*, 5 Kan. 490. The cross-examination disclosed that what the witness called possession in the plaintiff was perhaps nothing more than such control of the property as the mortgagee had the right to exercise under the mortgage through the mortgagor. The mortgaged property was in the Arlington Hotel, in the city of Atchison, used in the running of that business, and the mortgagor was the ostensible proprietor in charge. The testimony offered by the plaintiff as to possession was admitted without objection, and seemingly relied upon in the district court, and still relied upon in this court by him, as competent evidence of possession which should have been submitted to the jury. In this respect the counsel may have been misled in relying upon that character of evidence, but it cannot change the law applicable to this case. When possession is relied upon in such circumstances, there must be "an actual and continued change of possession of the things mortgaged." No such actual change of possession exists where the mortgagor continues in actual management and control of the property, even though he claims to be so acting as the agent of the mortgagee. *Swiggett v. Dodson*, supra.

Did the court err in rendering judgment for the return of the property to the defendant, or, in case a return could not be had, then for a recovery of its full value? Conceding the invalidity of the mortgage as to creditors, yet it was valid as between the mortgagor and the mortgagee; and the latter, as between them, was entitled to the possession of the property covered by the mortgage. This right of possession and of property was only subject to the lien of the execution held by the sheriff. When that lien was discharged, the defendant's right to the possession of this property ended. After the demurrer to the evidence was sustained, the court should have inquired into the right of property and right of possession of the defendant to the property taken. *Gen. St. 1889, par. 4267*. Upon such inquiry, the judgment should have been for the return of the property, or for the recovery of the value of the interest of the defendant, in case a return could not be had; such interest being that existing at the time of the trial. *Gen. St. 1889, par. 4268; Shahan v. Smith*, 88 Kan. 474, 16 Pac. 749; *Ponciler v. Marshall*, 45 Kan. 672, 26 Pac. 32; *Guy v. Doak*, 47 Kan. 866, 27 Pac. 968.

We are referred to the case of *Hall v. Jenness*, 6 Kan. 366, as authority for the judgment rendered in this case. The statement made in the opinion in that case with reference to the right to recover such a judgment is not applicable to the facts in this case, for there it seems to have been con-

ceded that a third party, and not the plaintiff, had the right of possession and of property. The same justice delivering the opinion of the court in *Guy v. Doak* said: "It is a universal principle in replevin that where each of the parties has an interest in the property, and the party not having the possession thereof at the time of the trial recovers in the action, he shall recover from the other party, as value, only the value of his own special interest in the property, and not the actual value thereof." The court, in this case, should have ascertained the value of the defendant's special interest, and rendered judgment for that amount. It was error not to do so. We are not able to determine from the record what the value of this interest is; consequently, even if so inclined, could not correct the error by the modification of the judgment in this respect. We think the ends of justice will be best served by remanding the case for a new trial, upon which, if the plaintiff fails to show by competent evidence actual possession of the property in controversy at the time the execution was levied, the defendant will be entitled to judgment for the return of the property, or the recovery of such amount as he shall then show to be the value of his special interest.

The judgment is reversed, for further proceedings in accordance with this opinion.

(1 Kan. A. 113)

CITY OF TOPEKA v. THOMAS.

(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1895.)

MECHANIC'S LIEN—CITY BUILDING.

The mechanic's lien law is sufficiently comprehensive to authorize a lien in favor of a material man who furnishes materials for the erection of a public building for a city of the first class. *Wilson v. School Dist.*, 17 Kan. 104, and other cases, followed.

(Syllabus by the Court.)

Error to district court, Shawnee county; John Guthrie, Judge.

Action by Jonathan Thomas against the city of Topeka. Judgment for plaintiff, and defendant brings error. Affirmed.

S. B. Isenhardt and Vance & Campbell, for plaintiff in error. Curtis & Safford, for defendant in error.

GARVER, J. The only question presented and to be decided by the court in this case is whether one of the public buildings of the city of Topeka, a fire station, is subject to the lien of a subcontractor who furnished materials for its erection. There is nothing in this case to distinguish it from the cases heretofore decided in the supreme court establishing the policy of the state in allowing such liens. All questions involved are fully covered by the decisions in the following cases: *Wilson v. School Dist.*, 17 Kan. 104; *School Dist. v. Conrad*, Id. 522; *Commission-*

ers of Jewell Co. v. Snodgrass & Young Manuf'g Co., 52 Kan. 253, 34 Pac. 741. The fact as to a personal judgment having been rendered against the city is disputed by counsel, and we are not able to say from the record whether a personal judgment was authorized by the pleadings and evidence, or whether such a judgment was in fact entered by the court. In any event, the property of the city used for public purposes is not subject to execution, and the mere form of the judgment holding the city liable to a lien on its property would not prejudice its legal rights. The judgment will be affirmed.

(1 Kan. A. 114)

CHICAGO, R. I. & P. RY. CO. v. REARDON.
(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1895.)

NEW TRIAL—INSUFFICIENCY OF EVIDENCE—DECISION OF TRIAL COURT.

It is the duty of the trial judge, passing upon a motion for a new trial, one of the grounds of which is that the verdict of the jury is not sustained by sufficient evidence, to review the evidence in the case, and to approve or disapprove the verdict; and if, after such review of the evidence, he is clearly of the opinion that the verdict is wrong, he should express his disapproval by setting it aside, and granting a new trial.

(Syllabus by the Court.)

Error to district court, Wyandotte county; O. L. Miller, Judge.

Action by Michael Reardon against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

M. A. Low, W. F. Evans, and J. E. Dolman, for plaintiff in error. Sherry & Hughes, for defendant in error.

GARVER, J. This was an action to recover damages for a personal injury to the plaintiff, alleged to have been caused by the negligence of the defendant. The allegations of the petition showing negligence are as follows: "That while the plaintiff was riding a mule along and upon a certain public highway near the town of Muncie, in said county, and at a point on said highway within about 25 feet of the track of said railway, and near the said moving engine and cars, the engineer in charge of said locomotive, wantonly, recklessly, and negligently, and without any just cause or reason therefor, caused to be sounded a loud, shrill whistle, which so alarmed and frightened the said mule that plaintiff was riding that it became ungovernable to such an extent that it turned and backed upon said track with plaintiff, whereby, and by reason whereof, the plaintiff was then and there run upon and struck by said locomotive." The injury occurred at the crossing of the public highway by the railway near Muncie station, and about one-quarter of a mile from the plaintiff's residence, where he had been living for a number of years. On the evening of the day of the ac-

cident, the plaintiff, riding a mule, was traveling on the public highway from his house west of the crossing, intending to visit his sister a short distance east therefrom. At this point the highway runs east and west, the railroad crossing it at an angle of about 45 degrees, and running from the northeast to the southwest. There was nothing to obstruct the view of approaching trains; and, as plaintiff approached the crossing from the west, he saw a freight train coming from the northeast, running at a speed of about 22 miles an hour. The mule was going upon a walk at the rate of about 3 miles an hour. When the plaintiff reached the crossing, the train had arrived at a distance of about 240 feet therefrom; and as plaintiff moved across the track, and the train approached still nearer, he was for a time hidden from the view of the engineer by the front of the engine. According to the testimony of the plaintiff himself, he had gone from 15 to 20 feet across the track, when two or three loud whistles were sounded from the engine, scaring the mule, and causing it to turn around and go back upon the crossing, where it and plaintiff were struck by the train. The engineer and other trainmen testified that the whistles sounded were for brakes, and were given about the time plaintiff was struck by the train. Other witnesses who were near by testified to there being two or three short, sharp whistles at or near this crossing, but did not give the situation of the plaintiff at the time. There were whistling posts at no great distances on each side of the crossing, but it was not necessary or customary for trains to whistle at the crossing, unless in case of danger. The train consisted of 28 or 30 freight cars, and depended for stopping on hand brakes, the train not being supplied with air brakes. It was stopped a very short distance west of the crossing. There was no testimony tending to show that the whistling at or near the crossing was done for any improper purpose, or in a reckless or wanton spirit, unless such facts may be rightly inferred from the mere fact that the whistles were sounded at an unusual place, and, evidently, because of the plaintiff's proximity to the train. The fact of the plaintiff's injury is undisputed, nor is there any claim that the sum of \$2,000, the damages allowed by the jury, is excessive. The only question is as to a liability for any amount whatever.

In passing on the defendant's motion for a new trial, the court said: "I might submit this case to a hundred juries of Wyandotte county, and their verdict would be about the same as this one. While I am clearly of the opinion that the plaintiff is not entitled to recover, and if it were submitted to me, without a jury, I would not hesitate for one moment to render judgment in favor of the defendant; but, as this case has been submitted to a jury, and they have rendered their verdict in favor of the plaintiff, I will not disturb it. Although I am firmly of the opin-

lon that the supreme court will reverse this judgment, and render a judgment in favor of the defendant; yet I do not think it would do any good to try the case over in this court. The motion for a new trial will be overruled." Notwithstanding the court expressed its disapproval of the results of the deliberation of the jury in this forcible language, it overruled the motion for a new trial, one of the grounds of which was that the verdict of the jury was not sustained by sufficient evidence, and entered judgment in favor of the plaintiff on the verdict. In this ruling, the court seems to have overlooked what the supreme court of this state has so frequently and clearly laid down as the duty of the trial judge when the correctness of the verdict of a jury is challenged, and the judgment of the court demanded thereon. In the discharge of their respective duties, the judge has no right to invade the special province of the jury. The functions of judge and jury are dissimilar until the verdict is rendered; but at that point the duties of the trial judge are enlarged, and he is called upon to consider, weigh, and pass upon all questions of fact as well as of law in the case. The decision of the jury cannot be ignored or laid aside simply because, in the exercise of his judgment upon the evidence, the judge would have arrived at a different conclusion; but, when the difference between the judge and jury is so marked that the former cannot bring his judgment to acquiesce in the conclusions of the latter as being such conclusions as reasonable men might under the circumstances naturally arrive at, it is his duty, without evasion or hesitation, to withhold any approving act from a verdict so rendered, and set it aside.

In speaking of this duty, Mr. Justice Brewer, in *Railway Co. v. Kunkel*, 17 Kan. 145-172, said: "We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake or prejudice or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury." It is not sufficient that the trial judge occupy merely a neutral position, neither approving nor disapproving the verdict, when the motion for a new trial is made, and the question presented; one course or the other must be followed by affirmative action. In *State v. Bridges*, 29 Kan. 133, 142,

Horton, C. J., said: "When the verdict is challenged upon the ground alleged in this case [that it was not sustained by sufficient evidence], the judge, who has the same opportunity to see and hear the witnesses as a jury, should declare his approval or disapproval of the verdict; and if he refuses to do this by overruling the motion pro forma, and thereby attempting to transfer the whole question to the supreme court, he trifles with the sacredness of his duty. A party is deprived by such action of a review and consideration of the evidence by a court hearing and seeing the witnesses." The same principle is enunciated in *Railway Co. v. Keeler*, 32 Kan. 163, by the syllabus, which reads as follows: "It is error for a trial court to overrule a motion for a new trial merely pro forma. Every trial court should exercise its best judgment when such a motion is presented to it, and should rule accordingly." So, also, *Railway Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108. Here the trial judge did not merely overrule the motion without consideration, but he went further, and, having considered and weighed the testimony, in unmistakable terms disapproved the verdict.

Counsel for defendant in error contends that the fact of overruling the motion for a new trial must be taken as an approval of the verdict by the trial judge, notwithstanding the opinion expressed by him at the time of such ruling. We do not think that is a reasonable inference to draw, for the words and act must be construed together. Apparently, the only reason the court had for overruling the motion was that given when he said: "I do not think it would do any good to try the case over again in this court." If the futility of another trial is attributable simply to the perversity or prejudice of the juries in that court, it is no reason for allowing an unjust verdict to stand, whether it be the verdict of the first or the hundredth jury that tries the case. After repeated trials, the trial judge should, of course, move with grave deliberation before a verdict is disturbed. Nevertheless, the duty rests upon him, no less imperatively in every trial and in the consideration of every verdict, to see that an unwarranted or unjust verdict does not stand. Somewhat similar disapproving language of the trial judge as to the verdicts were considered by the supreme court in *Railway Co. v. Dwelle*, 44 Kan. 394, 409, 24 Pac. 500, and *Railway Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108. In the last case cited, there had been two trials by jury,—resulting in substantially the same verdict. The first verdict, not meeting the approval of the trial judge, was set aside on motion made for a new trial. In passing upon the motion for a new trial, after the second verdict had been returned, the trial judge said: "The verdict in this case does not meet the approval of my judgment. * * * There must be an end to the litigation some time; and inasmuch as 24 men have substantially agreed upon a right

to compensation, though greatly in excess of what my judgment can approve, it is possibly fair and proper that I should stand out of the way of the final determination of the controversy." The supreme court said that the verdict should have been set aside, and a new trial granted; that the trial judge "has no right 'to stand out of the way,' and, against his judgment, overrule such a motion. He must approve or disapprove the verdict."

We have carefully examined the testimony, and think it fully justified a disapproval of the verdict by the trial judge. Before the plaintiff can recover, he must prove the negligence or reckless conduct charged to the defendant in the petition. The sounding of the whistle of a moving railroad engine is not negligence per se, and the mere fact of whistling does not justify the presumption of want of proper care. When the evidence fails to establish the fact of negligence of the defendant, or shows contributory negligence on the part of the plaintiff, there can be no recovery. On both these points the testimony in this case tends to show no legal liability of the defendant. For error in overruling the motion for a new trial, the judgment is reversed, and the case remanded for a new trial.

(1 Kan. App. 110)

**BRUSH ELECTRIC LIGHT & POWER
CO. v. GROSCH.**

(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1895.)

BILL OF EXCEPTIONS—TIME OF ALLOWANCE.

It must affirmatively appear from the record that the bill of exceptions which is incorporated in the transcript of the proceedings attached to the petition in error was presented for allowance during the term at which the alleged errors were committed, or such document cannot be regarded as a part of the record of the trial court.

(Syllabus by the Court.)

Error to district court, Shawnee county; J. B. Johnson, Judge.

Action by Christian Grosch against the Brush Electric Light & Power Company. Plaintiff had judgment, and defendant brings error. Affirmed.

Rossington, Smith & Dallas, for plaintiff in error. E. F. Hilton and J. G. Waters, for defendant in error.

CLARK, J. Objection is made by the defendant in error to any consideration of the record attached to the petition in error, for the alleged reason that it is not such a record as this court is authorized to examine upon a review of the proceedings of the trial court. The errors assigned are as to matters occurring upon the trial and not appearing upon the record of the trial court. The case is here upon the transcript of the record, and not on a case made. As a part of the transcript, there appears a document which was prepared and filed in that court as a case

made. No bill of exceptions was taken, and no order made by the court or judge thereof that this case made be considered as a bill of exceptions, and become a part of the record as such; and the question is presented as to whether or not the transcript of the record brings up matters contained in the case made, now called a bill of exceptions. The office of a bill of exceptions and case made is very dissimilar, and the manner of their proper preparation is entirely different. *Shumaker v. O'Brian*, 19 Kan. 476. The statute provides for taking and preserving of exceptions, and that when allowed they become a part of the record. Gen. St. 1889, par. 4398. They must be allowed and filed during the term at which the rulings complained of are made. Gen. St. 1889, par. 4395. "A bill of exceptions has no place outside of the court in which it is prepared. * * * When signed and filed, it is a part of the record, itself an original record." *State v. Nickerson*, 30 Kan. 545, 2 Pac. 654. A case made is no part of the record of the district court. *Transportation Co. v. Palmer*, 19 Kan. 471, 472. It may be allowed within, or out of, term. When filed, it is at once withdrawn for the purpose of use in a higher court. It was not the intention of the court or judge that this case made should be a part of the record of the court below. The certificate of the judge recites that the document is allowed, settled, and signed as a case made, and directs the clerk to "file and deliver the same to the defendant, and attest the same with his name and the seal of said court, as the law directs." When a case made has been withdrawn from the files by the party presenting it for allowance, again depositing it with the clerk of the district court, and having him file it and retain it, does not of itself transform it into a bill of exceptions, nor make it a part of the record. Nor can anything be made a part of the record by mere act of the parties which otherwise is not properly a part of the record. *McArthur v. Mitchell*, 7 Kan. 173; *Kshinka v. Cawker*, 16 Kan. 63. The record of the district court should show the allowance of a bill of exceptions, and that it was allowed in term; and where the record shows that 60 days were allowed in which to make a case, it cannot be presumed, in the absence of the proper evidence thereof, that a bill of exceptions was taken. The record, considered as a case made, being insufficient to preserve exceptions to the errors assigned, because of defects therein, cannot be supplemented by adding certified copies of the record of the district court. *City of Ft. Scott v. Deeds*, 38 Kan. 621, 14 Pac. 268.

There is nothing in the record to show that this case made, even if it could be considered a bill of exceptions, was allowed during the term. Attached to this transcript is a statement by the clerk of the district court of Shawnee county that the court adjourned for the term at a certain date, which was subse-

quent to the date of the second filing of the case made with the clerk of that court. Such statement cannot, however, be taken as competent evidence of the fact that a bill of exceptions was allowed within the term. The fact must, in some way, appear from the record itself. *Ferree v. Walker*, 54 Kan. 49, 36 Pac. 738. The court is of the opinion that the record here presented does not disclose the errors alleged to have been committed by the trial court. The judgment will be affirmed.

(1 Kan. App. 149)

BRUSH ELECTRIC LIGHT & POWER CO. v. STITT.

(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1895.)

BILL OF EXCEPTIONS—TIME OF ALLOWANCE.

Case followed. The case of *Power Co. v. Grosch*, 40 Pac. 933, followed.
(Syllabus by the Court.)

Error to district court, Shawnee county; J. B. Johnson, Judge.

Action by Jacob Stitt against the Brush Electric Light & Power Company. Plaintiff had judgment, and defendant brings error. Affirmed.

Rossington, Smith & Dallas, for plaintiff in error. E. F. Hilton and J. G. Waters, for defendant in error.

CLARK, J. This is an action brought in the court below by one Jacob Stitt to recover from the Brush Electric Light & Power Company for damages sustained by the plaintiff below through the alleged faulty and negligent construction and operation of certain machinery and appliances for the protection and transmission of electricity for lights and electric motive power. The plaintiff recovered judgment in the trial court, and the defendant brings the case to this court by petition in error, seeking a reversal of the judgment. The errors complained of are to matters occurring upon the trial which are not of record. This court is precluded from an examination of the alleged errors, as they are not preserved either by proper bill of exceptions or by case made, and the judgment is affirmed, on the authority of the case of *Power Co. v. Grosch* (just decided) 40 Pac. 933.

(12 Wash. 212)

LEWIS v. BARTLETT et al.

(Supreme Court of Washington. July 1, 1895.)
SHERIFFS—LEVY ON LAND—POWERS OF SUCCESSOR.

Service of execution on land commenced by a sheriff may be completed by his successor by a sale and conveyance of the land, without issuance to him of a writ of venditioni exponas.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action by Meyer Lewis against Frank A. Bartlett, executor, Mary Bartlett, and another. There was a judgment for plaintiff,

and, from an order confirming an execution sale under the judgment, defendant executor and Mary Bartlett appeal. Affirmed.

Rupert & Fitzgerald, for appellants. Morris B. Sachs, for respondent.

HOYT, C. J. Respondent obtained a judgment against the appellants, and caused an execution to be issued thereon, and placed in the hands of Richard De Lanty, who at the time was sheriff of the county. On the 20th day of December, 1894, this execution was by said sheriff levied upon certain real estate, the property of the appellants. Thereafter said Richard De Lanty, sheriff as aforesaid, began the publication of a notice which fixed the time of sale on the 22d day of January, 1895, before which date the term for which said De Lanty held the office of sheriff expired; and M. F. Hamilton, as his successor in said office, entered upon the discharge of its duties, and thereafter, on the said 22d day of January, sold the property levied upon by said De Lanty under the execution, without the issuance to him of a writ of venditioni exponas, and on the same day made return as to said sale, which was afterwards, over the objections of the appellants, confirmed by the court; and from this order of confirmation this appeal has been prosecuted.

The only reason suggested why the order of confirmation should not have been made is that the sheriff who succeeded the one to whom the execution had been delivered could not rightfully make the sale thereunder. The question as to whether or not a sheriff can complete the service of an execution which has been begun by his predecessor has been often before the courts, and the decisions thereon cannot be harmonized. In England much formality was required in the transfer of the office by a sheriff to his successor; and, under such practice, it was held by most of the courts that, until he had been relieved of the duties of the office by a transfer thus formally made, he was liable for the proper transaction of the business relating thereto, and on that account it was held that process in his hands should be executed by him rather than by his successor, even although his term of office had expired. In this country the practice of thus formally transferring the office of sheriff has never prevailed. Upon the expiration of his term and the qualification of his successor, such successor becomes entitled to all the emoluments of the office, and upon him is cast the burden of the discharge of its duties, excepting so far as from the necessities of the case they should be performed by his predecessor. Process under our practice is rightfully directed to the sheriff of the proper county, and it is not necessary that the person holding such office should be named therein. It would seem to follow, as a logical conclusion, that whoever was for the time being in posses-

sion of the office should execute process directed thereto; and that if, after process had been so directed, the person in possession of the office should change, the command thereof would apply to the one who had succeeded to the office, rather than to one who had been removed therefrom. The sheriff's duties, extraordinary excepted, should be held to have ended with the expiration of his term.

Most, if not all, of the courts, have decided that the levy of an execution upon personal property gave the officer making the levy a special property therein, and for that reason it has been held by such courts that it was his duty to complete the service of an execution so levied, if necessary, after the expiration of his term. If the officer who levies an execution on personal property acquires a special title thereto, such fact may furnish reason for the holding that he should complete the service after the expiration of his term, but it does not follow that he should be required to complete the service of an execution so levied upon real estate. By the levy the title to the real estate is not transferred, and there is no good reason why, after such levy, the successor of the one who has made it cannot as well complete the service by the sale of the property and the return of the execution as to have the same acts done by his predecessor in office; and, since the one who is in the actual possession of the office can best be held responsible for the proper discharge of its duties, the interests of all concerned would be best subserved by holding that he should complete the service of the execution which has been levied upon real estate. It may be conceded that, taking the cases, old and new, the greater number support the doctrine that the sheriff who made the levy should complete the service of the execution; but a large number of courts of the highest standing have come to the contrary conclusion, and have held in accordance with the above suggestions; and as such holding will, in our opinion, lead to less confusion than the other, we are satisfied to follow it. Freeman on Executions (section 62) lays down the rule that, where the levy is upon real estate, the successor in office may complete the service of the execution, and that his authority to do so is not by virtue of any writ of venditioni exponas which may be directed to him, but is derived from the execution directed to his predecessor in office. At the close of said section, this learned author makes use of the following language: "The better opinion is that, if a levy be made upon real estate, the officer levying the writ may, after the expiration of his term, complete the execution of the writ by a sale and conveyance, but that his powers in this respect are concurrent with those of his successor in office, and, therefore, that the venditioni exponas may properly be issued to and executed by

either." The latter clause of the above quotation would seem to indicate that it was necessary that this writ should be directed to the successor in office to authorize him to make the sale; but, when what is therein stated is taken in connection with the rest of the section, it will be seen that such writ only issues for the purpose of compelling the sheriff to do that which he would otherwise have the power to do. In the case of *Leshey v. Gardner*, 8 Watts & S. 314, this question was passed upon by the supreme court of Pennsylvania; and, after a full consideration of the practice in England and in this country, that learned court came to the conclusion that the successor in office could properly complete the service of the execution. To the same effect are *Bellingall v. Duncan*, 3 Gilman, 477; *Bank v. Beatty*, 3 Sneed, 305; *Clark v. Sawyer*, 48 Cal. 133; *Holmes v. McIndoe*, 20 Wis. 689; *Kane v. McCown*, 55 Mo. 181. These cases furnish authority upon which we feel authorized to decide the question. Many of the courts which have held to the contrary were of the opinion that it would have been better if the practice had been for the new sheriff to complete the execution of the writ, and only founded their decisions to the contrary upon a practice which had grown up under the rule in England, in the states in which the decisions were made, or in those from which their practice was largely derived. Many cases of this kind could be cited, but we call attention to only one as furnishing sufficient illustration of the opinion of such courts. See *Fowble v. Rayberg*, 4 Ohio, 45. We feel the more ready to adopt this rule for the reason that to our mind the practice in England should have little or no weight in determining the practice here upon sales of real estate, for the reason that in England only personal property could be sold on execution. In our opinion, the superior court adopted the rule which best accords with reason, and is sufficiently supported by authority. Judgment affirmed.

SCOTT, ANDERS, and GORDON, JJ., concur.

DUNBAR, J. I concur in the result, but do not wish to be understood as inferentially holding that any different rule should obtain in the case of a levy upon personal property.

(12 Wash. 207)

COOK v. TIBBALS et al.

(Supreme Court of Washington. July 1, 1895.)

DISMISSAL OF APPEAL—INSUFFICIENT BOND—EXCEPTIONS—CREDITORS' BILL.

1. Where the sufficiency of an appeal bond has not been submitted to the lower court, as required by statute, a motion to dismiss the appeal for irregularity in the bond will not be entertained. Anders, J., dissenting.

2. A general exception to the findings of fact will not be considered.

3. The complaint in an action by a judgment creditor to set aside a conveyance as in fraud of creditors, which alleges that execution on plaintiff's judgment "has been returned" unsatisfied, and that the judgment debtor "has no other property" to satisfy such judgment, is not defective on the ground that it fails to allege that the judgment debtor had no other property at the time of the conveyance.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action by Mary Cook against H. L. Tibbals, Sr., and Josephine I. Page, to set aside a sale as in fraud of creditors. From a judgment for plaintiff, defendant Page appeals. Affirmed.

Robert W. Jennings, for appellant. Trumbull & Trumbull, for respondent.

DUNBAR, J. The respondent moves to dismiss the appeal in this case on the ground that the bond on appeal is insufficient in form and substance, ineffectual, and void, in that the principal in said bond has failed to execute the same. The bond in this case is executed by R. W. Jennings, as attorney for the appellant. It is contended by the respondent that this is not such a bond as is contemplated by the statute. Our statute is not such a statute as prevailed in states in which many of the cases cited by respondent existed, for it provides that a bond may be made on behalf of the appellant with two or more sureties; so that it is not actually necessary that the appellant should sign the bond at all. However, we are inclined to think that there must be a bond, and a proper bond, given on behalf of the appellant, which was probably not done in this case, for this bond purports to be the bond of the appellant, and not a bond executed in her behalf. But the statute provides that all questions of this kind, viz. questions as to the sufficiency of the bond, must be submitted to the lower court; and, as the bond was not moved against in that court the motion will not be entertained here.

It is also urged by the respondent that no proper exceptions were taken to the statement of facts in this case, and an examination of the record shows this contention to be correct. After the announcement by the court of the findings of fact, the record entry is: "To all of which the defendant Page excepts, which exceptions are allowed." This exception is too general to constitute the exception provided for by the law, and has been so held by this court in *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440; and it has been the uniform holding of this court since in so many cases that it is not worth while to discuss them here.

This disposes, then, of the statement of facts in the case, and leaves only the question of the sufficiency of the pleadings. A demurrer was interposed to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. This was an action to set aside a certain convey-

ance as being in fraud of creditors, and it is claimed by the appellant that the conveyance cannot be impeached as fraudulent, unless it be shown by distinct averment in the complaint that the debtor had no other property at the time the conveyance was made. It is, no doubt, true, as a general proposition, that to allege that the conveyance was made for the purpose of defrauding creditors, while at the same time the debtor had other property out of which the creditor could make his debt, would be an inconsistent statement; and it is also true that it is no concern of the creditor what the object was which actuated the sale if sufficient property was left to the vendor to satisfy any judgments which the creditor would rightfully obtain against him; and, unless it affirmatively appears that such is not the case, we think with the appellant that the complaint would not be sufficient. But it seems to us that the allegations of the complaint that "the said execution has been returned by the sheriff wholly unsatisfied," and that "the defendant H. L. Tibbals, Sr., has no other property out of which the plaintiff could make her said judgment," are averments which are amply sufficient to sustain the complaint, so far as the particular objection pointed out by the brief of the appellant is concerned. The statement of facts, then, not being considered, and the pleadings, as we deem them, being sufficient, the judgment of the lower court will be affirmed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

ANDERS, J. I concur in the affirmance of the judgment on the merits, but, in my opinion, the appeal should have been dismissed because no bond was filed either by or on behalf of the appellant. This court has held on several occasions that the question as to the sufficiency of the affidavit of the sureties on appeal bonds should be raised in the court below, but I do not think we ought to go so far as to hold that an appeal should be retained and considered where it does not appear that any bond was executed by or on behalf of the appellant, as required by the statute, especially as the statute provides for a dismissal on that ground.

(12 Wash. 233)

BRYAN v. DUFF.

(Supreme Court of Washington. July 10, 1895.)

PAROL EVIDENCE TO VARY NOTE.

Parol evidence of a contemporaneous agreement between the drawee and payee of a draft that the payee will not hold the drawee liable in case of the nonpayment of the draft is inadmissible to vary the drawee's liability. Dunbar, J., dissenting.

Appeal from superior court, Cowlitz county; A. L. Miller, Judge.

Action by Beauregard Bryan against H. H. Duff. There was a judgment for defendant, and plaintiff appeals. Reversed.

Reynolds & Stewart, for appellant. N. H. Bloomfield and J. N. Pearcy, for respondent.

HOYT, C. J. Respondent was indebted to one H. C. Taylor, and the Ainslie Lumber Company was indebted to him. In payment of his indebtedness to Taylor, he drew an order, payable 90 days after date, on the said lumber company, which was accepted by it. Before it became due, the lumber company became insolvent, and the draft was not paid. This action was brought by the plaintiff, as assignee of the said Taylor, the payee of the draft, to recover of the defendant as the drawer thereof. It appears from the record that due notice of the dishonor of the draft was given to the drawer, and his liability thereon established; and it is clear that plaintiff was entitled to judgment if it was not competent for respondent to show by oral testimony that, at the time the draft was drawn, it was agreed as between the drawer and payee that the payee would not hold the drawer responsible for any default on the part of the drawee in the payment of the draft. Parol evidence to that effect was admitted over the objection of plaintiff, and the rightfulness of the action of the court in admitting it is substantially the only question presented on this appeal.

Respondent makes a further contention that the circumstances surrounding the transaction were sufficient to show that a new contract by way of novation had been entered into; but, in our opinion, there was no proof which would warrant any such contention if the evidence as to the agreement of the payee not to hold the drawer responsible was stricken from the record. That the general rule is that parol evidence cannot be admitted to change or contradict the terms of a written agreement is so well established that it is not necessary that we should say anything in support thereof, and respondent makes no contention against such rule, but contends that the evidence was properly admitted, for two reasons: (1) That it did not tend to change or contradict any written agreement; and (2) that, if it did, the circumstances surrounding the transaction brought it within one of the exceptions to such general rule.

The first contention is founded upon the claim that the liability of the drawer grows out of a legal conclusion, which conclusion is not in writing, and that for that reason to vary or contradict such conclusion is not to vary or contradict a written instrument. In our opinion, the liability of the drawer of a bill of exchange or the indorser of a note has become so well established under the rules of the law merchant, and is so well understood, that the person who assumes such liability must be held to have understood the effect thereof, and by his signature to have bound himself in the same manner as he would have done had the conditions been at the time of such signature fully written out and signed by him. A few cases have been cited by respondent for the purpose of establishing his

contention, but a careful examination thereof has led us to believe that, with a single exception, they are not strictly in point. One of them does fully sustain the rule contended for. This case is entitled to consideration by reason of the learning and ability of the distinguished judge who made the decision, but even his distinguished ability cannot give to the case the weight which would attach to a like decision by a court of last resort. The ruling was made during the progress of a trial as a part of the instructions to the jury, and for that reason probably not so fully considered as it would have been in a court of last resort. See *Bank Co. v. Evans*, 4 Wash. C. C. 480, Fed. Cas. No. 13,635.

The other claim is that the testimony was admissible to prevent fraud upon the drawer, and numerous cases have been cited to show that it was admissible for that purpose. Many of these cases undoubtedly hold that parol evidence is admissible to show that the contract growing out of the drawing of a bill of exchange or the indorsement of a promissory note was fraudulent, but in so doing they only announce a well-recognized doctrine that any contract, whether in writing or in parol, can be defeated by showing that its execution was induced by fraud, or that it was without consideration; and, in our opinion, none of the cases cited go further than to sustain this well-recognized exception to the general rule as to the admissibility of parol testimony to affect a written instrument. The rule that the contract which is implied on the part of such drawer or indorser must have the same effect as though it had been reduced to writing and placed above the signature is not only the reasonable one, but is supported by the great weight of authority; and a like weight of authority has established the rule that parol testimony cannot be introduced for the purpose of showing any agreement on the part of the payee or indorsee tending to affect such implied contract. The supreme court of Maine has several times passed upon this question, and has decided that such testimony cannot be admitted in favor of a drawer or indorser to relieve him of the liability implied by his signature, and has further decided that such contract will not support a recovery in an independent action brought thereon. See *Hancock v. Fairfield*, 30 Me. 299; *Evans v. Smith*, 34 Me. 33. In *Barry v. Morse*, 3 N. H. 132, substantially the same question was passed upon, and the rightfulness of the exclusion of the parol testimony sustained. The supreme court of Illinois has given this question attention in a large number of cases. In a few of the earlier ones there are some expressions tending to support the contention of respondent, but the later cases so emphatically contradict such contention, without making any statement of an intention to overrule the earlier ones, that all of the cases, construed together, must be held to establish the doctrine laid down in the later ones. That these fully sustain the con-

tention of appellant that such testimony is inadmissible will sufficiently appear from an examination of two cases,—*Beattie v. Browne*, 64 Ill. 360, and *Kirkham v. Boston*, 67 Ill. 599. The supreme court of Indiana, in the case of *Campbell v. Robbins*, 29 Ind. 271, passed upon this question, and the language used well sustains the headnote made by the reporter, which is in the following language: "The legal effect of an assignment in blank of a promissory note cannot be varied by evidence of a parol contemporaneous agreement that the note should be taken without recourse on the assignor." Mr. Parsons, in his work on Notes and Bills (volume 2, at page 501), states his views on this question in the following language: "If the defendant endeavors to prove an oral bargain between himself and the plaintiff, which differs in its terms from the written note, it will then be remembered that it is a firmly-settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, to add to, or subtract from, the absolute terms of the written contract." By statements in connection therewith, he shows that in the term "written contract" is included the contract implied by law on the part of the indorser or drawer, as well as those actually written out and signed. If the testimony introduced on the part of the respondent had tended to show that the making of the bill of exchange had been induced by fraud, or that there had been no consideration therefor, it would have been admissible, and, if sufficient, would have justified the conclusion reached by the trial court. But, in our opinion, it had no such tendency. It was conceded that it was drawn for a sufficient consideration, and there was not even a suggestion that there was any fraud on the part of the payee. The rule as to written contracts not being subject to change by contemporaneous oral agreements is of such importance that it should not be departed from unless such departure is brought within well-settled exceptions to the rule. The right of parties to put their final conclusions into writing, and thereby avoid any question of veracity as to what such conclusions were, is of the greatest public and private convenience. The circumstances surrounding the case at bar did not warrant a departure from the rule, and, for the reason that it was departed from by the trial court, the judgment must be reversed, and the cause remanded, with instructions to enter judgment in favor of plaintiff in accordance with the prayer of his complaint.

SCOTT and ANDERS, JJ., concur.

DUNBAR, J. (dissenting). I am unable to agree with the majority opinion in this case. Of course, there is no disputing the general rule that parol evidence cannot be introduced to alter or explain written agreements; but it

does not seem to me that the reasons which forbid the admission of parol evidence to alter or vary the terms of a written agreement apply to contracts where the obligation is implied. If a man makes an agreement, and reduces the terms of the agreement to writing, and solemnly signs it, for reasons which have been often stated, he ought to be held to a strict compliance with its terms. He knows just what he has agreed to do, and just what his obligations are, for they are of his own making. But it is altogether different when he is held to do something by a refined implication of law of which the ordinary citizen has no knowledge. In this case the terms of the written agreement are not sought to be avoided, explained away, or disputed. The defendant gave an order to the plaintiff on the Ainslie Lumber Company. He is not disputing this fact. He gave the order for a certain amount of money. The amount is not disputed. In fact, there is nothing in the written instrument itself which is disputed. The contention, and the reasonable contention, of the respondent, is that it was only that part of the agreement, viz. the agreement that the Ainslie Lumber Company should pay to the appellant so much money, that was put in writing; and that the other portion of the agreement, which is entirely disconnected from the main agreement, viz. that the appellant should have no recourse on the respondent in case of the failure of the Ainslie Lumber Company to pay the bill of exchange, was not undertaken to be put in writing at all, but that it was a separate and distinct agreement between the parties. Nearly all of the cases cited by the appellant, and nearly all of the cases which have been decided on this proposition, are cases where the terms of the written instrument itself are sought to be avoided or explained away by parol testimony,—as, for instance, that a different amount was agreed upon; that the maker of the note signed in an individual capacity, when the agreement was that he should sign in an official capacity; and cases of that kind where the terms of the instrument itself would be overthrown if parol testimony were admitted. But here it is only by an implication or by operation of law that the drawer of the bill of exchange is responsible, and not by reason of the contract which was made between the drawer and the purchaser of the bill; and it seems to me that, if these technical implications are to exclude the real contracts between the parties, the rule will become a pitfall for the feet of the unwary and the unlearned in technical law. If the evidence admitted in this case is true (and it was found by the court to be true), a positive agreement was made between the appellant and respondent that this bill of exchange should be received by the appellant in full satisfaction, settlement, payment, and cancellation of the respondent's note and mortgage. The bill of exchange was accepted by the Ainslie Lumber Company before it was

received by the appellant; and if such was the contract that was really made (it in no way controverting the terms of the written contract), the appellant ought to be bound by such oral agreement, and the judgment ought therefore to be affirmed.

(12 Wash. 244)

MCCARTY v. FLETCHER et al.

(Supreme Court of Washington. July 10, 1895.)

REVIEW ON APPEAL.

A finding of the trial court that notes and a chattel mortgage given to secure the same were fraudulent as to creditors will not be disturbed on appeal when the finding was warranted by the evidence.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by McCarty against W. S. Fletcher and others to foreclose a chattel mortgage. Plaintiff appeals from a judgment against him. Affirmed.

W. W. Likens, for appellant. Clise & King and Sharpstein & Blattner, for respondents Tacoma Grocery Co., R. L. Sabin, and J. H. Woolery.

SCOTT, J. Appellant brought this action to foreclose a chattel mortgage given to him by the defendant Fletcher to secure two promissory notes aggregating \$4,050. Fletcher was engaged in the mercantile business at Hot Springs, in this state, and prior to the giving of said mortgage had contracted certain indebtedness to the other respondents in this action. Preceding and at the time the mortgage in question was given said other parties had been pressing Fletcher for payment of their claims, and, being unsuccessful, began suits in attachment, and levied upon the stock of goods belonging to Fletcher. The attachment levies were made after the mortgage had been executed, but prior to the time it had been filed for record. Said actions proceeded to judgment, and the goods were sold under executions issued thereon. Upon the trial of this action the lower court found in favor of the defendants, excepting Fletcher, who made no defense. A number of questions have been raised upon this appeal, but we only find it necessary to examine one of them, and that relates to the evidence. One of the findings of fact made by the lower court was that the alleged chattel mortgage and notes given by Fletcher to the appellant were without consideration, and were given for the purpose of hindering, delaying, and defrauding the creditors of Fletcher, and were, therefore, fraudulent and void. We think this finding was fully warranted by the evidence introduced. We shall not undertake to set it forth in detail. Appellant claimed that the notes were given to him for money that he had loaned Fletcher at various times prior to the giving of the mortgage. It appeared that appellant was employed as a waiter in an hotel upon a small salary, and

it is conceded that he had substantially no property excepting this money, which he claims to have saved from his earnings. As to this, he testified that he had carried it upon his person, and that he had loaned it to Fletcher gradually in various amounts, without taking any notes prior to the ones in question, or any security therefor. These facts, taken in connection with his conduct with reference to the property afterwards, and certain statements he made as to his intention of protecting Fletcher against the claims of the other defendants, were amply sufficient, in our opinion, to justify the finding above specified, and consequently the judgment is affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

(12 Wash. 225)

SEWARD v. DERICKSON et al.

(Supreme Court of Washington. July 8, 1895.)

INDORSEMENT ON NOTE—GUARANTY OF PAYMENT—CONSTRUCTION—DURATION OF LIABILITY.

Where defendant, before the delivery of a note given and accepted in payment of another, on which he was liable, wrote his name across the back thereof to become surety thereon, and at maturity indorsed a guaranty of payment, waiving demand and protest, adding after his name, "For thirty days," but it was not agreed or understood by the payee to limit the guaranty to 30 days from maturity, defendant is liable thereon after that time.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by James I. Seward against R. W. Derickson and others on a note. From a judgment for plaintiff, defendant Henry Hewitt, Jr., appeals. Affirmed.

Fenley Bryan, for appellant. Hudson & Holt, for respondent.

DUNBAR, J. The amended complaint, on which this action is based, alleges that in October, 1890, the defendants Derickson and Sawyer, by their firm name of R. W. Derickson & Co., signed a certain promissory note to pay at the order of the Traders' Bank of Tacoma the sum of \$5,000, with interest; that, at the time of the signing of the note aforesaid, the defendants were indebted to the bank on another promissory note of prior date, for \$5,000, which note was signed on its face by the defendant Henry Hewitt, Jr.; and that there was written on the back thereof the names of all the defendants, the said note having been given for money which was paid to the said R. W. Derickson & Co. by said Traders' Bank of Tacoma at the request of the said Henry Hewitt; that the note sued on herein was received by the bank in renewal and discharge of the prior note above referred to, when it was indorsed by Henry Hewitt, Jr., by writing his name on the back thereof; that upon said indorsing the note was delivered to the bank by the said Hew-

itt, and the former note was canceled and discharged. The further allegation is to the effect that afterwards and before the maturity of the note, the defendant Henry Hewitt, Jr., by writing indorsed on the said note, "for value received," waived demand, notice, and protest thereof. Demand and nonpayment were also alleged. The defendant Henry Hewitt, in a separate answer, denies that, at the time of the signing of the note sued on, he was indebted to the Traders' Bank in the sum of \$5,000, or any other sum, upon a promissory note, as alleged in the complaint; denies that there was any agreement by which the whole note was to be discharged by a renewal in the shape of a new note. He admits that he wrote his name on the back of the note, but alleges that he did not so write his name on the back thereof until long after the same was executed, delivered, and accepted by said Traders' Bank of Tacoma; and avers that after the writing of his name across the back of said note, and shortly before the same became due, being desirous of further time in which to pay the same, and the said payee, the Traders' Bank of Tacoma, being willing to grant said further time, with the consent of all parties thereto, he signed a written guaranty of said note, whereby he guaranteed the payment thereof for a period of 30 days from maturity thereof, which said written guaranty it was at the time understood and agreed should be in lieu of and a substitute for the indorsement of his name across the back of said note, and was accepted by the bank as such; and that he was released from any liability which he may have had by reason of the first indorsement; that said guaranty was in the following words: "For value received, payment of the within, at maturity, is hereby guaranteed, waiving demand, notice, and protest. Henry Hewitt, Jr. For thirty days;" the words "For thirty days" being written under the name of Henry Hewitt. He alleges the expiration of the 30 days, and that no notice was given, and prays for his discharge. The reply denies that the defendant did not write his name on the back of the note until after the same had been executed, delivered, and accepted by the bank, but alleges that the same was written thereon before the delivery or acceptance of said note; alleges that the bank forebore to sue on said note, and to commence proceedings for the collection thereof, at the express request and direction of said Henry Hewitt, Jr.; and further alleges that the words "For thirty days" were added to the name of Henry Hewitt, Jr., and written on said note, without consultation with the plaintiff, and without any agreement, contract, or understanding with reference thereto; and without any agreement as to the meaning of said words.

A great many authorities are cited by both appellant and respondent on the subject of the rights of guarantors, indorsers, etc., but it seems to us that the findings of fact by the court do away with the necessity of constru-

ing these authorities. The court finds that before the delivery of the note to the bank, and before its acceptance, the defendant Hewitt wrote his name across the back thereof, for the purpose of, and with the intention of, becoming surety to the bank for the payment thereof; that the note was given in payment of and substitution for a note of like amount then due, which note was indorsed by defendant Hewitt, and for which he was responsible; that the bank, relying on the signing by the defendant Hewitt of his name on the back of the note on which this action is based, before the delivery thereof, canceled and discharged said other note, and that afterwards, and at the maturity of the note on which this action is based, for the purpose of saving and preventing the protest of said note, and waiving demand or notice thereof, the defendant Hewitt, in writing, indorsed on said note a guaranty of payment thereof, and waiving protest, demand, and notice thereof, and added after his name, signed thereto, the words "For thirty days"; that the said guaranty and waiver were not understood and agreed to be in lieu of, or a substitute for, the indorsement of the name of said Henry Hewitt, Jr., on the back of said note, and were not accepted by the said Traders' Bank of Tacoma as such, and the said Traders' Bank of Tacoma did not then or thereby release the said defendant from the liability which he may have assumed by reason of the first-mentioned indorsement; and finds, as conclusions of law, that the defendant Henry Hewitt waived notice of nonpayment, demand, and protest, and that the waiver of protest, notice, and demand by the defendant Henry Hewitt was not qualified by the words "For thirty days," written after his name, and that, by reason of the indorsement of his name across the back of the said note by the defendant, he became liable to pay said note at maturity thereof; that the other defendants did not pay the same upon demand and notice of nonpayment thereof; and, as a conclusion, that the plaintiff was entitled to recover of and from the defendants, and each of them, the amount due on said note.

We have examined the testimony in this case, and, while there is some conflict of authority, we think the facts as found by the court are justified by the evidence, and we do not therefore feel warranted in disturbing them. The wording of the waiver of notice and protest, including the words "For thirty days," added below, is rather peculiar, and seems to us somewhat meaningless; and we do not think, in the absence of convincing testimony that it was agreed and understood that the indorser should be released at the end of 30 days, if the note was not paid, that it should be construed into such a release. We think the findings of fact justified the conclusions of law reached by the court.

As to the other proposition contended for by the appellant, that the court erred in allowing the complaint to be amended to correspond

with the proof, that was a matter of discretion; and, as no injustice was worked upon the appellant, we do not think the discretion was abused. The judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(12 Wash. 246)

SWARM v. BOGGS et ux.

(Supreme Court of Washington. July 10, 1895.)

DEED BY MORTGAGOR TO MORTGAGEE—STIPULATION FOR REPURCHASE—CONSTRUCTION.

Where a mortgagor in default executes to the mortgagee an instrument in the form of a warranty deed of the land in consideration of the amount due on the mortgage, with a clause reciting that the deed is given in satisfaction of the mortgage, and that "said grantor shall have the right to redeem or repurchase said premises at any time within one year by paying said sum of \$1,175, together with interest until said redemption at the rate of 15 per cent. per annum, and all costs and taxes paid by the grantee, the grantor to have possession for said year," the instrument will be treated as a deed, it appearing that it was given to save the expense and delay of foreclosure, and it not being claimed that the consideration expressed therein was not the full value of the land.

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Action of ejectment by Axel W. Swarm against James Boggs and wife. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Byron Mellett, for appellants. John C. Kleber, for respondent.

HOYT, C. J. In March, 1891, the defendants became the owners in fee simple of the real estate, the title and the right to possession of which was in controversy in this action. Thereafter they made, executed, and delivered to one August Swarm their promissory note for \$1,000, and to secure its payment made and delivered a mortgage upon the property. In May, 1893, the note so secured by this mortgage became due and payable, the principal and interest at that date amounting to the sum of \$1,175. On the last-named date the defendants made, executed, and delivered an instrument which, with the exception of the clause to be hereinafter set out, was in the form of a warranty deed, conveying the premises in question to the person named as mortgagee in the aforesaid mortgage, August Swarm, who thereafter, and before the commencement of this action, conveyed all of his right, title, and interest in the property to the plaintiff. The clause above referred to, which was inserted in what would clearly without such insertion have been a warranty deed, was in the following language: "This deed is given in satisfaction of a certain note and mortgage for \$1,000, dated March 25, 1891, and said grantors shall have the right to redeem or repurchase said prem-

ises at any time within one year by paying the said sum of \$1,175, together with interest until said redemption at the rate of fifteen per cent. per annum, and all costs and taxes paid by the grantee; the grantors to have possession for said year." And the effect of said clause upon the character of the instrument is the only question presented by this record. The appellants contend that its effect was to make of said instrument a mortgage, while the respondent claims that it conferred upon the grantors therein only the right to repurchase the premises upon the conditions therein set out.

A deed which purports to convey a fee-simple title will be held to be a mortgage when it is made to appear, either from the face of the instrument or from oral testimony, that the parties intended it only as security. This rule is of long standing, and has become so well established that it is not now open to discussion. It is also well settled—at least in the courts of this state—that a deed absolute upon its face will be construed in accordance with its terms, when it is so intended by the parties, even although it be accompanied by a contemporaneous agreement to reconvey within a specified time upon the payment of a certain specified amount. See *Dignan v. Moore*, 8 Wash. 312, 36 Pac. 146. It follows that the instrument in question must be construed as an absolute deed, unless the intention of the parties to treat it as security only appears from the clause above set out. We are unable to gather any such intention from the language used. It clearly appears therefrom that the debt for which the grantee had before that time held a mortgage upon the property was, by the making of this instrument, to be satisfied; and, this being so, there would be nothing in the language tending to establish the contention of the appellants, were it not that in connection with the right to repurchase the word "redeem" is used, and in another place the "redemption of the property" is spoken of. But, in our opinion, the use of these words, when construed in connection with language which shows the evident intent of both parties to have been that the debt should be paid by the making of the instrument, was not sufficient to continue in force such debt; and, if it was not so continued, then no debt whatever existed as between the grantors and the grantee after the delivery of the instrument; and, while that fact might not in itself conclusively determine the character of the instrument, it is a circumstance which in all the cases has been given great weight in determining the question under consideration. It appears from the face of this instrument, taken as a whole, that it was intended by the parties to take the place of a mortgage then in force between them, and to hold that by its execution and delivery no substantial change had been wrought in the relations of the parties would be to hold that the making of the instrument was but an idle ceremony. In addition to the deed which

was put in evidence, there were certain facts bearing upon the question under consideration, agreed upon by the parties, but nothing appears therefrom to in any way aid the appellants in their contention that the deed was intended as a mortgage. On the contrary, it clearly appears therefrom that their intention was by the execution of this instrument to save the expense and prevent the delay incident to the foreclosure of a mortgage. When the instrument is construed in connection with the circumstances surrounding its execution, as shown by the agreed statement of facts, it appears beyond question that the parties did not intend such instrument as a mortgage, but, on the contrary, intended that thereby the absolute title should pass from the grantors to the grantee with the right in the grantors to repurchase in accordance with the conditions stated in the instrument. And since the rule under which a deed was held to be a mortgage was originated, that the real intent of the parties should be given force, the language of the instrument should not be nullified, unless it is shown that it did not correctly interpret the intention of the parties. The rule in some cases may have been extended so as to furnish relief to a grantor when it was not made to appear that the instrument did not express the intention of the parties, but this has only been done upon proof of such a want of adequacy in the consideration as to raise a presumption of fraud, or at least of overreaching, by the grantee as against the grantor. In the agreed statement of facts in the case at bar there is no suggestion that the consideration for which the deed was made was not the full value of the property, and, this being so, the intention to pass title evidenced by the instrument, having been controverted neither by the clause contained therein nor by the circumstances surrounding its execution, must be given force. The judgment of the superior court must be affirmed.

DUNBAR, ANDERS, and SCOTT, JJ., concur. GORDON, J., not sitting.

(12 Wash. 259)

MURRAY v. OKANOGAN LIVE-STOCK & DRESSED-BEEF CO. et al.

(Supreme Court of Washington. July 13, 1895.)

APPEAL—FAILURE TO EXCEPT—EQUITY—DEMAND FOR DAMAGES—RIGHT TO JURY TRIAL—CONVERSION—MEASURE OF DAMAGES.

1. A judgment will be affirmed where appellant fails to take a sufficient exception to any of the findings of fact.

2. Where one purchases a business, and takes possession thereof, under a contract that the purchase price shall be deposited in a bank till it is determined whether the seller or another person claiming to own the business is entitled thereto, and that, in the event of its being determined that the seller is the owner, the money shall be paid to him, but, if found that the claimant is the owner, the money shall be returned to the purchaser, and the purchaser is after-

wards made a party defendant to a suit by the claimant to be declared the owner, and for damages for the conversion of the good will of the business, he is not entitled as of right to a jury trial on the question of damages.

3. In an action for damages for the conversion of the good will of a business, it appeared that defendant took possession of the business under an agreement that the price agreed to be paid by him should be deposited in a bank till it was determined whether the seller or plaintiff owned the business; and that, if it was determined that the seller was the owner, the money should be paid him, while, if plaintiff was the owner, it should be returned to defendant. Plaintiff's title was based on a prior bill of sale made by the seller to him, and the seller, at the time of the sale, was in possession under a lease from plaintiff. *Held*, that defendant was not prejudiced because the measure of damages was fixed at the amount of the deposit, though the contract of sale to defendant also provided that the seller should not for a certain time engage in the same business.

4. It was proper to charge the damages against the deposit.

5. Defendant, not having set up false representations in regard to the amount or character of the business, could not complain because the court refused to receive evidence as to such false representation.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by David Murray against the Okanogan Live-Stock & Dressed-Beef Company and others to establish plaintiff's ownership of a business, and for damages for its conversion. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

M. Gilliam, for appellant Splawn. Metcalfe & Jurey, for appellants Okanogan Live-Stock & Dressed-Beef Co., Hill and Granger, and Hill, as receiver of said company. Burke, Shepard & Woods and Charles E. Shepard, for respondents.

SCOTT, J. The defendants Hill and Granger were in possession of and conducting a wholesale and retail butcher business in the city of Seattle, known as the "People's Market." They claimed to own and to have the right to sell the good will of said business. They were also in possession of certain tools, implements, and slaughterhouse property used in connection with the business, under an oral lease from the plaintiff. The defendant Splawn, acting for himself and the defendants Bounds and Meyer, agreed with Hill and Granger to purchase said business and the leasehold interest in said personal property and slaughterhouse. While Splawn was preparing to engage in said business, he learned that the plaintiff claimed to own it, and he notified him by telegraph that he had bought the same of Hill and Granger, as aforesaid. On receipt of this notice, the plaintiff came to Seattle, and claimed to own the business, whereupon Splawn caused his agreement with Hill and Granger to be reduced to writing, and it, with the consideration of \$3,000 moving from him therefor, which was represented by a promissory note for that amount, was deposited with the defendant National Bank of Commerce, to

await action on the part of the plaintiff. Said written agreement was executed by Splawn individually, and not by Splawn & Co. It contained the following provisions material to the question here considered: "It is agreed that if said Murray, or any person claiming under him, shall, within sixty days hereafter, legally prevent said Splawn from having and enjoying the right hereby conveyed, then the said money shall be returned to said Splawn by the said bank, and this transfer shall be deemed void; but, if the said Murray shall not within that time legally prevent said Splawn from having and enjoying the right hereby conveyed, then said money shall be paid by the bank to the grantors or their successors in the trust herein: Provided, however, that, if within the said sixty days said Murray shall commence legal proceedings to prevent the enjoyment of said right by the said Splawn, then the money shall remain in the bank unto the termination of such proceedings, and then be returned to said Splawn, or paid to the grantors herein, or their successors in the trust, accordingly as the decision may be for or against the right of said Splawn, as hereinbefore stated." The plaintiff was not a party to this agreement. After the execution thereof, the defendants Splawn, Bounds, and Meyer, under the firm name of A. J. Splawn & Co., took possession of the property aforesaid, and conducted said business. The plaintiff subsequently began this action to obtain certain relief of an equitable nature against Hill and Granger and the Okanogan Live-Stock & Dressed-Beef Company, and especially to have himself adjudged to be the owner of the property aforesaid, and of the good will of said business, which latter he alleged to be very valuable, that Hill and Granger had undertaken to dispose of the same in fraud of his rights, and that Splawn or Splawn & Co. had converted said good will, and alleged damages in the sum of \$5,000; and he asked to have appellants and said firm of A. J. Splawn & Co. charged as trustees for him of said business, and that the defendant bank be required to apply the amount deposited with it upon whatever judgment he might recover in said action for the alleged conversion of said good will, etc. Separate answers were filed, and a trial had, and judgment was rendered in favor of the plaintiff. Two appeals were prosecuted therefrom. The Okanogan Live-Stock & Dressed-Beef Company, and Hill and Granger, and Hill, as receiver, joined in one appeal, and Splawn appealed separately.

Upon the argument of the case here, it was objected that the appeal first mentioned should not be considered for want of exceptions to the findings of fact by the lower court, and a motion was made for the affirmance of the judgment as to said parties on that ground. An examination of the record discloses the fact that no sufficient exceptions were taken by these appellants to the find-

ings of fact, under the repeated holdings of this court, and as to such appellants the judgment of the lower court is affirmed. The effect of this is to relieve Splawn of liability as to said parties, and to make him liable, if at all, to the plaintiff.

As against appellant Splawn, the court assumed that the sum of \$3,000, which he had agreed to pay for the business, etc., was the measure of damages which the plaintiff was entitled to recover, and it was directed to be paid to the plaintiff accordingly. Several errors are alleged by Splawn as entitling him to a reversal of the judgment. It is contended that the plaintiff's action against him was substantially one for damages, and that he was entitled to a trial by jury. He demanded one, and the court refused it. It is conceded that the action, as against the other parties, was properly brought on the equity side of the court; and we think that Splawn's relations to the subject-matter of the suit, in having succeeded to Hill and Granger, being in possession of the property and conducting the business, having obtained the benefit of the good will, and in view of the provisions of the agreement hereinbefore set forth, were such as to make him a proper party defendant; and it is well settled that a court of equity, having obtained jurisdiction for one purpose, has jurisdiction for all purposes, and a trial by jury of any of the issues involved therein is not a matter of right, but one which simply rests in the discretion of the court, and we do not find that there was an abuse of such discretion in this instance.

It is further contended that the price which Splawn had agreed to pay to Hill and Granger as aforesaid could not be held to constitute the measure of the plaintiff's damages; and it is also contended that, under the agreement, it was stipulated that, in case the plaintiff should establish a right to the property and business, the consideration was to be returned to Splawn. It is true that the price fixed by Hill and Granger and Splawn was not binding upon the plaintiff, and the plaintiff evidently did not elect to be bound by that price in bringing his action, for he sought to recover more than that sum, and only asked that the deposit be applied upon the judgment. The court, however, seemed to assume that this stipulated price was the measure of damages; and, while the relief awarded was not in strict accord with that sought in the complaint, nevertheless, if it appears that appellant has sustained no substantial injury, the judgment should not be disturbed. The agreement between Splawn and Hill and Granger is somewhat indefinite and ambiguous; yet we think it fairly appears from the part heretofore quoted that this price was deposited to be paid to whichever party should be found to be lawfully entitled to it. Splawn's object was evidently to get the business and possession of the

property, for which he agreed to pay the sum of \$3,000. He did get possession of it accordingly, and thereafter maintained it. The plaintiff might have sought a remedy by injunction to prevent Splawn or Splawn & Co. from entering upon and conducting the business. He also had a right to treat the sale as valid, and recover the price agreed upon. While he did not elect to do either in bringing his action, but sought to recover damages in excess of the amount fixed by the other parties, as the consideration for the transfer, on the ground of an alleged fraudulent conversion of the good will and business, the relief that he finally obtained was upon the ground of a ratification of the sale. The agreement only provided that the consideration should be returned to Splawn in case he was prevented from enjoying the rights attempted to be conveyed to him thereunder; and, while the plaintiff was not technically a successor to Hill and Granger, we think he was so within the contemplation of the parties in making this agreement. Splawn obtained and has ever since enjoyed all that the contract with Hill and Granger purported to convey to him. We cannot see any valid reason why he should not pay the price stipulated to the rightful owner of the property.

It was contended upon the argument that one part of the agreement was that the parties transferring such rights should not engage in a similar business in Seattle within a stipulated period of time. But this agreement, in terms at least, only related to the corporation, the Okanogan Live-Stock & Dressed-Beef Company; and, if Murray could thereafter engage in a like business as an individual, we see no reason why Hill and Granger, or either of them, could not have done the same thing.

It was further contended that the decree should not stand, on the ground that, if Hill and Granger had brought an action upon the note deposited with the bank, Splawn might have had defenses partial or otherwise thereto, for the reason that the business was not as good as represented by Hill and Granger; and it is contended that the court refused to permit evidence to be introduced by Splawn as to the value of the good will to show that it was of much less value than represented to him by Hill and Granger. There were no stipulations, representations, or warranties with reference to the value of the good will or the amount or character of the business incorporated in the written agreement; but, conceding that Splawn might have shown such oral representations, we do not think that he is in a position to raise the question in this case, for nothing of the kind was set up as a defense in his answer. He was fairly advised by the complaint that the plaintiff sought to obtain this \$3,000 deposited as aforesaid; and, if he had any defense going to the failure of the consideration or by way

of recoupment, he should have pleaded it. Not having done so, he was not entitled to make the proof offered. Otherwise the matters aforesaid between said parties seem to have been fairly and fully litigated, and we are unable to discover that any substantial injury has been done to appellant Splawn, and as to him the judgment is also affirmed.

DUNBAR, ANDERS, and GORDON, JJ.,
concur. HOYT, C. J., not sitting.

(12 Wash. 217)

STATE v. CRAEMER.

(Supreme Court of Washington. July 3, 1895.)

PROSECUTION FOR MURDER—SUFFICIENCY OF EVIDENCE—OTHER CONTEMPORANEOUS CRIMES—RIGHT TO CONTINUANCE—ABSENT WITNESS.

1. An affidavit for continuance which alleged that a witness by whom defendant expected to prove an alibi was a miner, and had no fixed place of abode, but failed to state that any effort was made to locate him at the time defendant was charged with the offense, which was a few hours after its commission, or to keep him located up to the time of the trial, showed inexcusable want of diligence.

2. On a trial for murder, evidence that defendant at the same time killed the child of the deceased is admissible.

3. Where no objection was made to the reception of evidence at the trial, it cannot be urged on appeal.

4. Evidence that defendant was seen in the shrubbery adjoining the deceased's premises 13 days before the homicide was admissible to prove that robbery was the motive for the murder.

5. Evidence that defendant's revolver was found on the premises of deceased 18 days after the murder was admissible.

6. On a trial for murder, testimony of the amount and character of money found in the possession of defendant's wife, as tending to show that robbery was the motive for the crime, if not admissible, was not prejudicial.

7. The refusal of the court to adjourn the case, to secure a witness whose name and residence and the materiality of whose testimony was not stated, was not error.

8. Evidence that deceased was killed with a hammer; that part of the handle was found on defendant's premises; that defendant had been out of work prior to the homicide; that a quantity of gold coin had been taken from the house of deceased; that about the same amount was found on defendant's premises, and in possession of his wife; that defendant lived near deceased, and, some days before and immediately prior to the murder, was seen in the brush near deceased's house,—and contradicting defendant's alleged alibi, was sufficient to sustain a conviction of murder in the first degree.

Appeal from superior court, King county;
T. J. Humes, Judge.

Henry Craemer was convicted of murder in the first degree, and appeals. Affirmed.

Daniel T. Cross and Relfe & McCutcheon, for appellant. A. W. Hastie, Pros. Atty., and W. W. Wilshire, Dep. Pros. Atty., for the State.

GORDON, J. Appellant, Henry Craemer, was convicted in the superior court of King county of murder in the first degree, and sen-

tenced to death. From the judgment of conviction and an order denying his motion for a new trial, he has appealed.

The record discloses that appellant was arrested on August 14, 1894; on August 17, 1894, he was taken before the committing magistrate for the purpose of a preliminary examination; that, agreeably to the right conferred by statute in such cases, he waived examination, and was committed without bail; that on August 25, 1894, he was arraigned in the superior court, upon information filed therein charging him with murder in the first degree for the killing of Philipina Mueller on August 13, 1894; that to the crime so charged he entered his plea of "Not guilty," and the court thereupon fixed September 7, 1894, as the time for trial. It further appears that from the time of his arrest he was attended by counsel. The alleged errors relied upon for a reversal of the conviction will be considered in the order in which they appear in appellant's brief.

The first error assigned is the overruling of the motion by appellant for a continuance. This motion was based on the affidavits of himself and Mary Craemer, his wife, and N. Soderberg, his attorney. The continuance was sought for the alleged purpose of securing the testimony of one Jack Quincy, by whom appellant in his affidavit stated that he could show that he (appellant) went to Tacoma (distant some 30 miles from the scene of the killing) on the afternoon of the day of the alleged murder, to meet said Quincy; that said Quincy and appellant spent a portion of the afternoon of said day in Tacoma, and that during said time Quincy paid appellant the sum of \$35; that said Quincy was a miner, with no fixed place of abode, and was, at the time when said affidavit was made, supposed to be absent somewhere in the Cascade Mountains, in the neighborhood of Monte Cristo, in Snohomish county. The affidavit of Soderberg was to the effect that, some seven days before the trial, he caused two letters to be addressed to the said Quincy, one mailed to Tacoma, Wash., and the other to Monte Cristo; that four days later he caused a subpoena to be issued for said Quincy, and placed the same in the hands of the sheriff of Snohomish county for service, without any definite direction as to where said alleged witness could be found. This, in brief, constituted the showing made for a continuance, and we think that it failed to meet the requirements of the statute respecting diligence. The migratory habits of Quincy being well known to appellant, the necessity of locating and keeping him located in order to secure his testimony was a matter that due diligence required of him and his counsel. Accused of this crime within a few hours after its alleged commission, and within less than one day from the time when he claims to have been in the company of Quincy, he apparently made no effort to secure his attendance, or to keep advised of his wanderings. In this con-

nection we may add that the affidavits generate a doubt, which is strengthened by the circumstances established upon the trial, as to the actual existence of the so-called "Quincy"; but, be that as it may, we do not think that the appellant used such reasonable means as were within his power to secure the attendance of the so-called "Quincy," and the motion for a continuance was properly denied.

It appears from the evidence that the infant child of the deceased was murdered at the same time, and evidently by the same hand that destroyed the mother's life; and it is next contended that the court erred in admitting evidence of the killing of the babe. The general rule is that, in the trial of a defendant for a specific offense, evidence tending to show the commission of other distinct offenses is inadmissible. But this general rule admits of many exceptions. One of these exceptions is that, where two crimes are connected, both may be proved. *Kennedy v. State*, 107 Ind. 144, 6 N. E. 305. Here the two homicides were so intimately connected with regard to time, place, circumstances, and the means employed to effect death, that proof of the killing of the babe was necessarily involved in a complete description of the offense charged against the prisoner, and constituted a circumstance in the history of the crime charged, incapable of being separated from it in describing the condition and appearance of the mother and the premises where the killing occurred. But, aside from this, it appears from the record that no objection of any character was made to the reception of this evidence at the trial, and the settled practice does not admit of its being urged for the first time upon appeal. *Sears v. Railway Co.*, 6 Wash. 227, 33 Pac. 389, 1081; *People v. Baird* (Cal.) 38 Pac. 633.

The court did not err in admitting the testimony of Mrs. Smith and Laura Cushman, witnesses for the state, who testified to having seen the prisoner in the briar bushes adjoining the deceased's residence 13 days prior to the homicide. The theory of the state was that robbery was the motive leading to the murder, and the presence of the appellant at that time was a circumstance which, we think, the jury was entitled to consider.

Nor was it error to permit the witness McCormack to testify to finding a revolver upon the premises of the deceased some 18 days after the homicide. This revolver was identified as the property of the appellant, and its discovery was also a circumstance to be weighed by the jury.

The testimony on the part of the state as to the amount and character of the money found in the possession of the wife of appellant, if not strictly competent, was not, we feel confident, prejudicial to the appellant.

At the close of the evidence at the trial, appellant's counsel requested an adjournment for the purpose of calling a witness concerning whose testimony, it was stated to the court,

counsel had just been advised. The application was denied, and this refusal of the court is made the ground for specific assignment of error. If the record disclosed that there was in fact a person whose testimony could have been secured upon reasonable adjournment had, and that such testimony was material to appellant's case, we should not hesitate to say, considering the great importance of the issue, that the refusal of the court to grant a reasonable continuance would be error. But no such condition is presented by the record. The name of the witness is not given, nor his residence stated, nor is the materiality of the proposed testimony made to appear. We cannot say from the record that the cause of the appellant was prejudiced by the refusal of the court to grant the adjournment.

We think the charge of the learned judge fully covered the different phases of the case as presented by the evidence, and correctly stated the law.

The last proposition contended for in the brief of appellant is that "the evidence, taken as a whole, is insufficient to support the verdict rendered." The killing of the deceased occurred at her home in the city of Seattle, between 7 and 8 o'clock on the evening of August 13, 1894. This home consisted of a small wooden house, containing five rooms, three of which were located on the first floor, and occupied by the deceased, her husband, and three children, the youngest of whom (a baby) was killed at the same time and place, and evidently by the same hand and by the same means made use of to effect the mother's death. The upper rooms in the home were occupied by two lodgers. The deceased was found dead by her children and some of the neighbors about the hour of 8 o'clock p. m. She was lying on the floor in the middle room. There was a compound fracture of the nose, and compound fracture of the maxillary bone on the left side. Her skull was fractured in front of the left ear, and there were other cuts and bruises on her face, the cause of death being assigned to the fracture of the skull, with hemorrhage. The baby had a fracture of the skull near the angle of the orbit on the left side, and was found lying on the bed in the same room with the mother. The character of the wounds was such as to indicate clearly that they were made by some blunt instrument. Upon the windowsill in the front room downstairs was found a carpenter's claw hammer smeared with blood, which was evidently the weapon with which both mother and child were killed. A towel bearing bloody finger marks was found in the kitchen. A trunk of the deceased had been broken open, and the sum of \$240 in gold coin stolen therefrom. The other contents were scattered about the room in confusion. The rooms upstairs had also been rifled, clearly and unmistakably indicating that robbery was the motive which actuated the murderer. An attempt had been made to fire the premises, and the body of the mother had been placed upon

some bedclothing in the center of the middle room, the clothing saturated with kerosene extracted from a lamp, and books, papers, and chairs piled thereon.

It appears from the evidence that appellant occupied with his family a house in the neighborhood of the deceased. The husband of the deceased and appellant were for a short period fellow workmen in a brewery; but at the time of the homicide, and for some months previous thereto, appellant had been out of employment, and was in straitened circumstances. A piece had been sawed from the handle of the hammer found upon the premises where the killing was committed, as above stated, evidently for the purpose of shortening it, and making it of more convenient size for carrying in concealment. This hammer was identified as the property of the appellant, and the missing end was also found, on the day following the murder, in a shed upon the premises of the appellant. Upon further search of the premises, the sum of \$200 in gold coin was found in a miter box upon a beam of the said shed. On the night of the murder, appellant had given his wife some \$20, which sum, in connection with the amount so found and other items expended by the prisoner prior to his arrest and subsequent to the killing, aggregated about the amount that was stolen from the premises of the deceased. Appellant disclaimed any knowledge of the money so found upon his premises, and contended that the money which he had given his wife was a part of the proceeds of the sum of \$35 which had been paid him by the so-called "Quincy," as set out in his affidavit for continuance heretofore referred to. Harry Gyer, a witness for the state, testified to having seen appellant at about a quarter to 7 of the evening of the day of the killing, and at that time appellant was standing in the brush at a point about 200 feet from the home of the deceased; that he was then looking towards the said house, was partially concealed by the brush, and quite motionless. As already adverted to, the appellant had been seen in that vicinity some 13 days prior to the killing, under circumstances which, we think, create a degree of suspicion; but at that time he was aware that his presence had been discovered. The husband of the deceased and the two lodgers referred to had left home shortly before or about 7 o'clock upon the evening of the homicide, and gone into the city to attend a labor meeting, at which they remained until apprised of the homicide, at about the hour of half after 9.

Appellant, prior and subsequent to the time of his arrest, and upon trial, insisted that, upon the day of the homicide, he had taken a steamboat at about the noon hour for Tacoma, where he arrived about 2 o'clock, and that he remained there until about 7 p. m., returning to Seattle on the steamer Flyer, and arriving at the latter place about 9:30 p. m., or some time after the homicide had been committed. It appeared that there was consid-

erable music on the boat upon its return trip, but, being questioned concerning it, appellant stated that he heard none of it; and upon being questioned concerning the presence upon the boat of different persons with whom he was acquainted, and who were shown to have been passengers and employés thereupon, he was unable to state that he had seen any of them.

It would be neither practicable nor profitable in this opinion to fully review the evidence. The record is very voluminous, and abounds in circumstances which convince the mind of the appellant's guilt. From a full examination of the case, we think the evidence is amply sufficient to sustain the verdict, and that the record discloses no error requiring a reversal. The judgment of conviction is affirmed, and the case remanded to the lower court, with directions to proceed to appoint a day for the carrying of its sentence into effect according to law.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

(5 Cal. Unrep. 59)

EATON v. METZ, Constable. (No. 19,512.)
(Supreme Court of California. June 27, 1895.)

WRONGFUL ATTACHMENT—LEVY—ACTION AGAINST
OFFICER—DEFENSES—FRAUDULENT SALE—
PLEADING AND PROOF.

1. In an action against an officer for property levied on under an attachment against plaintiff's vendor, an averment by defendant that the sale to plaintiff was made with the design on his part, and on the part of his vendor, to delay and defraud the creditors of the grantor, and to prevent the application of the property to the satisfaction of their demands, does not authorize the admission of evidence of actual fraud.

2. In an action of claim and delivery against an officer on account of a levy under an attachment against plaintiff's vendor, defendant may, under a denial of plaintiff's title, show that there was not an immediate delivery or continued change of possession as between plaintiff and his vendor, and he need not specially plead such facts.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action of claim and delivery by Fred. B. Eaton against A. W. Metz, constable. From a judgment for defendant, plaintiff appeals. Affirmed.

Trippet, Boone & Neale and A. L. Gill, for appellant. W. S. Wise and E. W. Britt, for respondent.

SEARLS, C. This is an action in claim and delivery to recover the possession from defendant of 13 horses, 1 four-horse wagon, and 1 set or double harness, or their value, alleged to be \$2,000. The amended answer contains two separate defenses. The first denies the ownership or possession of the plaintiff of the property described in the

complaint, or any part thereof, or that it is of any value exceeding \$1,200, or that defendant at any time took the same, or any part thereof, from the possession of the plaintiff, or that he wrongfully withholds the same from said plaintiff. The second defense avers that A. C. Eaton was and is the owner of the property described in the complaint, and justifies taking the same as a constable of the township of Perris, 'n the county of San Diego, under and by virtue of sundry writs of attachment issued out of justice court in and for said township, in actions pending therein in favor of sundry persons against said A. C. Eaton. Defendant further averred as follows: "Defendant, here answering, is informed, and believes, and therefore alleges, that the said Fred. B. Eaton claims to be the owner of the property described in his complaint herein, in virtue of an alleged sale thereof to him by the said A. C. Eaton; and defendant avers also, upon his information and belief, that such alleged sale was made for the purpose and with the design, on the part of said A. C. Eaton and Fred. B. Eaton, to hinder, delay, and defraud the creditors of the said A. C. Eaton, particularly [naming them], and to prevent the taking and application of such property to the satisfaction of the demands of such creditors against said A. C. Eaton." The cause was tried by the court, and written findings filed, upon which judgment was entered in favor of the defendant for the redelivery to him of all the property described in the complaint, except one horse, viz.: "One sorrel horse, blind of one eye, mentioned in the complaint, or the sum of one hundred and twenty-five dollars, the value thereof." Defendant had costs. Plaintiff appeals from the judgment. The case comes up on the judgment roll, containing a bill of exceptions, in which the evidence is set out. The court found, in substance, among other things, that at the date of the levy by defendant (on or about October 5, 1892) the plaintiff was the owner of the sorrel horse described in the complaint, but was not the owner of the other property, or any part thereof, but that A. C. Eaton, the father of the plaintiff, was the owner thereof; that plaintiff claims to be the owner of all the property (except the sorrel horse) by virtue of an alleged sale thereof, made to him on or about June 25, 1892; that such sale was not accompanied by an immediate delivery of the property, although such property was then in possession of said A. C. Eaton, and that there was never an actual or continued change of possession. Upon the charge that the sale was made for the purpose and with the design, by the plaintiff and A. C. Eaton, to hinder, delay, or defraud the creditors of A. C. Eaton, etc., the finding is in favor of the plaintiff, and to the effect that it was not made for any such purpose or with such design. At the trial, plaintiff introduced evidence to show that he was the

owner of the property in dispute, and that it was taken by defendant without his consent, etc. At various stages of the trial, in the cross-examination of plaintiff's witnesses, and when testimony was offered on behalf of defendant, counsel for plaintiff objected to the introduction of any and all testimony tending to show fraud, upon the ground that there was no pleading to support the same. The court overruled these several objections, and the rulings are assigned as error.

The contention of the plaintiff here is that fraud must be pleaded by setting up the facts constituting it; that general allegations are insufficient, and that defendant's answer failed to set out any facts upon which fraud could be predicated. In support of this proposition we are referred to the following cases: *Sukeforth v. Lord*, 87 Cal. 402, 25 Pac. 497; *Pehrson v. Hewitt*, 79 Cal. 598, 21 Pac. 950; *Mason v. Vestal*, 88 Cal. 396, 26 Pac. 213; *Wetherly v. Straus*, 93 Cal. 284, 28 Pac. 1045; *Albertoli v. Branhams*, 80 Cal. 633, 22 Pac. 404. As was said in *Mason v. Vestal*, supra: "A defendant is not required to anticipate the source from which the plaintiff claims to derive his title, but if he does proceed to set up the acts of fraud which he charges rendered plaintiff's title invalid, he must state facts which are sufficient in law to that end." And if a defendant pleads fraud in general terms, if a demurrer is interposed to his plea, or, in the absence of such demurrer, if the evidence tending to prove the supposed fraud is objected to at the trial upon the ground of immateriality, it is error to admit it. But, in the absence of a demurrer, or objection to evidence under such general plea, there is no error of which the losing party can complain. *Sukeforth v. Lord*, supra. The defense of actual fraud in the case at bar was even more general than that set up in the answer in *Sukeforth v. Lord*, and, objection having been made to all evidence offered in support thereof, we must hold (waiving for the present the question of the admissibility of the evidence under other portions of the answer) that the court below erred in its admission. But the plaintiff was not injured by such error, for the palpable reason that the finding of the court upon the issue of actual fraud was in his favor. The finding reads as follows: "That such alleged sale was not made for the purpose and with the design, on the part of the said A. C. Eaton or Fred. B. Eaton, to hinder, delay, and defraud his creditors, and to prevent the taking and application of such property to the satisfaction of the demands of such creditors against him, the said A. C. Eaton." Error without injury is not cause for reversal.

It is further objected by appellant that the findings of the court as to constructive fraud are without the issues, because the only kind of fraud which is attempted to be pleaded is actual fraud. It is proper to say that, whatever conclusion may be reached in re-

gard to the admission by defendant of title in the plaintiff by the plea of a fraudulent sale of the property, as set out in the second defense of defendant, such admission only goes to that defense. To illustrate: A., the payee of a promissory note, sues B., the maker. B. sets up three separate defenses: (1) That he never made the note; (2) that he has paid it; (3) that it is barred by the statute of limitations. The second and third defenses admit the making of the note; but it is only for the purposes of such defenses that the admission applies, and under the first defense the plaintiff must still prove the making of the note. Each defense must be consistent with itself, but need not be consistent with the others. *Bell v. Brown*, 22 Cal. 671; *Wilson v. Cleveland*, 30 Cal. 192; *Buhne v. Corbett*, 43 Cal. 264. Defendant, in his first defense, having, as hereinbefore stated, denied the title of plaintiff to the property, and the latter having, as he was bound to do, introduced evidence of ownership in himself, the defendant was at liberty to combat such claim of ownership by showing that there was not an immediate delivery or a continued change of possession, as between plaintiff and his vendor, and that defendant, as a constable acting under a valid writ against the vendor, and in favor of his creditor, had taken the property pursuant to the command of such writ. These were facts which, under section 3440 of the Civil Code, went to defeat the title set up by plaintiff, and needed not to be specially pleaded, such title being denied. *Grum v. Barney*, 55 Cal. 254; *Mason v. Vestal*, 88 Cal. 396, 26 Pac. 213.

The bill of exceptions fails to show that any objections were made to testimony tending to show that defendant was a constable acting under valid writs of attachment, or that the parties in whose favor such writs issued were creditors of plaintiff's vendor; and the objections to the findings fail to specify any insufficiency of evidence on these points, being directed to the evidence going to the facts as found,—that plaintiff was not the owner of the property; that A. C. Eaton was such owner; that the sale from said A. C. Eaton to plaintiff was not accompanied by an immediate delivery and a continued change of possession of the property sold, although such property was at the time of such sale in the possession of said A. C. Eaton; and that defendant (except as to the sorrel horse) did not take the property from the plaintiff wrongfully or at all. Upon these alleged insufficiencies of evidence there was such a substantial conflict as must preclude a reversal here. Under such circumstances, it becomes unnecessary to detail the evidence, or to dwell upon the peculiar relations of the parties, the manner in which the property was used after the pretended sale, or the suspicious circumstances involved in the transaction. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(107 Cal. 536)

STATLER v. SUPERIOR COURT OF ALAMEDA COUNTY. (L. A. 35.)

(Supreme Court of California. June 27, 1895.)

INSOLVENCY PROCEEDINGS—EFFECT OF APPEAL—SUBSEQUENT MODIFICATION OF ORDER—LAND FRAUDULENTLY CONVEYED.

1. After a creditor has appealed from the usual order in insolvency proceedings adjudging a debtor insolvent and staying all proceedings against him, the court cannot modify it by permitting the assignee, who is also a judgment creditor, to levy execution upon certain property of the insolvent.

2. Though it is the duty of the court to preserve an insolvent's estate for the benefit of creditors, it cannot, after appeal from the order adjudging the debtor insolvent and staying further proceedings against him, modify said order so as to subject land fraudulently conveyed by the insolvent to the claims of creditors; the remedy in such case being by action against the insolvent and his fraudulent vendees.

In bank.

Certiorari by T. K. Statler to the superior court of Alameda county to annul an order of said court. Order annulled.

Pierson & Mitchell and Robert A. Friedrich, for petitioner. A. W. Thompson, for respondent.

VAN FLEET, J. This is an original proceeding in this court by certiorari, seeking to review and have annulled an order of said superior court made in a proceeding in insolvency. In December, 1894, R. P. Thomas, a resident of Alameda county, filed in said superior court his voluntary petition in insolvency, and thereupon the usual order was made, as provided in the insolvent act, adjudging Thomas insolvent and staying all proceedings against him. Subsequently one Chetwood, a creditor, was elected and duly qualified as assignee of the estate. Thereafter, on March 18, 1895, the petitioner herein, a creditor whose claim had been filed against said estate, took and perfected an appeal to this court from said order of adjudication, and said appeal is still pending here. On March 30th, and after the perfecting of said appeal, Chetwood, whose claim is based upon a judgment theretofore recovered by him against said insolvent in the superior court of the city and county of San Francisco, but under which no execution had been levied or lien acquired in any manner upon any property of the insolvent in Alameda county, made an application to said superior court for a modification of the order of adjudication, to the extent of permitting him, as such judgment creditor and assignee, to take out execution upon his said judgment and levy it upon certain real estate constituting the homestead of the insolvent in Alameda coun-

ty, which it was alleged largely exceeded in value the statutory exemption, and to subject such excess in value to the satisfaction of said judgment. The superior court granted said application, and made an order modifying said order of adjudication in the manner requested, and said Chetwood thereupon took out execution, and is proceeding to subject said property to the satisfaction of his said judgment. The said order of modification was made without notice to or consent of the petitioner; and petitioner deeming that said court had no power to make the order, and there being no appeal therefrom, he seeks the aid of this proceeding to have the order annulled.

We think it clear that the court was without authority to make the order complained of. The order of adjudication was an appealable order, and the effect of the appeal from that order was to stay "all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein." Code Civ. Proc. § 946; *Dennery v. Superior Court*, 84 Cal. 7, 24 Pac. 147; *Pennie v. Superior Court*, 89 Cal. 31, 28 Pac. 617. Pending the appeal the superior court had no more power to modify the order appealed from in the manner indicated than it would have had to proceed and enforce it in its entirety. The effect of the appeal is to remove the subject-matter of the order from the jurisdiction of the lower court, and that court is without power to proceed further as to any matter embraced therein until the appeal is determined. *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211.

It is contended, however, by respondent, that the appeal "is from the judgment and decree adjudging the said R. P. Thomas insolvent, and not from the order creating the stay," and that, therefore, the court was not prevented from modifying the stay order. This argument is based upon the assumption that that part of the order of adjudication declaring the insolvency, and the part staying proceedings, are separate and distinct orders, in no way dependent upon each other. This position is untenable. The order is one order, containing different and somewhat distinct adjudications, it is true, but still a single order, the different features of which are dependent upon each other. Insolvent Act, § 6. The appeal is "from the judgment and decree made and filed in this matter. * * * adjudging the said R. P. Thomas insolvent, and from the whole of said judgment and decree." It is apparent that the appeal was intended to embrace every part of said order, and the language is sufficiently comprehensive to make the intention effectual.

It is further urged by respondent that the order made by the superior court was solely with a view and purpose of preserving the property of the insolvent for the creditors; and that this the court had a right to do. It is undoubtedly the duty and within the power of the court to keep the property of the

estate intact, and to preserve it from loss or spoliation, and to adopt proper measures to that end (*Dennery v. Superior Court*, supra); but it is not authorized for such purpose more than another to travel outside its jurisdiction. Assuming, as is claimed by respondent, that the only object of the order in question was for the protection of the rights of all the creditors, which is not clearly manifest from the nature of the order itself, it was wholly unnecessary for the purpose, even had it been proper. If it be true, as asserted, that the insolvent had, prior to filing his petition in insolvency, made a fraudulent transfer of his interest in the homestead property, for the purpose of covering it up and preventing any excess in value from coming to his creditors, there existed a plain and adequate remedy by which his act could be defeated and the property recovered. It was perfectly competent for Chetwood, the judgment creditor, to bring an action, on behalf of himself and the other creditors, to set aside such transfer as in fraud of creditors. Such an action is not within the prohibition of section 45 of the insolvent act. Even though necessary to make the insolvent a party, it would not be an action against him upon a debt or obligation provable against his estate, but to recover from his fraudulent vendees, for the benefit of the estate, the property so transferred. As such it would not contravene the order staying proceedings, even if the latter remained in force. The case of *Miller v. Kehoe* (Cal.) 40 Pac. 485, presents such an instance. Here, however, the stay order was suspended by the appeal, and no question could, therefore, arise as to the right to maintain such an action. The order complained of should, therefore, be annulled, and it is so ordered.

We concur: GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.; HARRISON, J.

(107 Cal. 563)

DAVIS v. PACIFIC POWER CO. (No. 15,846.)

(Supreme Court of California. June 29, 1895.)

INJURY TO EMPLOYE OF LESSEE — LIABILITY OF EMPLOYER — REVOLVING SHAFT IN BUILDING — CONTRIBUTORY NEGLIGENCE.

1. Evidence that a boy, while at work for the lessee of premises on the first floor thereof, got thistles in his fingers from a strawcutter, and went to the most available light, which was in the basement, to get them out, justifies a finding that he was in the basement for a necessary purpose in the performance of his duty, so as to impose upon the lessor the duty of protecting him while there from injuries arising from unsafe machinery placed in the basement by the lessor.

2. Where a landlord retains control of a portions of his premises, he is bound, if he puts dangerous machinery thereon, to fence it, or otherwise protect those in its vicinity from injury thereby.

3. An employé of a lessee of part of a building, having gone to a part of the leased premises in the performance of his duty, was, while there,

injured by a revolving shaft placed there by the lessor for the purpose of transmitting power to other parts of the building. The employé testified that he stood at a safe distance from the shaft, and that, the first thing he knew, he was caught by it. It appeared that the surface of the shaft was rough and jagged, so as to be more likely to seize hold of clothing, and that this was not apparent when the shaft was revolving, and was unknown to the person injured. *Hdd*, that the question of contributory negligence was for the jury.

4. In an action for personal injuries caused by an iron shaft, a witness may, when shown the size of the shaft, refer to a piece of iron of about the same dimensions.

Department 1. Appeal from superior court city and county of San Francisco; Charles W. Slack, Judge.

Action by Herbert Sumner Davis against the Pacific Power Company for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

C. H. Wilson, for appellant. Geo. A. Rankin, for respondent.

VAN FLEET, J. Plaintiff recovered a verdict, and from the judgment entered thereon, and an order denying a new trial, the defendant appeals. Defendant, a corporation, is engaged in the business of leasing buildings for business purposes and furnishing steam power in connection therewith. During the year 1891, William Davis, the father of the plaintiff, occupied, under lease from defendant, the basement and first floor of one of its buildings at No. 28 Jessie street, in the city of San Francisco. These premises were used by William Davis as a factory for the manufacture of horse collars. The basement was an underground room, 52 by 25 feet. In one corner of this basement, where it fronts on Jessie street, there was a flight of stairs leading from the basement into Jessie street, and extending into the basement about 5 feet. Midway of the stairs were two large doors, consisting mostly of glass, by means of which the basement was largely lighted. The stairs and doors afforded the only means of entering the basement directly from the street, and without their use the basement was largely useless. There was no machinery in the basement when it was leased to William Davis, and he never used any therein, except some collar-blocking machines run by hand. He used certain machinery run by steam on the floor above the basement, the power to run this machinery being furnished by the defendant by means of a shaft which was in the second story of the building. The stairway in question was constantly used by William Davis and his employés in carrying goods to and from the basement and the street, and for other purposes. There was an inner stairway leading from the basement to the first floor. In September or October, 1891, the defendant entered upon the leased premises, and erected in this basement an iron shaft for the purpose of transmitting power from its power house on the west side

of the leased premises to a new building erected by it across Jessie street on the east. This shaft was a little over three inches in diameter, and ran throughout the entire length of the basement, and under Jessie street to the new building. It was put up along the west wall of the basement about 10 inches out therefrom, being supported by brackets attached to the sleepers of the floor above, and was carried over and along one side of the front basement stairs aforesaid, and through the casing of one of the doors above referred to. Where it ran over the stairway, it varied in height from about four or five feet above the lower step to a little over two feet above the step on which the doors rested, where it passed through the casing. When completed and connected, the shaft, which was kept running every day except Sundays, revolved at a high rate of speed. The plaintiff, at the time of receiving the injuries which form the basis of the action, was a lad of about 16 years of age. Shortly after the erection of the shaft, about November, 1891, he went to work in his father's collar factory as an employé. For a short time he was employed partly in the basement and partly on the floor above. During this time he had occasion to observe the running of the shaft. Subsequently he was set at work on the floor above, running some of the time a steam straw cutter, and at others a collar stuffer. On the 31st of December, 1891, plaintiff, while engaged at work on the straw cutter, got some thorns or thistles in his hand, and it became necessary for him to go to the light to get them out. By reason of obstructions on the floor where plaintiff was working at the time, there was no available light sufficient for his purpose, and the only place to which he could go without leaving the building was to the glass doors in the basement. He accordingly went into the basement, and stood on the steps in front of the basement doors along which ran the shaft, as above stated; and, while engaged in removing the thistles from his hand, his clothing was caught by the revolving shaft in some manner unknown to him, and he was drawn over and around the shaft, all his clothing stripped from him, and his body and limbs very badly broken and injured. When the shaft was stopped to remove plaintiff's clothing, it was discovered that that portion of the shaft over the stairway, and where plaintiff was caught, had upon its surface a great many rough and jagged projections and raised, sharp points, varying from a sixteenth to an eighth of an inch high, and of a character calculated to make the shaft at that point much more likely to catch clothing or other substance of the kind coming in contact with it, and consequently more dangerous in that respect. These projections had the appearance of having been produced by the grinding or scraping of tongs or other instruments used in handling or turning the shaft while placing it in position. They could

not be seen when the shaft was revolving, as it then appeared to have a smooth surface, and plaintiff was unaware of this condition of the shaft until after the accident. Up to the time of the injury to plaintiff, the shaft had been permitted by defendant to remain entirely unfenced and unprotected throughout the length of the basement and along the stairway, and open at all points to approach and contact by any one.

The contention of appellant is that, upon the facts disclosed, plaintiff is not entitled to recover, for the reasons—First, that at the time of the accident defendant owed the plaintiff no duty which required it to protect him from the dangers of its shaft; and, second, that the evidence shows that plaintiff was guilty of contributory negligence proximately conducing to his injury. The first proposition is subdivided by counsel into several minor heads, each of which is elaborately presented in the briefs, but they all converge eventually in the general proposition, as stated above, that defendant owed the plaintiff no duty in the premises which can render it liable in damages.

It is argued that at the time of the accident the plaintiff was wandering over the premises of his employer, for his own purposes or convenience, and not in pursuit of his employment, and away from where his duty called him; that, while so engaged, he was not on the stairway by right, but was a mere licensee; and that as such the defendant was under no obligation to guard him from injury. In the first place, this proposition rests upon the assumption of a right in the defendant itself to maintain its shaft upon the premises. The evidence upon this point is conflicting; that of plaintiff tending to show that defendant went upon the leased premises, and erected the shaft, without asking or receiving any permission from William Davis, the tenant; while the evidence on the part of the defendant is to the effect that, although defendant originally started in to erect the shaft without permission, William Davis afterwards assented thereto. In view of the fact, however, that the court below instructed the jury that, if defendant erected and maintained the shaft with the consent of William Davis, the plaintiff could not recover, the verdict must be regarded as negating such consent. The defendant was therefore a trespasser, or at best was itself a mere licensee, exercising a privilege at bare sufferance. As such, it is not in a position to question the plaintiff's right in the premises. But, even if it were, the evidence does not sustain defendant's position. As we view it the evidence shows a clear right in the plaintiff to be where he was. There is certainly nothing to show that he had been forbidden by his employer to go into the basement, or upon the stairs, or elsewhere, or anything to indicate that he was in any way restricted as to going about the premises for any necessary purpose. But it is said that

plaintiff was not on the stairway for a necessary purpose or in the performance of his duty. We think the jury were justified in saying that he was. It was not an absolute necessity, it is true, which took him there; but it is not necessary that it should have been. He needed a good light to remove the briars or thistles from his hands, and the basement doors afforded the most available place for the purpose, without going from the building, which he was not called upon to do. It is true that he did not go there directly in the line of his work, but it cannot be said that it was not in the line of his duty. He was suffering from pain and inconvenience from a cause which interfered with and prevented him from proceeding with his work, and it was his duty to his employer to remove the cause of his disability as speedily and conveniently as possible. In this view, his going to the basement and the stairway was as much in the interest of his employer as his own, and cannot therefore be justly characterized as a wandering over the premises solely for his own private ends. To hold, under the circumstances, that plaintiff was in the place where the injury occurred as a mere volunteer, and without right, would be taking an exceedingly narrow view of the rights of an employé. The case is quite distinguishable from the cases relied upon by the appellant. The plaintiff having a right to be where he was, the defendant owed him the duty of protection, whether or not the latter was rightfully maintaining its shaft upon the premises. *Donnelly v. Hufschmidt*, 79 Cal. 74, 21 Pac. 546.

It is said that William Davis, by failure to object to the erection and maintenance of the shaft, assumed for himself and his employés the risk of injury therefrom. But the evidence shows that William Davis did in effect, if not in terms, object to the introduction of the shaft. When he was informed that defendant was proceeding to erect the shaft, and was disturbing and interfering with his workmen in the basement, he went to its officers, and inquired into their purposes. He was informed substantially that he ought not to object, but, if he did, it would make no difference; in other words, that the shaft had to go in. He was assured that he would never know it was there, either from the space it would occupy, or the noise it would make; that defendant's servants would go in every day and look after it, and he (Davis) should never be disturbed by it. This evidence, it is true, is denied by defendant, but the jury evidently believed and acted upon it. The shaft was admittedly put in and maintained solely for the use and benefit of the defendant, and was in no way connected with or used by William Davis. It was, furthermore, wholly under the control and management of defendant, as was likewise the space that it occupied. Under such circumstances, the tenant cannot be

held to have assumed any of the risks incident to its maintenance. Where the landlord retains or has control of a portion of leased premises, the responsibility rests with him to see that no injury results to those having rights there by reason of the manner in which such portion of the premises is occupied or used; and, if he puts dangerous machinery thereon, it is his duty to fence it, or use other proper means to protect those rightly in its vicinity. These principles are thoroughly well settled. 2 *Shear. & R. Neg.* § 719; *Stewart v. College*, 12 Allen, 58; *Glickauf v. Maurer*, 75 Ill. 289; *Jessen v. Sweigert*, 66 Cal. 182, 4 Pac. 1188; *Readman v. Conway*, 126 Mass. 374.

On the question of contributory negligence, we think the case was a proper one for the jury. It is only where the undisputed facts are such as to leave but one reasonable inference, and that of negligence, that the court is justified in taking the question from the jury. It is not enough that the evidence be without conflict. If, upon the facts disclosed, there is room for a reasonable deduction of proper care on the part of the person injured, the case is one for the jury, and the court is not justified in substituting its judgment for that of the jury, and withdrawing the question from their consideration. *Fernandez v. Railway Co.*, 52 Cal. 45; *Whart. Neg.* § 420. In *Shierhold v. Railroad Co.*, 40 Cal. 447, it is said: "The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury, and pass upon the facts; and the nonsuit should only be granted in such cases where the evidence of the misconduct on the part of the injured party is so clear and irresistible as to put the case on a par with those cases where a nonsuit is granted for a failure to introduce evidence sufficient to go to the jury upon some point essential to the plaintiff's case. The fact must be so clear that, looking upon the plaintiff's case in the most favorable light, and giving him the benefit of all controverted questions, the court can see that a verdict in his favor must necessarily be set aside." And see *Van Praag v. Gale* (No. 15,851; decided by this court June 6, 1895) 40 Pac. 555. Tested by these principles, we cannot say the evidence clearly or necessarily discloses negligence on the part of the plaintiff. It is true that plaintiff knew of the existence of the shaft along the stairway, and was aware in a general way of its dangerous character, and it was his duty to look out for it. It was his duty to use care, knowing of the danger; but he says that he did. He testifies that he stood at what he considered a safe distance from the shaft, but that, the first thing he

knew, he was caught and jerked over it. Just how the thing occurred cannot be known, but it could be accounted for on many reasonable theories other than that of plaintiff's negligence. A gust of wind may have blown his apron against the shaft, or a momentary dizziness may have seized him. Even if, in a moment of forgetfulness, he moved too near the shaft, and was thereby caught, it would not necessarily be negligence. People are liable to lapses of memory with reference to facts with which they are daily confronted. It would be for the jury to say whether such lapse of memory was negligence, taking into consideration all the circumstances. Furthermore, it appears that the danger from the shaft was not wholly visible or apparent. The rough and jagged surface of the shaft at the point where plaintiff was caught tended, as shown by the evidence, to make the shaft at that point much more likely to seize and hold clothing or other pliant substance than it would otherwise have been. This condition of the shaft was not visible when the shaft was revolving, and was unknown to plaintiff. How far this roughened surface may have aided the natural centripetal tendency of the revolving shaft, and thus contributed to the injury, it is impossible to say. It may well be that the jury considered that, but for this condition of the shaft, the degree of care exercised by plaintiff would have avoided the accident. Plaintiff was only called upon to use such circumspection as would avoid those dangers which were apparent.

There are no other points requiring special consideration. It was not error to permit the witness Peterson, in illustration of his testimony with reference to the size and condition of the shaft, to refer to a piece of iron of about the same dimensions. It was not pretended that it was a model, and the jury were so expressly informed; but it was simply used to illustrate more clearly the testimony of the witness. For this purpose it was proper. The instructions, taken together, fully and fairly laid the case before the jury. If anything, they were more favorable to defendant than to the plaintiff. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(5 Cal. Unrep. 64)

Ex parte MEYER. (S. F. 57.)

(Supreme Court of California. June 27, 1895.)

PERJURY—EVIDENCE.

On an examination for perjury it appeared that defendant, on his voir dire as trial juror, stated, when asked if he knew the proprietor of a certain gambling place, that he had nothing to do with "such places"; that at the place referred to gambling prohibited by statute was carried on; that defendant visited places where gambling not prohibited by statute was carried on. *Held*, that he was not guilty of perjury.

Julius Meyer was arrested for perjury, and makes application for a writ of habeas corpus. Allowed.

Andrew J. Clunle, for petitioner. Edgar D. Peixotto, for respondent.

BEATTY, C. J. The petitioner has been held to answer on a charge of perjury, and asks to be discharged, upon the ground, among others, that he was committed without reasonable or probable cause. The evidence adduced before the committing magistrate is, in my opinion, wholly insufficient to sustain the charge as laid in the information, or any charge. It seems that one Paulsell was on trial in the superior court on a charge of robbing the proprietors of a faro bank. The petitioner, being a member of the regular panel of trial jurors in attendance upon that department of the superior court, was called into the jury box and examined on his voir dire touching his qualifications as a juror. He was questioned by the prosecution, and passed. Counsel for defendant then asked him the following question, among others: "Do you know a man named Carrall, or Ross, or Webber, the men who were proprietors of the gambling house at 620 Market street?" To which he answered: "No, sir; I have nothing to do with such places." The charge is that the latter part of this answer was false; that in fact petitioner did have something to do with "such places." It appears from the evidence that the place kept by Carrall, Ross & Webber at 620 Market street was a clandestine and illicit gambling house, where a game of faro was conducted. The game of faro, as well as all banking and percentage games, are prohibited by statute, and those who conduct and carry them on are subjected to heavy penalties of fine and imprisonment. Pen. Code, § 330. Such games are necessarily conducted in secret, and the places where they are carried on are guarded by every precaution to prevent discovery and prosecution. And not only are they who conduct the games engaged in an unlawful occupation, but those who go there to bet are also guilty of a misdemeanor. Such, in short, was the character of the place with which the petitioner said he had nothing to do. To prove this declaration false, evidence was adduced at the examination to the effect that the petitioner had been in the habit of resorting frequently to the Thalia and other places, where, in private club rooms, the game of poker was played, and where he usually joined in the game. And it also appeared that he had acted as a "booster," a technical term describing a person who, in the interest of the club-house proprietor, takes a hand in a game to keep it from stopping for want of a sufficient number of players, and who is furnished money to bet with, and allowed to keep his winnings as compensation for his services. All this, however, merely tends to prove that Mr. Meyer's pursuits are not of a laudable character; but it does not prove that

the Thalia is such a place as the gambling house at 620 Market street. The difference between the two places is just exactly as broad as the difference between legality and illegality, or, in other words, since we have none but statutory crimes, it is as broad as the difference between guilt and innocence. Faro is a game prohibited under heavy penalties; its conductors and patrons are criminals; and the place where it is carried on is a criminal resort. Poker, played for money, however objectionable in fact, is, in the eyes of the law, as innocent as chess, or any game played for simple recreation; and its votaries, and the places where it is played, are not criminal. There is, therefore, no inconsistency between the declaration of the petitioner that he had nothing to do with such places as a faro bank and the fact that he did frequent club rooms where poker was played for money. And, since there is neither evidence nor accusation of any other false statement made by him, it follows that he cannot be held for perjury, and must be discharged from custody. It is so ordered.

(5 Cal. Unrep. 66)

BEDELL v. SCOGGINS et al. (No. 18,416.)
(Supreme Court of California. June 27, 1895.)

TRUSTS—PAYMENTS BY TRUSTEE AFTER DEATH OF CESTUI QUE TRUST—DECLARATIONS.

1. Defendant gave deceased a note, for money which he owed her, by which he promised to pay \$400 for her funeral expenses or to return it to her on demand. During her last sickness, deceased handed the note to defendant, saying, "Here is something for you." *Held*, that an express trust, to expend the money, after her death, for her funeral expenses, was created.

2. Where deceased gave money to defendant in trust to expend, after her death, for her funeral, and he thus expended it, her administrator cannot recover such sum from him, where all preferred claims have been paid, and it does not appear that the probate court has disapproved of the payments made by him, even admitting that claims against a decedent's estate cannot properly be paid without the sanction of the probate court.

3. Declarations of decedent, not against interest, relative to a transaction with defendant, are not, in an action by her administrator, admissible in his favor.

Commissioners' decision. Department 1.
Appeal from superior court, Colusa county;
John F. Ellison, Judge.

Action by I. M. Bedell, administrator of Henrietta R. Cooke, deceased, against J. N. Scoggins and others. Judgment for defendants. Plaintiff appeals. Affirmed.

H. M. Albery and John T. Harrington, for appellant. U. W. Brown, W. G. Dyas, and Edwin Swinford, for respondents.

BELCHER, C. On the 30th day of December, 1892, Henrietta R. Cooke sold and conveyed to the defendant J. N. Scoggins a lot of land in the town of Colusa. The purchase price of the lot was \$3,000, and of this sum the defendant at once paid \$1,200, by assuming and discharging an in-

debtedness of Mrs. Cooke in that amount, which was secured by a mortgage on the property. On the 26th of February, 1893, Mrs. Cooke died, and thereafter the plaintiff was duly appointed administrator of her estate by the superior court of Colusa county, and qualified as such. In April, 1893, the plaintiff commenced this action to recover the sum of \$1,800, alleged to be the balance of the purchase money still due and unpaid, and to enforce a vendor's lien therefor on the lot. The answer denied that any part of the purchase money was due and unpaid, and alleged that the purchase price, to wit, \$3,000, was paid in full on December 30, 1892. The case was tried by the court without a jury, and, among other things, the court found: "That said sum of three thousand dollars was fully paid and liquidated by said defendant J. N. Scoggins in the manner and according to the agreement and understanding at the time of said purchase had between said Henrietta R. Cooke, since deceased, and said defendant J. N. Scoggins. That, at the time of the institution of this suit, there was nothing due or unpaid on account of the purchase price of said lot of land and premises, but that the whole of said purchase price had been fully paid and discharged." Judgment was accordingly entered that the plaintiff take nothing by his action, from which, and from an order denying his motion for a new trial, he appeals.

The appellant contends that the findings were not justified by the evidence, and that numerous errors of law were committed by the court in the rejection of offered evidence, and hence that his motion for new trial should have been granted. As to \$1,400 of the purchase money, there was direct and positive testimony that that sum was paid to Mrs. Cooke on the day the deed was executed. Scoggins testified: "I paid Mrs. Cooke \$1,400, and gave her my note for \$400 on the 30th of December, 1892,—note and receipt,—for her place; and released a mortgage on that place, and took it upon my old place, making altogether \$1,200, and the \$1,400, making \$2,600. My wife was present when the money was paid. No one else was present. The note was, in case she dies, to have the money ready for her funeral expenses. This paper [identifying] is the note, signed by me. On the opposite side is a receipt which I drew up to give her in place of the note, on the start, and she said, 'Maybe you had better give me a note.' The receipt was drawn first. Then the note was drawn, on the back of the receipt. They were drawn on the 30th of December, 1892." Mrs. Scoggins testified: "I am the wife of the defendant J. N. Scoggins. Was in Colusa on the 30th day of December, 1892; was at Mrs. Cooke's residence on that day, when certain moneys were paid to Mrs. Cooke, on the purchase price of this land. I saw Mr. Scoggins pay her the money. He came in and paid her the

money. He handed it out by the hundred, and laid it in her lap. He handed out \$1,400, and then they were talking about the other \$400; and, as they were talking about that, I went out to the old part of the house, and was gone a few minutes, and when I came in Mr. Scoggins was reading the receipt or note, and he gave it to her, and she said that was satisfactory to her." J. E. Farris testified: "I reside in Colusa, and am a carpenter. Was in town in January, this year. Knew Mrs. Cooke in her lifetime. Know about the time of the sale of her property to Mr. Scoggins. I did work on the place. About the 7th of January, I had a conversation with Mrs. Cooke, in her house, concerning the transaction. Q. You may state about that conversation. A. Well, she came to the door and beckoned me, and I went in, and she said, 'Why should I not be one of the happiest women on earth?' I said I didn't know why. She said she had sold her property, and had plenty to keep her as long as she lived, and that she had the use of those two rooms as long as she paid rent on them, and had plenty to keep her as long as she lived, and that she had made necessary arrangements for her funeral expenses. Q. Did she say anything about her receiving her money from the property? And, if so, what did she say about that? A. She said she had received her money." To meet and overcome this evidence, the plaintiff proved that, after the sale of her property, Mrs. Cooke deposited no money in the bank at Colusa, and sent none, even through the bank, or by express, or by mail; and that, at the time of her death, she had no money in her possession, except \$85, contained in a purse which a Mrs. Wescott brought and delivered to her during her last illness.

It is earnestly urged that, in view of all the circumstances shown to have attended the transaction, the defendant's evidence as to the payment of the \$1,400 was wholly incredible, and ought not to have been believed. But while, of course, it seems strange that the money, if paid, should have disappeared as it did, and no one be able to account for it, still, the question as to whether the evidence in regard to the payment was true or false was a matter for determination by the trial court, and, under a well-settled rule, its conclusions cannot be disturbed in this court.

As to the remaining \$400, defendant introduced in evidence a receipt and note reading as follows:

"Colusa, December 30, 1892. Received from Mrs. H. R. Cooke four hundred dollars, to be used as funeral expenses or returned to Mrs. H. R. Cooke on demand. \$400. [Signed] J. N. Scoggins."

"\$400. Colusa, December 30, 1892. After her [Mrs. Cooke's] death, or at her [Mrs. Cooke's] demand, I promise to pay the sum of four hundred dollars, in United States

gold coin, to the aid and assistance of her [Mrs. Cooke's] funeral expense, or at her [Mrs. Cooke's] demand. Made this 30th day of December, 1892. J. N. Scoggins, Marshal. Colusa, Cal."

Scoggins testified that he drew the receipt first, and offered it to Mrs. Cooke, and she said, "Maybe you had better draw up a note, so in case anything happens to you I will have it to show," and that he then drew the note on the other side of the same paper; that he gave the paper to her, and she said she would return it to him if anything happened; and that, after she was stricken down in her last illness, she handed the paper back to him, saying: "Here is something for you." Scoggins further testified that during her illness Mrs. Cooke gave him \$35 in money, stating that she wished him to see that her doctor was paid; and that he had paid the doctor and a small bill for medicines and her funeral expenses, the several sums aggregating \$435, for which he produced receipts. Appellant contends that these payments by Scoggins were made without authority, and constituted no part of the purchase money, and therefore no defense to the action; that the adjustment of claims against the estate of a deceased person, whether created for funeral expenses or otherwise, is a matter of exclusive probate jurisdiction; and that, had Mrs. Cooke signed the alleged written authority, it was not within her power to create a valid trust for the payment of any indebtedness after her death, without the sanction of the probate court.

Under our statute, an express trust relating to personal property may be created by parol (Civ. Code, §§ 2221, 2222), and the evidence clearly shows that such a trust was created as to the \$400. The delivery and return of the note were equivalent to a payment of the money by defendant and a return of it to him as trustee. The trust was not extinguished by the death of the trustor, but was intended to be, and apparently was, executed in good faith after her death. Now, conceding that no claim against the estate of a decedent can properly be paid without the sanction of the probate court, still, when, as in this case, preferred claims are paid, and it does not appear that any such claims remain unpaid, or that the probate court has disapproved the payments, we do not think the representative of the estate should be permitted to recover back from the trustee the money so paid. To hold otherwise would require the defendant to pay a second time, and would work out a wrong and injustice, which neither law nor equity will permit, if it can be avoided.

It is objected that, under the answer, this defense was inadmissible, but we think otherwise. The answer alleged full payment on the 30th of December, 1892; and, under that issue, it was competent to show

how and when the payment was consummated. During the trial numerous questions were propounded by the plaintiff to his witnesses as to what Mrs. Cooke had said after the sale in regard to its terms, the payments made and to be made, etc. The questions were objected to as irrelevant, incompetent, and immaterial, and the objections were sustained, and exceptions reserved. It does not appear what any of the answers would have been; but, assuming that they would have tended to support the theory of plaintiff, they were clearly inadmissible, the declarations not having been made against the interest of the declarant. Code Civ. Proc. §§ 1853, 1870, subsec. 4. As said in *Fischer v. Bergson*, 49 Cal. 294: "These declarations were not in disparagement of the title of the declarant. They were not offered by the defendant, but by the plaintiff himself, to strengthen his own claim. They had no greater force as evidence than they would have had had the decedent brought this action in his lifetime, in which case the inadmissibility of such declarations would be apparent." We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(107 Cal. 541)

PEOPLE ex rel. LYNCH et al. v. HARRISON. (No. 19,546.)

(Supreme Court of California. June 28, 1895.)

WRITS—SERVICE BY PUBLICATION—SETTING ASIDE VOID JUDGMENT—PUBLIC LANDS—APPLICATIONS FOR SCHOOL LANDS—CURATIVE ACTS.

1. In an action by the state to foreclose the interest of a purchaser of school lands for default in the payment of installments of the price, publication of summons under Pol. Code, § 3549, must be based on an affidavit and order of publication, as in other cases.

2. Where, on motion to set aside a default judgment, made three years after its rendition, the judgment plaintiff does not deny the allegations that defendant did not appear in the action, and that no service of summons was had on him, but merely questions the necessity for an affidavit and order of publication in case of service by publication, and evidence, admitted without objection, shows want of service of summons, the judgment should be set aside as void.

3. Though, in an action to vacate a second certificate of purchase of school lands, relator relies on an application of purchase valid as of its date, he may take advantage of the curative acts of 1870 and 1872, which were general acts, without having pleaded them.

4. Act 1870, curing defective applications for the purchase of lands from the state, applies to applications for the purchase of lands, though at the time of the passage of the act the legal title to the land had not yet vested in the state.

Department 1. Appeal from superior court, San Bernardino county.

Action on the relation of John Lynch and others against Hannah E. Harrison. There was a judgment for defendant, and relators appeal. Reversed.

W. J. Curtis, J. C. Lynch, and M. L. Wicks, for appellants. W. F. Henning and H. S. Hazard, for respondent.

GAROUTTE, J. This is an action to cancel a second certificate of purchase of school lands, the state having made a prior sale on which the patent has issued. The township survey, embracing the land in controversy, was approved by the United States surveyor general for California September 18, 1868, and the map was duly filed in the United States land office July 7, 1869. John Mullan made application to the surveyor general to purchase the land January 15, 1869; and upon August 18th of the same year the surveyor general of the state applied to the United States land office for said land. About August 21, 1869, the surveyor general approved Mullan's application, and issued to him the customary certificate, which, in due time, Mullan presented to the county treasurer of San Bernardino county (in which county the land was situated), and paid the treasurer the full amount due thereon, to wit, 25 per cent. of the principal and one year's interest; and thereupon the register of the land office issued to Mullan a certificate of purchase for the land. Mullan's application to purchase was defective, in this: that the affidavit accompanying the same failed to contain a description of the land sought to be purchased, as provided by the statute in such cases. Upon the 1st day of September, 1874, the land involved was listed to the state, and Mullan made all payments due thereon, up to and including the year 1876. In the year 1880 an action was brought by the district attorney of San Bernardino county to foreclose Mullan's interest under his certificate of purchase, based upon his failure to make the payments demanded by the statute, and this action went to judgment, as prayed for in the complaint, January 4, 1881, and a copy of such judgment was filed in the land office. Upon December 21, 1882, respondent, Harrison, made application to purchase the land, and the certificate of purchase which formed the subject of this litigation was issued to her. December 29, 1884, upon motion of Mullan's successor in interest, the default judgment of foreclosure was set aside and vacated, upon the ground that the court had not acquired jurisdiction of the defendant, Mullan, no service of summons having been made upon him, either actual or constructive; and subsequently thereto the action was dismissed upon motion of the district attorney of said San Bernardino county. Patent to the land issued to Mullan's successor in interest September 20, 1886. Judgment went for defendant, Harrison, in the trial court, and this appeal is taken therefrom upon the judgment roll without a bill of exceptions.

1. The judgment of foreclosure against Mullan was set aside, upon motion, as being a void judgment; but respondent insists that the judgment was not void, and that a publication of summons in this character of action, under section 3549 of the Political Code, is not required to be based upon an affidavit and order of publication, as in other cases. Whatever might be the decision of the court upon a construction of that section of the Code, if it were presented to us as a new question, is immaterial, for it is now too late to change a rule of construction which has been recognized and approved for many years in many cases. *People v. Applegarth*, 64 Cal. 229, 30 Pac. 805; *People v. Mullan*, 65 Cal. 396, 4 Pac. 343; *People v. Greene*, 74 Cal. 400, 16 Pac. 197; *Hyde v. Redding*, 74 Cal. 501, 16 Pac. 380; *People v. Pearson*, 76 Cal. 400, 18 Pac. 424. Under these decisions, the decree rendered against Mullan was void, as being without the jurisdiction of the court, and should have been set aside, if appropriate proceedings had been had for that purpose.

The question still remains, had the court the power to set this judgment aside three years after its rendition, upon motion, upon evidence presented outside the judgment roll? The case of *People v. Temple*, 103 Cal. 447, 37 Pac. 414, in many respects, both as to the facts and the law, is similar to the case at bar; and the principle of law there declared that the court has no power to set aside a judgment upon evidence not found in the judgment roll, more than six months having elapsed since its rendition, must be held controlling as authority. But this case is distinguishable from that case in other ways, and an additional principle of law is here involved. In the discussion of this question under the authority of the *Temple* Case, declaring such action void, let us eliminate from the record the order of the court setting aside the judgment of foreclosure rendered against Mullan. In this case we find an allegation in the complaint in reference to such judgment, to the effect that Mullan never appeared in said action, nor was summons ever served upon him personally, nor was any affidavit ever made by any one to obtain an order of publication of summons, nor was any order ever made in said action authorizing the service of summons by publication. By her answer, respondent denies none of these allegations, but simply avers that summons was duly served by publication, as required by section 3549 of the Political Code. It is plainly apparent that no issue was made between these parties as to the facts pertaining to the service of summons. No denial is made of the allegations of the complaint in this regard, but respondent, both by her denials in the answer and by her proof, raises a question of law as to the character of service required by said section 3549. In addition to these conditions presented by the pleadings, the court found as a fact that the allegations of the complaint, as to the matter of service, were true, and that

the only service upon Mullan consisted of publication of a summons, not based upon any affidavit or order. It must be borne in mind that the present appeal comes to us direct from the judgment, without a statement or bill of exceptions. No evidence is here, and by the facts found by the court we must be guided and controlled. Upon this judgment roll it therefore appears that the judgment of foreclosure rendered against Mullan was void, and this brings the case directly in line with the principle of law so clearly and forcibly declared in *Hill v. Cab Co.*, 79 Cal. 191, 21 Pac. 728. We quote: "But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where a judgment is void upon its face. In the present case the findings establish the fact that there was no service of summons upon or authorized appearance by the defendant, and none of the evidence is brought up, nor does the question appear to have been raised by exception or demurrer, or in any other way. The facts, therefore, must be taken to be established by the record beyond all controversy, and upon such facts the law is that the judgment is void." The foregoing quotation is taken from an action brought upon a domestic judgment of a court of general jurisdiction, in which action defendant set up that he had not been served with summons in the original action, and that, therefore, the judgment was void for that reason. The court found his claims to be true, and that no service was ever made upon him, and upon appeal the case was decided upon the law as above declared. In its decision the court assumes that evidence to impeach the judgment by showing a want of service of summons would not be admissible, but declares in effect that, if the parties stipulate that there was no service, or the evidence is admitted at the trial to that effect, without objection, it is then established that the judgment is void, and that, whenever such fact is brought to the attention of the court, it is the duty of the court to so declare. A judgment roll is received as evidence in an attack upon the validity of a judgment, because it imports absolute verity; yet it is no more conclusive, as to the fact of service or nonservice of summons, than the stipulation of both parties to the litigation to that effect, or the admission of evidence to that point, upon the offer of one party, and without objection by the other.

For the foregoing reasons, we conclude that the record in this case shows the judgment of foreclosure against Mullan to have been rendered without service of summons, and that such judgment is therefore void.

2. The case then presents itself to us upon the one question, was Mullan's application

void by reason of the defective affidavit attached thereto? That the affidavit was defective in substantial parts has been decided by this court in various cases. In addition to the complaint and answer, respondent, Harrison, filed a cross complaint, setting out therein her own title, and the invalidity of the Mullan title, and praying for appropriate relief. Respondent now insists that, inasmuch as appellant in its complaint has relied upon a valid application to purchase as of its date, it cannot now, in the absence of a pleading to that effect, depend upon certain curative acts, passed subsequent to the date of the application, to make valid an application otherwise void. This point is not well taken. These curative acts of 1870 and 1872 were essentially general acts, and it was not necessary to either allege their existence or prove them at the trial.

It is further contended that neither the curative act of 1870 nor that of 1872 can be invoked in this case to validate a defective application to purchase, for the reason that the title to this land did not vest in the state until its listment thereto in the year 1874, and that neither of these acts covered lands to which the state had no title at the date of their respective passage. In construing the act of 1872 in *Land Co. v. Moir*, 83 Cal. 101, 22 Pac. 55, and 23 Pac. 359, a minority of the court held such to be the true construction of that act. The views there expressed did not obtain the assent of a majority of the court, and for that reason may not be considered binding as authority; and when we consider the doctrine of *Rowell v. Perkins*, 56 Cal. 219, and *People v. Noyo Lumber Co.*, 99 Cal. 456, 34 Pac. 105, the soundness of these views, so promulgated, may well be doubted. But, whatever may be the true construction of the act of 1872, there can be no doubt as to the applicability of the act of 1870 to the facts of the present case; for, as we view that act, the location of the legal title at the date of its passage is not an element entering to any degree into its construction, when applied to any particular state of facts. The act is purely remedial in its character, and should receive a liberal construction. In the absence of vested rights, the legislature had the power, and it undoubtedly was their intention, to validate and ratify all defective applications to purchase land from the state, previously made in good faith. By its terms, the act applies to all applications, except where conflicting interests have arisen. The act does not purport to deal with titles, but solely with applications to purchase. In the present case, Mullan made an application to purchase this land. He was personally qualified to make the application, and had the right to make it. The state recognized these facts and his right, and entered into a contract of purchase with him for the land, and received part payment thereon. It was the very case present in the mind of the legislature when the act was passed, and to remedy

defective applications like that of Mullan was the purpose of the act.

For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

(5 Cal. Unrep. 71)

DELAFIELD v. SAN FRANCISCO & S. M. RY. CO. et al. (No. 15,911.)

(Supreme Court of California. June 27, 1895.)

CONTRACT—PLEADING—EVIDENCE—WAIVER OF OBJECTION.

1. A complaint alleging performance of services for defendant and others, at their request, and agreement of defendant to pay therefor, supports a judgment against him alone.

2. One who agreed to pay in stock and refuses to deliver it is liable for the amount in money.

3. Where the complaint alleges the performance of service, and a promise to pay therefor a certain sum, and the answer alleges a contract to pay a certain amount per month in stock, and admits that a certain number of shares thereof are due, objection to the admission of a contract like that alleged in the answer, except providing for a smaller payment, cannot for the first time be made on appeal, on the ground that it varied from that alleged in the complaint.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Robert H. Delafield against the San Francisco & San Mateo Railway Company and others. Judgment for plaintiff against said company, and it appeals. Modified.

Morrison, Stratton & Foerster, for appellant. A. Barnard, for respondent.

VANCLIEF, C. Plaintiff sues as assignee of Harding & Forbes, attorneys at law, to recover \$1,700 for professional services alleged to have been performed by the latter for the San Francisco & San Mateo Railway Company and the S. S. Construction Company (corporations), at their instance and request, and for which, it is alleged, the former company and defendant Joost promised to pay said sum of \$1,700. At the close of the evidence, counsel for defendants moved a nonsuit in favor of the S. S. Construction Company, whereupon counsel for plaintiff, by leave of court, and without objection by any one of the defendants, dismissed the action as against the defendants Joost and the S. S. Construction Company, and prayed for judgment against the San Francisco & San Mateo Railway Company alone, for the whole sum demanded, and this prayer was granted by the court. The San Francisco & San Mateo Railway Company brings this appeal from the judgment upon the judgment roll with a bill of exceptions as to matters of law and fact.

1. The principal point made by appellant is that the complaint does not support the judgment. No doubt the S. S. Construction Com-

pany and Joost were improperly joined as defendants; but, since the misjoinder was not pleaded, and the action as to them was dismissed without objection, the only question to be considered under this head is whether the complaint supports the judgment against the appellant alone; and I think it should be held that it does. It is alleged in the complaint that Harding & Forbes performed certain services for appellant and the S. S. Construction Company at their instance and request, and that appellant "agreed to pay therefor the sum of seventeen hundred (1,700) dollars."

2. It is contended that the evidence does not justify the finding that the appellant agreed to pay Harding & Forbes in money, but only that it agreed to pay in capital stock of the appellant corporation. It is agreed that the contract by which Harding & Forbes were retained, and under which they rendered the services in question, is correctly expressed in a recorded resolution of the directors of the appellant corporation, as follows: "Resolved, that R. T. Harding and Charles H. Forbes, copartners under the firm name of Harding & Forbes, attorneys and counselors at law, be retained as the attorneys of the company until the 1st day of January, 1892, and that they receive as compensation for their services the sum of \$100 per month, payable in the capital stock of the company, at the rate of \$50 per share, from the 1st day of January, 1891, until the bonds of the company are sold; and then and thereafter the said attorneys shall receive the sum of \$100 per month in cash, payable on the 1st day of each and every month, until the expiration of said term. Said services shall not include the active prosecution or defense of any litigation in which the company may become engaged." It was proved, without conflict of evidence, that the bonds mentioned in the contract were never sold; that for the first 2½ months of the year 1891 the appellant issued and delivered to Harding & Forbes five shares of its stock in payment of their salary to March 15th, but ever thereafter refused to deliver to them any more stock, although requested by Harding & Forbes so to do after more stock became due. The legal consequence of such refusal to pay in stock, according to the contract, was that appellant became obligated to pay the salary of \$100 per month in money. *Cummings v. Dudley*, 60 Cal. 333, and authorities there cited. It is true that the contract was not fully stated in the complaint, as it should have been; but it is alleged in the answer of defendants that appellant "retained said Harding & Forbes as the regular attorneys of said company, and agreed to pay them * * * for their services the sum of \$200 per month, payable in the capital stock of the company at the rate of \$100 per share"; and it is further alleged that the salary at that rate was paid in stock up to March 15, 1891; and it is further expressly admitted "that there

is now due and owing to said Harding & Forbes 19 shares of the capital stock of said company." Besides, there was no objection to the admission in evidence of the contract as recorded in the minute book of the appellant corporation, which, by the way, proved to be more favorable to appellant than that set out in the answer of defendants, inasmuch as it fixed the salary of Harding & Forbes at \$100 per month, whereas it was stated in the answer to have been \$200 per month. Under these circumstances, the appellant should not be heard to object to the contract here for the first time, on the ground that it varies from that alleged in the complaint. *Cummings v. Dudley*, supra.

3. Upon the admitted and indisputable facts of the case, the plaintiff is entitled to judgment for \$950, with interest thereon from January 1, 1892, and his costs in the court below, and no more. That is to say, he is entitled to recover the salary of Harding & Forbes from March 15, 1891, until January 1, 1892,—9½ months,—at \$100 per month, with legal interest and his costs in the trial court, but should pay the costs of this appeal. And it clearly appears that a new trial could not lawfully result in a different judgment. The only ground upon which plaintiff claimed judgment for the additional sum of \$750 was that the defendant Joost had individually promised to take from Harding & Forbes 15 shares of capital stock of appellant, and to pay them therefor \$50 per share, and had failed to do so; but it was admitted by plaintiff, at the trial, that appellant was not responsible for any default of the defendant Joost.

Other points urged by appellant are considered irrelevant to the merits of the appeal. I think the cause should be remanded, with instruction to the lower court to modify the judgment in accordance with this opinion.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, and the court below is instructed to modify the judgment in accordance with said opinion, the costs of the appeal to be taxed to respondent.

(5 Cal. Unrep. 74)

DAGGETT v. GRAY et al. (No. 19,410.)¹
(Supreme Court of California. June 27, 1895.)

ACTION BY RECEIVER—CONVERSION OF PROPERTY
—SUFFICIENCY OF COMPLAINT.

1. The complaint in an action by a receiver, as such, for the conversion of property during his receivership, must allege that his insolvent was the owner or entitled to possession of the property.

2. A complaint in an action by a receiver, as such, which alleges that the plaintiff was, on a certain date, by order of court in a certain suit against his insolvent, appointed receiver of the insolvent's property, with the right to take possession of and to sue for and demand the same,

3 Rehearing granted.

sufficiently avers plaintiff's appointment as receiver, and his right to sue.

8. In an action for conversion of property by unlawful detention, where the original possession was lawful, the complaint must allege a demand and refusal.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Henry Daggett, as receiver, against Will M. Gray and others for conversion of property of his insolvent. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

Parrish & Mossholder and Walter Rose, for appellants. Johnstone Jones and D. L. Withington, for respondent.

SEARLS, C. This action is brought by the plaintiff, as the receiver of one E. M. Brickey, to recover damages in the sum of \$5,500 for the conversion by defendants of a stock of drugs, claimed to have belonged to said E. M. Brickey, and to which plaintiff, as receiver, claimed to be entitled. The cause was tried by the court without a jury, and judgment rendered in favor of plaintiff for \$915 damages, from which judgment, and from an order denying their motion for a new trial, defendants appeal.

Defendants interposed a demurrer to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action, which demurrer was overruled by the court, and the ruling is assigned as error. The complaint may be epitomized thus: By an order of the superior court made March 17, 1893, in the case of Mollie S. Brickey, Plaintiff, vs. Enoch M. Brickey, Defendant, plaintiff was appointed receiver of the property of defendant, with authority to take and keep possession of the property, receive rents, etc., to sue for and demand the property of said Brickey, and to demand from Brickey or Braun & Co. the stock and fixtures in the drug store in the Hotel Brewster building, etc. He filed a bond and duly qualified. On said 17th day of March, 1893, the plaintiff, as such receiver, was the owner and lawfully entitled to the immediate possession of a stock of goods in the drug store in the Hotel Brewster building, in San Diego. That on said last-named day "defendants [who are averred to be copartners under the name of F. W. Braun & Co.], then being in possession of said goods, unlawfully converted and disposed of the same to their own use," to plaintiff's damage, etc.

From the foregoing it will be observed that the receiver brought the action in his own name, as receiver, which he well might do under section 568 of our Code of Civil Procedure. There are a few cases in which a trustee, by reason of the title to the trust property being vested in him under the law, may sue in his individual name without any allegation or reference to the fiduciary relation which he occupies. This is notably so

in the case of an assignee in insolvency. *Dambmann v. White*, 48 Cal. 439. So, too, an executor, administrator, receiver, or other trustee may in like manner sue in his own name, where the contract sued on has been entered into with him, and no extrinsic facts need be alleged. But in those cases where the obligation is not incurred to him directly, and in which title to the subject-matter is not vested in him by operation of law, and the trustee is called upon to protect trust property, or, otherwise, to bring an action for the benefit of the beneficiary, when no contract has been made with him in his own name, and when his right to represent the beneficiary will not appear without showing the facts which create the trust, then not only the facts must be pleaded showing the cause of action, but also the authority of the trustee to enforce it. *Bliss*, Code Pl. §§ 262-264, and cases there cited. In the present case there is probably a sufficient allegation of the appointment of plaintiff as receiver of the property of Enoch M. Brickey, and of his right to bring the action. There is not, however, any distinct allegation that Brickey ever owned or possessed the property claimed to have been converted by the defendants. If Brickey was not the owner thereof, the plaintiff could not have become the owner, or entitled to the possession thereof, by virtue of his appointment as receiver, and it is in this latter capacity that he brings the action. "In general, a receiver, by virtue of his appointment, is clothed with only such rights of action as might have been maintained by the persons over whose estate he has been appointed, and to whose rights, for purposes of litigation, he has succeeded. It is essential, therefore, in order to sustain a suit brought by him in his representative capacity, that he should allege and set forth the equities of the parties whose rights of action he represents," etc. *High*, Rec. (3d Ed.) § 201; *Falkenbach v. Patterson*, 43 Ohio St. 359, 1 N. E. 757; *Coope v. Bowles*, 28 How. Prac. 10, 42 Barb. 87. So far as is shown by the complaint in this case, the defendants are liable to the plaintiff here to the same extent, and no greater, than they would have been to Enoch M. Brickey, had no receiver been appointed; and the complaint should show that but for such appointment Brickey would have had a cause of action against the defendants, which, by virtue of his appointment, plaintiff is entitled to maintain. Again, the complaint fails to show that the taking of the property by defendants was unlawful, and yet it fails to aver a demand for its return before suit brought. In cases where the original possession of property is acquired by tort, no demand is necessary before suit brought. *Palge v. O'Neal*, 12 Cal. 496. But where the original possession is lawful, and the detention only is unlawful, a demand is necessary before the

action can be maintained. *Campbell v. Jones*, 38 Cal. 507; *Boulware v. Craddock*, 30 Cal. 190; *Sargent v. Strum*, 23 Cal. 361; *Ledley v. Hays*, 1 Cal. 160. We are of opinion the complaint was fatally defective.

The judgment and order appealed from should be reversed, and the court below directed to sustain the demurrer to the complaint, with leave to the plaintiff to amend if he shall be so advised.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer to the complaint, with leave to the plaintiff to amend if he shall be so advised.

(110 Cal. 267)

In re BEISEL'S ESTATE. (No. 15,915.)¹

Appeal of VAN REYNEGOM.

(Supreme Court of California. June 27, 1895.)

ACCOUNTING BY TRUSTEE—MAINTENANCE OF MINOR BENEFICIARIES—LIMITATIONS.

1. Where the estate of deceased was distributed to the widow and minor children, and the former, who took charge of the persons and estates of the children several years before she was appointed legal guardian, thereafter presented an account entitled "In the matter of the guardianship of the estates of A. and B.," and embracing the whole period of her management, the accounting will be treated as an accounting in equity by the widow as trustee of the children's estates, all objections to the jurisdiction of the court being expressly waived at the hearing.

2. Where a widow has taken in charge the persons and estates of the minor children, though not appointed legal guardian till several years thereafter, she will, on an accounting, be credited with money paid for the maintenance of the minors, and expenditures incurred in good faith in improvements on their property, during the time there were no letters of guardianship on their estates.

3. The accounting being that of a voluntary trust, no allowance for proper expenditures incurred during its administration will be barred by limitations.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal by F. W. Van Reynegom, guardian of the estate of George D. Beisel, a minor, from a judgment settling an account of Caroline Sherrer with the estates of George D. and Gustave H. Beisel. Modified.

Otto Tum Suden, for appellant. Shadburne & Herrin, for respondent.

VAN CLIEF, C. This is an appeal by the guardian of the estate of George D. Beisel, a minor, from judgment of the superior court settling an account of Caroline Sherrer, the mother of Gustave H. Beisel and George D. Beisel, minors, and Emma N. Beisel, now of

lawful age, with the estates of the minor children.

Caroline Sherrer, formerly Caroline Beisel, was the widow of Jacob Beisel, deceased, whose estate was distributed September 1, 1887, one-half to his widow, and the other half to her three minor children. The property thus distributed to the minor children consisted of \$4,007 in money, and a half interest in certain real estate, consisting of tannery property. There was no legal guardianship of the estates of either of the minor children until the 13th day of May, 1892, when letters of guardianship of the persons of Gustave H. and George D. Beisel, and of the estate of Gustave H. Beisel, were granted to Caroline Sherrer; and at the same date F. W. Van Reynegom was appointed as guardian of the estate of George D. Beisel. Between the time of the distribution of the estate of Jacob Beisel, in 1887, and the issuance of the letters of guardianship, in 1892, the mother of the minor children took charge of the persons and estates of the minors, and with the money belonging to the minors purchased certain real estate on Capp street, in the city and county of San Francisco, for their benefit, taking the conveyance in her name in trust for them. The rental value of this property was about \$360 per year, and Mrs. Sherrer expended on it about \$600 in repairs and street work, besides taxes. In September, 1892, Emma M. Beisel, having arrived at full age, brought an action for partition of the real estate thus purchased, and procured a sale thereof, the proceeds of which netted only \$3,654. One-third of that sum, amounting to \$1,218, was paid to Emma N. Beisel, and a like sum distributed, returned, and inventoried in each of the estates of the minor children, besides one-sixth interest of each in the tannery property. Thereafter, on the 20th of January, 1894, the superior court made an order in the matter of the estates of both minors, allowing to Caroline Sherrer the sum of \$20 per month for the support and maintenance of each of them, from and after the 20th day of January, 1892, which allowance was paid one-half from each estate. On the 21st day of February, 1894, Caroline Sherrer presented to the superior court for settlement, in the matter of both of the estates of her minor children, an account embracing the entire period of her management of the property of all of her children, charging herself with the entire \$4,007 distributed to them from their father's estate, with legal interest thereon from September, 1887, to February, 1894, amounting to \$1,800.19, with half of personal property sold, in the sum of \$309, and with half the rents of the tannery property, in the sum of \$993.50, making an aggregate of \$7,109.69. She claimed credit, on the other hand, for one-half of the expenditures and improvements on account of the tannery property, in the sum of \$2,130, including therein one-half of large expenditures in the building of cottages, grading, house moving, taxes, insurance, water rates, plumb-

¹ Rehearing granted.

ing, sewer, and other items of expenditure on account of the property. She also claimed credit for support of the boys, at the rate of \$20 per month, for the period of four years and four months from September, 1887, prior to the allowance made by order of the court, aggregating the sum of \$2,080, and a credit of \$720 for support of Emma N. Beisel during her minority, for a period of three years, at the same rate, besides credits of \$1,000 under the allowance before made by the court, \$100 for attorney's fees, and \$500 for compensation for her services as guardian. The total of credits claimed in the account aggregated \$6,530.48. The account, as presented, states a balance due from Mrs. Sherrer to the minors of \$571. The court found that there was no bad faith in the management of the estate, and that Mrs. Sherrer should be charged with the sum of \$4,007 and annual interest at 7 per cent., and that she should be credited with the amounts returned into court to the credit of each of the minor children from the proceeds of the sale of the Capp street property. The court further found that the account was supported by evidence and proper vouchers, and allowed the same in all respects, save the item of \$500 for compensation of guardianship, which was rejected as premature, the guardianship not being yet terminated, and the account was settled by allowing a credit of the residue of the money in the hands of both guardians, amounting to \$1,216; \$658 being in the hands of F. W. Van Reynegom, as guardian of the estate of George D. Beisel, and \$558 in the hands of Caroline Sherrer, as guardian of the estate of Gustave H. Beisel.

1. An error is apparent in the account in including charges and credits on account of Emma N. Beisel, who was not a party to the accounting. Mrs. Sherrer has charged herself with \$2,369.89 too much on account of Emma N. Beisel's one-third interest in the sum of \$7,109.69, accounted for by Mrs. Sherrer. It is unnecessary to decide whether Emma N. Beisel is estopped by her proceeding in partition from claiming any further allowance from her mother on account of her share of the original \$4,007, and interest thereon, in addition to the sum of \$1,218 obtained by her upon sale of the Capp street property, as the result of her suit in affirmance of the purchase of that property for her benefit. It is sufficient to say that, not being a party to this accounting, no items either of credit or charge to Emma N. Beisel should appear in the account. The items credited to Mrs. Sherrer on account of Emma N. Beisel's one-sixth of the improvements and expenditures on the tannery property amount to \$710. The sum of \$720 is charged for her board for three years. These items deducted from the \$2,369.89 leave a balance of account in favor of Emma N. Beisel in the sum of \$939.89. There is no deduction in the account for the \$1,218 paid to Emma N. Beisel; and the two minor children are credited in the settlement with the aggregate balance of the whole account,

after deducting only the \$500 for compensation of Mrs. Sherrer as guardian, and crediting the remainder of the funds in the estates of the minors. The minors were thus benefited in the sum of \$939.89 to which they were not entitled. This error is against the respondent, and could not be ground for reversal upon this appeal; yet it is proper to notice it, in view of the contention of appellant that the court erred in allowing, as against the minor children, the items in the account for board of Emma N. Beisel, and for her share of expenditures of the tannery property. This contention is correct; but the error is without prejudice to the appellant, since the estate of George D. Beisel is profited by one-half of the balance of error of \$939.89, with which Mrs. Sherrer is charged in the settlement with the two minors, on account of her having charged herself with Emma N. Beisel's interest in the estate of Jacob Beisel, deceased, without the allowance of any credit for the \$1,218 paid to her.

2. Appellant contends that there was no warrant for an allowance by way of credit to Mrs. Sherrer for maintenance of the minor children during the time when there were no letters of guardianship upon their estates. But she is chargeable in equity as a quasi guardian or trustee of their estates, and the accounting must be deemed in the nature of an accounting in equity, and determined upon equitable principles. The court finds, in substance, that the action of Mrs. Sherrer, as the mother of the children, was bona fide; and it had jurisdiction to allow reasonable and proper credits to her for their maintenance, and for expenditures incurred on their account. A guardian de facto who is not a guardian de jure will be held to account in equity only upon equitable principles, and will be allowed for all proper disbursements for the benefit of the ward. *Peale's Adm'r v. Thurmond*, 77 Va. 756. "The rule is that where an infant has property of his own, and his father is dead, or is not able to support him, he may be maintained and educated out of the income of property absolutely his own, by the person in whose hands the property is held; and a court of equity will allow all payments made for this purpose, which appear upon investigation to have been reasonable and proper." *Schouler*, Dom. Rel. § 238. Where the income is insufficient for the maintenance and education of a child, equity will break into the principal. *Barlow v. Grant*, 1 Vern. 255; *Bridge v. Brown*, 2 Younge & C. Ch. 181; *Ex parte Green*, 1 Jac. & W. 253; *Newport v. Cook*, 2 Ashm. 332; *Osborne v. Van Horn*, 2 Fla. 360. A mother will be allowed in equity for the past maintenance of her children, from the death of the father, out of the estate of the children, though she has a separate estate. *Wilkes v. Rogers*, 6 Johns. 567. 589, 593; *Gladding v. Follett*, 2 Dem. Sur. 68; *Aynsworth v. Pratchett*, 13 Ves. 320; *In re Besondy*, 32 Minn. 385, 20 N. W. 366; *Os-*

borne v. Van Horn, 2 Fla. 360. The criterion for determining whether a past maintenance should be allowed is whether a chancery court would have authorized it in advance. *Alston v. Alston*, 34 Ala. 27. Appellant objects that the allowance for maintenance of the children prior to the accounting was barred by the statute of limitations. But the accounting was of a voluntary trust, and no allowance to a trustee for expenditures properly incurred during the administration of the trust can be considered as barred by the statute of limitations. The expenditures made for the benefit of the children must be deemed in equity as having been made out of their funds, and as constituting an equitable offset to the liability of the trustee, who could not plead the statute of limitations in defense to the liability. The credits are no more barred by the statute than is the charge against the trustee. It would be inequitable to hold the mother to account for principal and interest of the sums received by her from the estate of her husband for the benefit of the minor children for nearly 6½ years, and to allow her no offset for maintenance of the children, and for expenditures made in good faith for their benefit, during that period. No abuse of discretion appears as to the amount of the allowance for maintenance of the children. Nor did the fact of the allowance for two years out of the \$2,436 paid into court as the proceeds of the Capp street property preclude a further allowance, upon an accounting by Mrs. Sherrer of her trust during the preceding years, in which she is charged with the principal sum received by her as the children's share of the estate of their deceased father, in September, 1887, with interest thereon until February, 1894. The minors are credited in the account with their full share of the rents of the tannery property, and they are justly chargeable with their proportion of the expenditures incurred by their mother in good faith in the improvement of that property, and in the payment of necessary expenses for taxes, insurance, and repairs. The allowance of attorney's fees was in the discretion of the court, and was reasonable in amount.

3. The jurisdiction of the court to settle the account of the mother with her two minor children was assailed in the objections of appellant to the account, but all objections to the jurisdiction were expressly waived at the hearing. Although the account was entitled "In the Matter of Guardianship of the Estates of Gustave H. Beisel and Geo. D. Beisel, Minors," the accounting was in its nature an accounting in equity by the mother of the minors as trustee of their estates. In *re Thompson's Estate*, 101 Cal. 349, 35 Pac. 901, and 36 Pac. 98, 508; In *re De Leon*, 102 Cal. 537, 36 Pac. 864.

4. An error was committed in the settlement of the account, not only by including charges and credits to Emma N. Beisel, but also in taking the difference between the bal-

ance of the account as rendered and the total residue of the funds in both estates as the measure of indebtedness of both estates to the mother. The estate of George D. Beisel shows a residue of \$658, while that of Gustave H. Beisel shows a residue of \$558; and the two estates cannot have an equal balance of indebtedness to the mother. Excluding from the account all items relating to Emma N. Beisel, the account should be settled thus: The total amount of proper charges to Mrs. Sherrer on account of the minor children is two-thirds of \$7,109.69, amounting to \$4,739.79. Of this amount she had paid into court \$2,436, or \$1,218 to each estate, from the proceeds of the Capp street property, the sale of which is repudiated as not being for the interests of the minors; and she is therefore entitled to a credit for the whole amount paid into court, the amount paid out by order of court for board of the children and for other expenses being simply a mode of accounting for the residue now in the hands of the guardians. There remains \$2,303.78 to be accounted for. But the other proper credits to Mrs. Sherrer for two-sixths of the expenditures on the tannery property, for past board of the minors, and for attorney's fees aggregate \$3,000, leaving a balance of indebtedness to the mother from the estates of the two minors of \$1,296.22. One-half of this, in the sum of \$648.11, should be charged to each estate and paid out of the residue of property remaining in each estate. There being a residue of \$658 in the estate of George D. Beisel, this will leave a residue of money in the hands of his guardian of \$9.89, after Mrs. Sherrer is paid in full. In addition thereto, appellant should recover the costs of this appeal, leaving the interest of George D. Beisel in the tannery property intact. There being a residue of only \$558 in the estate of Gustave H. Beisel, that estate will owe to Mrs. Sherrer a balance of \$90.11, which is properly chargeable against the interest of that estate in the tannery property. The difference between the result of this accounting and the balance of account as settled by the court is not great. Some of the errors committed in the accounting have largely counterbalanced each other.

One result of a modification of the judgment in accordance with this opinion will be, according to my figuring, to require the appellant to pay to Caroline Sherrer, from the estate of his ward, \$648.11, less appellant's costs of this appeal. And, as there is no dispute about the facts, I think the cause should be remanded, with instructions to modify the judgment in accordance with this opinion.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with instruction to modify the judgment in accordance with this opinion.

(5 Wyo. 501)

VAN HORN v. STATE.

(Supreme Court of Wyoming. July 1, 1895.)

CRIMINAL LAW—REVIEW ON APPEAL—DESTRUCTION OF BUILDING ON MINING CLAIM—INFORMATION—EVIDENCE.

1. Instructions cannot be considered on appeal where they appear on loose sheets not referred to in the bill of exceptions, and it is not sufficient that they are identified by counsel's affidavit, or included in a motion for a new trial.

2. Rev. St. § 3251, provides that, when any offense shall be committed upon property belonging to several partners or owners, it is sufficient to allege in the indictment that the property belonged to any one or more of such partners or owners. By Sess. Laws 1890-91, c. 59, § 10, the provisions of the Code of Criminal Procedure applying to indictments are applicable to informations. *Held*, that in an information under Sess. Laws 1888, c. 40, § 10, for destroying a building on an oil placer mining claim owned by four persons, it was sufficient to allege ownership in two.

3. On a prosecution for destroying a building on an oil placer mining claim, it was not error to exclude a deed of the premises, where there was no offer to connect defendant with the grantee in the deed, or to show that the acts of defendant were done under claim or color of right.

4. On a prosecution for destroying a building on an oil placer mining claim, it was proper to exclude testimony as to the condition of the ground adjacent to the mining claim, where the materiality of such testimony was not shown.

5. On a prosecution for destroying a building on an oil placer mining claim, it is no defense that the mineral does not exist thereon, if the claim was located in good faith.

6. The absence of defendant's counsel in an adjoining county, attending court, is no ground for continuance.

Error to district court, Natrona county; J. W. Blake, Judge.

T. C. Van Horn was convicted of destroying a building on an oil placer mining claim, and brings error. Affirmed.

C. C. Wright, for plaintiff in error. B. F. Fowler, Atty. Gen., for the State.

GROESBECK, C. J. The plaintiff in error, T. C. Van Horn, was convicted of the offense of unlawfully removing a certain building from an oil placer mining claim situate in the county of Natrona, and was fined in the sum of \$300, and judgment was rendered against him for the costs of the prosecution. The offense is defined by Sess. Laws 1888, c. 40, § 10, which reads as follows: "Any person who shall unlawfully cut down, break down, level, demolish, destroy, injure, remove or carry away any sign, notice, post, mark, monument or fence upon or around any shaft, pit, hole, incline or tunnel, or any building, structure, machinery, implements on (or) other property, on any mining claim or mineral property, ground or premises, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a penal sum of money not less than fifty dollars nor more than one thousand dollars, or be imprisoned for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court."

1. A large number of the assigned errors relate to the alleged errors of the trial court in its instructions to the jury, but these we must not consider. Accompanying the record are a number of loose sheets, purporting to be the instructions of the court, marked as "Exhibit A," but they are not referred to or identified in the bill of exceptions, either under that designation or otherwise. The only exhibit so marked in the bill is a motion for a continuance and the supporting affidavits. In the motion for a new trial the instructions appear, but this is not sufficient, as it is but the statement of counsel that certain instructions were given or refused, and they are not therein identified by the court or the judge thereof. Nowhere else in the bill is there any reference to the instructions to the jury, although minute reference is made designating and identifying the oral and documentary evidence received in the court below. It is urged by counsel for the plaintiff in error that, upon certain affidavits of himself and one of the attorneys for the prosecution, this exhibit, purporting to contain the instructions, but nowhere incorporated in the record or referred to or identified in the bill of exceptions, contains the instructions of the court to the jury, and was in the original bill when signed by the judge of the trial court in the form of newspaper clippings, and was removed at the suggestion of the judge, and typewritten instructions inserted in lieu thereof. But there is nothing in the bill that refers to or identifies these so-called "Instructions," except the motion for a new trial, to which they were attached as an exhibit, and which is merely the work of counsel for one of the parties, and not the judge. The judge must include in the bill of exceptions all matters not a part of the record, in order to make them of the record, and neither counsel nor the clerk of the court may do this. It would be a loose and a dangerous practice to supply omissions in the bill by affidavits of the counsel or others, and the statute does not permit it. What is not made by the statute a part of the record of the trial court must go in the bill and be identified by the judge of the court, the same as the other records are. We cannot suspend the statute or the rule in order to let into the record matters not embodied or referred to there, unless, perhaps, by consent. The counsel for the state object to the motion of defendants to incorporate this matter in the bill, and it must be overruled, and the record considered without reference to the so-called "Instructions."

2. The information charges that, upon a day named, at the county of Natrona, the defendant did unlawfully cut down, level, demolish, destroy, injure, remove, and carry away a certain building erected on a certain oil placer mining claim, describing it, the property of W. Tennant and Boney Earnest. The proof is not clear as to the question of ownership. The mining claim consisted of 160 acres, and was located by eight locators. Four of these

locators transferred their title to Boney Earnest, and the claim seems to have been in him and three other of the original locators, including Tennant, who is mentioned in the information. The court, it is claimed, charged the jury that the prosecution must prove beyond a reasonable doubt that the building destroyed was the property of the persons named in the information, or any one of them, and that the jury must so find, or acquit; but we are unable to consider the instructions, as we have already held that they are not a part of the record in this court. Considering the matter of ownership with reference to the information and the evidence, both are sufficient under our statute. "When any offense shall be committed upon or in relation to any property, belonging to several partners or owners, the indictment for such offense shall be deemed sufficient, if it allege such property belonged to any one or more of such partners or owners, without naming all of them." Rev. St. § 3251. Under the statute providing for prosecution by information (Sess. Laws 1890-91, c. 59, § 10), the provisions of the Code of Criminal Procedure, and all other provisions of law applying to prosecutions upon indictments, to writs and process therein, and the issuance and service thereof, to motions, pleadings, trials, and punishments, or the execution of any sentence, and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to informations and all prosecutions thereunder. Since the information is to be governed in its allegations by the statutory rules relating to indictments, the allegation and proof of ownership of the building or of the mining claim is not defective, although but two members of the copartnership are alleged to be such owners.

3. The plaintiff in error complains of the exclusion by the trial court of a certain deed from certain parties, E. C. Bartlett and wife, to one Isaac Van Horn, conveying, among other premises, the land embraced within the limits of the mining claim mentioned in the information from which the building was removed as oil placer mining ground. An attempt was made to introduce evidence of another location notice by the defendant, but, upon objection, the offer of the testimony was withdrawn by counsel for defendant, although made to show that the "parties interested in the prosecution of this case" have no title to the land in question, the objection of the counsel for the prosecution being that the date of the location was 60 days subsequent to the date of the location offered in evidence by them. The attempted introduction of the deed from the Bartletts to Isaac Van Horn followed, but there was no offer made to connect the deed in order to show title in said Isaac Van Horn, and to connect defendant with him, or to show that the acts of the defendant

in removing and destroying the building on the mining claim were done under claim or color of right. The offer of the deed was "for the purpose of showing that this property in question in the information, together with the cabin that is alleged to have been torn down, was, prior to the alleged offense, sold and conveyed to one Isaac Van Horn by one E. C. Bartlett." In the absence of any attempt or offer to connect the defendant and Isaac C. Van Horn with some claim of right, the court did not err in excluding this deed from the evidence.

4. Error is predicated on the refusal of the trial court to permit a witness for the defendant to testify to the condition of the ground adjacent to the mining claim from which the building was removed; but we do not see what materiality the evidence would have, unless to show that there were no indications of oil or other mineral in the vicinity. In the absence of any offer to show the materiality of such testimony, we cannot say that the court erred in excluding this evidence.

5. The main contention of the plaintiff in error is that the so-called "placer mining claim" was not mineral land, and that no oil was discovered before or after the location on the claim. This is not disputed in the evidence, the only claim being that the location was in the oil belt, and in certain formations that indicated the presence of oil. The trial court seemed to proceed upon the theory that if the location of the oil placer claim was made in good faith, and with the intention to explore for oil, this was sufficient for the purposes of the case. Although the evidence is clearly insufficient to establish the right of the locators or their assigns to title to the land without discovering oil on the premises, or in a contest before the officers of the government land office, yet we think that the testimony shows that the location was made in good faith. It is certainly unnecessary to show in a prosecution like the one at bar that the mining claim upon which the trespass is made was one that would be upheld in a contest therefor. The object of the statute was to prevent the wanton destruction of property on a mining claim, as well as on mineral lands, in order to prevent the lawless acts of parties claiming the land or others. To hold to the rigid rule contended for by counsel for plaintiff in error would be to leave the improvements of miners and prospectors at the mercy of those who, from caprice or malice, would invade their locations, even though imperfectly made, and destroy the fruits of their toil. We cannot assent to such a rule, as such a doctrine would transfer to the arena of a criminal prosecution land contests and disputes over the title, and prevent the punishment of wanton despoilers, and invite lawlessness. The exploration of the mineral lands of the government should be encouraged, and has been en-

couraged by national, state, and local laws; and the honest efforts of those making mineral locations ought not to be discouraged by inviting the destruction of their property by trespassers who have no claim or color of right to the premises they trespass upon. The supreme court of California, in the case of *Gregory v. Pershbaker*, 73 Cal. 116, 14 Pac. 401, says: "It is insisted by counsel for respondents that no location of mineral land is valid unless valuable mineral had been actually discovered in the land before the location was made. As to placer claims, we find no such condition in the acts of congress, in the local laws, or practice of miners." Again, the court says: "Of course, a patent for mineral lands can only issue under the acts of congress relating to the disposition of mineral lands, on proof that they are such." As the evidence shows that the oil placer mining claim from which the building was removed was located in good faith, it is no defense to the unlawful act to say that mineral does not exist upon the mining claim. The defendant admitted the removal of the building, and no excuse or justification is attempted to be offered for this unlawful act.

6. The district court did not err in overruling the motion of the plaintiff in error for a continuance. No diligence was shown on the part of the defense, and due diligence must be shown before the continuance can be granted. This is in effect conceded by counsel. The absence of counsel for the defendant in an adjoining county, attending court, is no ground for continuance. If it were, where terms of court conflict, continuances would be of frequent occurrence.

There are other errors assigned, which will not be considered, as they were either not excepted to at the time or were unimportant. Finding no error in the record properly before us, the judgment of the district court is in all respects affirmed.

CONAWAY and POTTER, JJ., concur.

(5 Wyo. 433)

CONNORS et al. v. CONNORS et al.

(Supreme Court of Wyoming. July 1, 1895.)

VALIDITY OF MARRIAGE—LEGITIMACY.

1. On an issue of the legitimacy of children of an intestate, it was proper to exclude a letter written by their mother, one of the defendants, in which there was nothing to show that the marriage to the deceased was invalid, or that she was not his wife, or affecting the legitimacy of the children.

2. A marriage without a license is not invalid, though the parties participating in the ceremony may be criminally liable.

Error to district court, Albany county; J. W. Blake, Judge.

Action by Huldah M. Connors and others against Augusta Connors and another. From a judgment for defendants, plaintiffs bring error. Affirmed.

W. H. Fishback, for plaintiffs in error. C. E. Carpenter, for defendants in error.

CONAWAY, J. The four infant plaintiffs in error are the nephews and nieces of Charles Connors, deceased. Defendants in error are Augusta Connors, his widow, and Elmer T. Beltz, administrator of his estate. The plaintiffs in error claim to be his heirs at law, to the exclusion of his widow and children, and bring this proceeding in error to review and reverse a judgment and decree of the district court for the distribution of the estate to his widow and children. These children are Carl Arthur Raymond Connors, born to defendant in error Augusta Connors while she and Charles Connors were living together as husband and wife, and Robert Connors, a posthumous child born two months after the death of Charles Connors. Plaintiffs in error seek to establish two propositions—First, that there never was a valid marriage of Charles and Augusta Connors; and, second, that Carl Arthur Raymond Connors and Robert Connors are not the children of Charles Connors, deceased.

The exclusion of evidence of admissions and statements of Augusta Connors, including two letters written by her, one to Charles Connors and one to another man, is assigned as error. This evidence was properly excluded. There was nothing in it tending to show that the marriage of Charles Connors and Augusta was invalid, or that she was not his wife, though it might be an unfaithful wife. Neither is it admissible as evidence affecting the legitimacy of Carl Arthur Raymond Connors and Robert Connors and their property interests, such interests being represented by Elmer T. Beltz, administrator, one of the defendants in error. Augusta Connors was sworn and examined as a witness in the case. This is the proper way to procure her testimony,—not by unsworn statements or letters. It is proven beyond question that Charles and Augusta Connors were married on August 14, 1876, and lived together as husband and wife until May 3, 1892, when she went to Denver. There is no claim that they were ever divorced. The trial court finds as a conclusion of law that this was a valid marriage, whether any license was obtained from the county clerk or not. This is a correct proposition of law, although the parties participating in such ceremony might be criminally liable in case of the absence of such license. But the testimony shows satisfactorily that a license was issued, but not recorded, as the only record of marriage licenses as of that time appearing in the county clerk's office is an index of such licenses. This license is indexed as of the day after the marriage,—probably a mistake in the date. The evidence sustains the judgment of the district court in favor of defendants in error, and the judgment is affirmed.

GROESBECK, C. J., and POTTER, J., concur.

(5 Wyo. 439)

ARNOLD v. STATE.

(Supreme Court of Wyoming. July 1, 1895.)

CRIMINAL LAW—EVIDENCE OF HOSTILE WITNESS—INSTRUCTIONS.

1. It is within the discretion of the court to allow the prosecution, on being surprised by adverse testimony from one of its witnesses, to proceed to examine such witness as to previous statements, to induce him to make his testimony consistent with them, and to show the reason the prosecution had for calling him. Groesbeck, C. J., dissenting.

2. The fact that answers to questions addressed to a hostile witness as to previous statements made by him for the purpose of making him conform his testimony to his former statements, or to show grounds for calling him as a witness, tend to impeach his credibility as a witness, will not render such answers incompetent.

3. A ground of objection to evidence, not made at the trial, cannot be urged on appeal.

4. Where, on a criminal prosecution, the jury might infer from the evidence of a witness that he was an accomplice of the defendant, an instruction upon evidence of an accomplice is proper. Groesbeck, C. J., dissenting.

Error to district court, Converse county; R. H. Scott, Judge.

George Arnold was convicted of killing neat cattle, and brings error. Affirmed.

M. B. Camplin and Baird & Churchill, for plaintiff in error. B. F. Fowler, Atty. Gen., for the State.

POTTER, J. Plaintiff in error was convicted of the crime of unlawfully killing neat cattle, being charged with killing a certain black cow, the property of F. E. Wolcott & Co. The jury found the value of the animal to be \$15, which, under the statute, subjects the offender to imprisonment in the penitentiary, and he was sentenced to such imprisonment for the term of three years. Several errors are assigned and relied on, which we will consider in their order.

It is first assigned as error that the court permitted counsel for the state to inquire of a witness (William Dolan) produced by it concerning certain statements which he had made to said counsel, the sheriff and others, to the effect that he had witnessed the killing of the animal by the defendant, Arnold. When Dolan was called as a witness it had already been shown that the head and some other remains of the slaughtered animal had been found near the ranch or house of Arnold, which was situated inside the pasture of F. E. Wolcott & Co.; and wagon tracks were discovered leading therefrom to said ranch. Other circumstances had also been testified to, tending to connect said killing with some one at the ranch of Arnold. Dolan testified, without objection: That at the time when it was claimed the animal had been killed he was residing upon Arnold's ranch with him. That, when in company with Arnold one day, Prentice, an employé of F. E. Wolcott & Co., had asked them, "What did you fellows do with the beef you killed up the creek?" That he (Dolan) told him he did

not know anything about any beef that was killed up the creek, but that there was a beef which had been killed and taken to town, which was an animal they had got from Grass creek. And he also testified such animal was not killed at the place where the black head had been found. Thereupon he was asked, "State if you know anything about a black head and black feet being found around there," to which he answered, "No; nothing more than what Prentice told me about it." Counsel for the state then put to him the following question: "Mr. Dolan, I want to refresh your memory by calling your attention to a conversation you had with me in the office of the jail on last Wednesday, since the beginning of this court, in reference to this matter; and now ask you to state to the jury what you know in reference to the killing of a black cow near the Arnold ranch." This was objected to as immaterial, and on the ground that the state cannot impeach its own witness. The objection was overruled, and exception taken. The witness answered, "I know just what I stated here." This question was not objectionable, and the answer did not prejudice the defendant; therefore, on either ground, no error can be predicated upon it. He was then asked if he remembered a conversation with the sheriff, Mr. Williams, and counsel, in the August preceding, in the office of the jail, in reference to the matter, and he gave an affirmative reply. The following question was then propounded to him: "Now Mr. Dolan, refreshing your memory by reference to that conversation, will you state to the jury what you know in reference to the killing of a black cow in August, 1892, near Arnold's ranch, in Converse county?" Objection, on the ground that it had already been answered, being overruled, he replied, "What I have told here is all that I know about it." Counsel for the state thereupon informed the court that he had placed reliance upon statements of said witness; that he did not care to state to the jury what they were, but he had been led to rely upon his testimony, and had been disappointed therein; that, as he appeared to be a hostile witness, he desired leave to examine him by cross-examination, and by asking leading questions. Defendant's counsel objected to "the statements of counsel in the presence of the jury." The court granted the leave, to which exception was taken. Up to this point it is clearly apparent that there was no error. The counsel for the state proceeded to interrogate the witness further in a leading manner, and first asked him this question: "Mr. Dolan, isn't it a fact that you, along about the 24th of August, 1892, witnessed the killing of one black VR cow in the Wolcott pasture, just above the pasture fence of the defendant Arnold; and that you so stated to the officers, the sheriff and deputy of this county, and myself, on a day of August last, of this year, in the county jail, here in Douglas?" The objection made to this question at the

time was that the examination in part called for matters already testified to, and for the further reason that it is the fact, and not what witness may have stated, that the jury are to take evidence upon. The objection being overruled, the witness answered, "No, sir; I did not witness it." It is also clear that, whether this question was objectionable or not, the answer did not and could not prejudice the defendant. The objection, however, now urged that the state could not impeach its own witness, nor discredit him, or that it was incompetent, was not made to the question at the time. The next question was, "Answer the rest of the question." This was not objected to, and was answered: "I made such a statement to you. I told you just about that." No objection was offered to the answer, nor was any motion made to strike it out. If the objection to the preceding question should be held as applying to the one answered as last above, it was not made on the ground now complained of. Several following questions were put to the witness with respect to what he had told the counsel and the officers, some of which were not answered; and to those which did elicit an answer, the witness admitting he had made such statements, the objection in each instance made thereto, by counsel for defendant, was either that the question had already been answered, or as being indefinite as to time and place. Upon the witness being recalled by the state, and other similar interrogatories being propounded to him, objections were interposed upon the sole ground that they were immaterial. The witness had stated that his former statements were untrue.

Whatever the rule of law may be as to the right of the prosecuting counsel to inquire of a hostile or unwilling witness produced by him concerning his previous statements, as applicable to the case at bar, we are clear that in no instance was the objection made upon the ground that it was incompetent or improper to do so. The attention of the court was not at the time called to the matter of objection now urged by counsel for plaintiff in error, and the court might well assume that no claim or contention of that kind was intended to be asserted. To the first question attempting to refresh the memory of the witness, counsel for defendant, it is true, did claim that the state could not impeach its own witness, but, when permission was requested to examine him as a hostile witness, no objection thereto was offered; it was only stated that objection was taken to the statements of counsel in the presence of the jury. The questions complained of not being objectionable on the grounds indicated by the counsel for defendant upon the trial, and no objection thereto then being stated on the ground of either incompetency, the leading character thereof, that they tended to discredit or impeach the witness, or that they were improper for any such or similar reason, no error was committed in overruling the

objections. Whether a question shall be permitted that has already been answered must be allowed to rest very largely, if not entirely, within the sound discretion of the trial court. Certainly, to authorize a reversal of a judgment for such a reason, there should appear to have been a flagrant abuse of discretion, which has clearly been prejudicial to the complaining party.

Notwithstanding that the reason already assigned might practically dispose of the assignment of error under discussion, we go further than that. We think the circumstances bring the case clearly within the rule, best sustained by authority, allowing a party to interrogate an unwilling witness produced by him respecting his previous statements, contradictory of, or inconsistent with, his testimony. *Hurley v. State*, 46 Ohio St. 320, 21 N. E. 645; *Bullard v. Pearsall*, 53 N. Y. 230; *State v. Tall*, 43 Minn. 273, 45 N. W. 449; *State v. Sorter* (Kan. Sup.) 34 Pac. 1036; 1 Rice, Ev. p. 615. We do not think the trial court in the case at bar abused the sound discretion with which it is vested. It is true that a party producing even a hostile witness may not, upon being surprised by his testimony, proceed to examine him as to previous statements or otherwise, merely to discredit him; but we do not perceive that to have been the controlling purpose in this case. That the answers of such a witness may involve him in contradictions, so as to incidentally affect his credibility, does not prevent the inquiry. The purpose evidently was to prove the recollection of the witness, and induce him to correct the error in his testimony, and make it consistent with his former statements, as well as to explain the circumstances which induced the party to call him. For either purpose the inquiry was proper. The fact that our legislature has recently enacted a statute, which is now the law in this state, expressly authorizing such an examination of one's own witness, is greatly persuasive of the reasonableness of the rule we here approve; more especially so when we consider that other states have adopted similar statutes. The witness Dolan, it appeared, had been living at Arnold's ranch with him at the time when it was alleged the animal had been unlawfully killed. After causing himself to be called as a witness for the state by giving information to the effect that he had witnessed the crime, to the surprise of the state's counsel, he denies all knowledge of it, and distinctly says he did not witness it. This statement could not have been drawn from him as a witness for defendant, and thereby the prosecution was injuriously affected by his testimony. Occupying the position he did, his denial of knowledge, under all the circumstances, resulted as injuriously to the party calling him as testimony of a positive fact, if that kind of testimony is required to authorize this character of inquiry. We do not think the case, so much relied on, of *Com. v. Welsh*, 4 Gray, 535, con-

licts with the views here expressed as applicable to the facts in this case. If it does, and if it was there intended to declare a doctrine which should be inelastic, and should under any and all circumstances, regardless of the injurious effect upon the disappointed party, preclude an inquiry such as is here complained of, when the witness has denied any knowledge of a fact concerning which he has been examined, then the majority of this court decline to follow it. It would hardly be questioned that, had the witness Dolan corrected his testimony, and admitted the truth of his former statements, the inquiry would have been proper as an inducement to him to speak the truth. I cannot comprehend how the result of the examination; whether successful or otherwise, can affect in any way the competency of the original inquiry, or of the questions which are propounded. If success crowning the efforts of counsel for the state would have rendered the method permitted and employed unobjectionable, surely it is just as free from objection if failure ensued, and the witness maintains the truth of his testimony and the falsity of his previous statements, as in the case before us.

The second assignment of error charges that the verdict is not sustained by the evidence. We cannot agree with counsel asserting this proposition. Having carefully considered all the evidence, we think the verdict is amply sustained thereby.

It is assigned as error that the court refused to allow the witness Dolan to explain how he came to make the statements which he had admitted having made. This, if erroneous, was subsequently cured. While the witness was on the stand, counsel for prosecution withdrew all objection to such explanations being made, and counsel for defendant was informed by the court he might proceed to examine the witness in that respect, which counsel then declined or at least failed to do.

The court gave to the jury an instruction relative to the testimony of an accomplice. The law with reference to such testimony was fairly well stated in the instruction. It is urged, however, that it was improper, because there was no testimony of an accomplice given upon the trial. We are not sure of the correctness of this contention. The jury might, from the testimony of Dolan, entirely outside of his admission of previous statements, have looked upon him as an accomplice; and, although his testimony may have been very slight, we are not prepared to say that it was entirely improper to caution the jury with respect to the testimony of an accomplice, and explain in that connection the extent of corroboration required in such case. Further than that, however, we cannot impute any prejudice to the defendant by the giving of the instruction complained of. If irrelevant, we cannot conceive that in this case it was harmful.

The last assignment of error is the refusal of the court to give the tenth instruction re-

quested by the defendant, which attempted to define the effect of circumstantial evidence. The counsel for plaintiff in error is mistaken in his statement that no instructions were given upon the effect of such evidence. The court gave to the jury instructions Nos. 5 and 9 requested by defendant, both of which had reference to circumstantial evidence, and the effect thereof, and correctly, as well as sufficiently cautioned and instructed the jury in that regard. We are inclined to look upon said tenth request as misleading, seemingly open to the construction that each circumstance, not all taken together, must be consistent, and in harmony with the guilt of the accused; and also that each circumstance must be of such a character that it cannot reasonably be true and the defendant be innocent. However this may be, the jury were sufficiently instructed in this particular. For the foregoing reasons, the majority of the court conclude that there is no error in the record. Judgment affirmed.

CONAWAY, J., concurs.

GROESBECK, C. J. I dissent. The witness Dolan, called by the prosecution, testified that he knew nothing about the killing of the animal for the killing of which the defendant was accused, except what was told to him by Prentice, a witness for the prosecution. Upon the statement of the attorney for the prosecution that the witness appeared to be "hostile," the court permitted the examination of the witness as to statements made by the witness out of court. I think these questions were sufficiently objected to, even though the language of defendant's attorney in making the objections was perhaps technically inexact. The counsel objected to one question, which contained a direct leading question, asking the witness if he had not witnessed the killing of the cow about the 24th of August, 1892, at a certain place named in the question, and a question as to the statements of the witness to that effect, made to the examining attorney out of court, specifying the time and place of the statements, and who were present. This question was objected to partly upon the ground "that it is the fact, and not what witness may have stated to the state, that the jury are to take evidence upon." When the witness answered the first part of the question, and said that he did not witness the killing of the animal, counsel for the state asked him to "answer the rest of the question," and no objection was taken to that. I think that this reason for holding that the question was not objected to properly is purely technical. There were three conversations brought to the attention of the witness, at which he admitted that he made statements to the examining counsel and others, inculcating the defendant, inconsistent with his testimony that he knew nothing about the affair. He testifies in court, in response to

the question of the attorney for the defendant, that all these statements were untrue. A party may have the right to contradict his witness who unexpectedly testifies against him by cross-examination as to what he had stated in regard to the matter on a former occasion, either in court or otherwise, and thus refresh the memory of the witness, and give him full opportunity to set the matter right if he will, and, at all events, for the purpose of setting the party right before the jury. But this cannot be done for the mere purpose of discrediting the witness. *Greenl. Ev. § 444a*, a note to the statement of the author. *Com. v. Welsh*, 4 Gray, 535. This, in effect, is the rule announced in *Bullard v. Pearsall*, 53 N. Y. 230, where it is said that: "Such questions [as to previous declarations inconsistent with the evidence of the witness] may be asked for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he is fallen into error, and that his original statements were incorrect, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility. * * * As a matter of course, such previous unsworn statements are not evidence; and, when the trial is before a jury, that instruction should be given." It is stated in the syllabus to the opinion, and this is the doctrine of the case, that where the party cross-examines his own witness, and the sole effect of an affirmative answer to a question asked by such party will be to discredit the witness, the question is properly excluded, and this rule is the correct one under the authorities. Such I believe to be the ruling in the case of *Hurley v. State*, 46 Ohio St. 320, 21 N. E. 645. Applying these rules to the case at bar, there was manifest error in the action of the court and counsel. No instruction or direction was given to the jury to the effect that such unsworn previous statements of the witness were not evidence. On the contrary, additional error was committed when the court, against the objection of the defendant, gave to the jury the following instruction: "The jury are instructed that they are to take an accomplice's testimony with caution, unless it is corroborated by other evidence of facts and circumstances as proven at the trial. The corroborating evidence need not of itself be sufficient to show the commission of the crime, nor connect the defendant with it; nor need it be wholly inconsistent with the theory of the defendant's innocence. It is enough if it tends to connect the defendant with the commission of the crime." This

instruction was clearly erroneous. The only evidence that could possibly be considered that of an accomplice was the testimony of Dolan, and nothing in his testimony shows that he was connected with the crime. He rented the ranch of defendant near the scene of the killing, and was occupying it when the alleged offense was committed, and was in company with the defendant when he met Prentice, a witness for the prosecution, who accused both of them of killing the cow. There was not even "slight" evidence that Dolan was an accomplice. With this instruction in the case, and in the absence of any instruction modifying it, or an instruction or direction to the jury not to consider the statements made by Dolan out of court, which he stated under oath were untrue, it is clear to my mind that the jury regarded such statements as substantive evidence, and the evidence of an accomplice. In a doubtful case like this, where the evidence was purely circumstantial, this was sufficient to turn the scale against the defendant. It is not proper, in my judgment, to permit the prosecution to manufacture evidence in this way, or to get it before the jury as evidence, without asking the defendant to explain his inconsistent statements, and without any direction to the jury to disregard such statements as evidence. When instructions are given to the jury, all extraneous matter must be excluded from the case, and no instructions should be based on an assumed fact not in the record, and especially the judge should not state anything not in the proofs. *Bish. New Cr. Proc. § 978*, and cases cited; *Clark, Cr. Proc. § 464 et seq.*

The fact that by legislation since the trial a party is permitted to impeach his own witness is no reason for upholding the rule contended for in the majority opinion. The statute is not declaratory of the common law, but establishes a new rule of evidence. But, even if it could be applied to the case at bar, yet there would be error in the action of the court and counsel in the case at bar. This statute provides that a party producing a witness shall not be allowed to impeach his credit by evidence of his bad character, but may contradict him by other evidence, and may also prove that at other times he has made statements inconsistent with his present testimony; and this rule applies to criminal as well as to civil causes. Before the proof last mentioned can be given, the circumstances of the supposed statements sufficient to designate the particular occasion as near as may be must be mentioned to the witness, and he must be asked whether or not he made such statements, and, if so, "allowed to explain them." *Sess. Laws 1895, c. 68*. It seems that under this statute the explanation of the inconsistent statements must go with his testimony, and that it would not do to thrust upon the defendant the burden of requiring an explanation from the witness. However, under the common-

law rule in force at the trial of the case, this explanation should have been required of the witness while he was being examined by the prosecution, in my judgment. This would be fair to the witness, and just to the defendant. But, independently of this, it plainly appears in the record that the purpose of the prosecution was not to elicit the truth from the witness, as it was not attempted by the prosecution to get any explanation at all from him, and only withdrew its objection to his explanation after all the statements had gone to the jury. But, aside from this unfair and prejudicial examination of the witness, the error of the court below is glaring. It should have directed the jury to disregard the previous unsworn statements of the witness Dolan, which were stated by him to be untrue. The authority cited in the majority opinion shows this to be the rule. *Bullard v. Pearsall*, supra. This error was only intensified by the action of the court in instructing the jury as to the evidence of an accomplice, when there was no evidence whatever given by an accomplice. The jury must have given these statements the force of evidence, under the instruction of the court, as these statements of Dolan would have made him an accomplice if he had testified to their truth. The judgment of the district court should be reversed, and the defendant awarded a new trial.

(5 Wyo. 453)

SLAYMAKER v. PHILLIPS.¹

(Supreme Court of Wyoming. July 1, 1895.)

ELECTIONS—INDORSEMENT OF BALLOTS—OFFICIAL STAMP—INITIALS OF JUDGE—CONSTITUTIONALITY OF LAW.

1. Sess. Laws 1890, c. 80, § 130, providing that, in the canvass of the votes, any ballot which is not indorsed by the official stamp, or has not the name or initials of the judge of election, as provided in that act, shall be void, and shall not be counted, requires that both the official stamp and the name or initials of the judge of election appear on the ballot. Groesbeck, C. J., dissenting.

2. Sess. Laws 1890, c. 80, § 130, requiring both the official stamp and the name or initials of the judge of election to make the ballot valid, is in full conformity with Const. art. 6, §§ 1, 2, giving certain citizens, not falling within any of the classes excluded, the right to vote; and section 11, providing for elections by a secret ballot, and that only the official ballots shall be received and counted; and section 13, imposing upon the legislature the duty to pass laws to secure the purity of elections. Groesbeck, C. J., dissenting.

3. Unless the official stamp and the name or initials of a judge of election, provided for by Sess. Laws 1890, c. 80, § 130, appear upon the exterior of a ballot when it is folded so as to conceal its face, as required by section 122, the ballot cannot be counted. Groesbeck, C. J., dissenting.

Case reserved from district court, Converse county.

Proceeding by Samuel Slaymaker against Arthur W. Phillips to contest an election. Cause reserved for the decision of the supreme court upon important and difficult

questions arising in the cause. Judgment for defendant.

Lacey & Van Devanter, for plaintiff. R. W. Breckons, for defendant.

CONAWAY, J. This is an election contest. Plaintiff and defendant were candidates for the office of clerk of the district court for Converse county, and defendant had a majority of the votes cast, counted, and returned for the office. Plaintiff contends, however, that the ballots cast at three voting precincts in the county were illegal and void, and should not have been counted, and were counted contrary to express provisions of our statute. If the votes of these precincts were rejected, plaintiff would be elected. The alleged illegality in the ballots cast at these three precincts consisted in their not having the name or initials of either of the judges of election upon the back or upon any part of any of the ballots, and in two of the precincts none of the ballots were indorsed with the official stamp, though the stamp was placed upon the face of the ballots, at the head of the ballots. Upon these facts, the district court reserves for our decision the following important and difficult questions: "(1) Are the provisions of the election laws of Wyoming which require that the judge of election, before delivering any ballot to an elector, shall print on the back of the ballot the designation 'Official Ballot,' and the other words provided by said laws, and that one of said judges shall write his name or initials upon the back of each ballot, directory only, or are they mandatory? (2) Should any of the ballots cast at said election at either of the above-named precincts be rejected, and, if so, which of said ballots should be so rejected? (3) Upon the facts aforesaid, should judgment be entered for the plaintiff or for the defendant?"

Section 110 of chapter 80 of the Session Laws of 1890 provides that the county clerk or clerk of the municipality, in case of a municipal election, shall furnish to the judges of election the proper number of ballots; and provides, further, that "he shall also deliver to the said judges a rubber or other stamp with ink pad for the purpose of stamping or designating the official tickets as hereinafter provided. Said stamp shall contain the words 'Official Ballot,' the name and number of the polling precinct, the name of the county or municipality as the case may be, and the name and official designation of the clerk who furnishes the tickets." Section 119 of the same act provides as follows: "At each election the judges of election shall designate two of said judges who shall deliver the ballots to the qualified electors. Before delivering any ballot to an elector the said judge shall print on the back and near the top of the ballot with a rubber or other stamp provided for that purpose the words 'Official Ballot,' and the other words on the said stamp as hereinafter provided, and one of the said

¹ Rehearing pending.

judges shall write his name or initials upon the back of each ballot and directly under the official stamp. * * * Section 130, in so far as it affects the questions before us, provides as follows: "In the canvass of the votes any ballot which is not endorsed by the official stamp or has not the name or initials of the judge of election as provided in this act shall be void and shall not be counted." There can be no question that this last provision is mandatory. The language that the ballots specified "shall not be counted" requires no construction, and admits of none. It seems to be as plain as any words that could be selected. But counsel contend that the provision may be construed to require the absence of both the stamp and the name or initials of one of the judges, in order to make the ballot void. Some room for this idea is furnished by the language of the statute in specifying negatively and disjunctively what defects shall cause the rejection of the ballot, and not putting the provision in the affirmative form of declaring what shall be requisite in the indorsement of a ballot, otherwise legal, to authorize it to be counted. If the statute said that a ballot, otherwise legal, should be counted only when it is indorsed by the official stamp, or has the name or initials of the judge of election, as provided in this act, it would be clear that the presence of either one or the other would authorize the counting of the ballot. But as the provision reads it is equally clear that the meaning is that the absence of either one or the other shall cause the rejection of the ballot. The name and initials are interchangeable, of course, and both of these are not required. This all seems obvious from a mere inspection of the language, and this disposes of all the points made by counsel for defendant in brief or oral argument.

But one member of this court insists that this is an unreasonable and unconstitutional restriction of the right of suffrage. The majority of the court think differently. The duty of courts to pass upon the constitutionality of acts of the legislature is, perhaps, the most delicate duty they have to perform. Courts may well hesitate long before declaring an act of the legislature invalid, or unreasonable to the extent of being unconstitutional, and then should not do so unless such conclusion is necessary and unavoidable. The question whether a provision is reasonable or unreasonable is a question primarily for the legislature to decide in enacting the law. And it has been held that it is the duty of the courts to enforce statutory provisions, however unreasonable they may appear. *Steamboat Co. v. Foster*, 5 Ga. 194. In case of apparent conflict between statutory and constitutional provisions, they should be harmonized, if possible. But we find no conflict between the statutory provisions under consideration and the constitution in any of its provisions. The constitution imposes upon the legisla-

ture the duty to pass laws to secure the purity of elections and to guard against abuses of the elective franchise. Article 6, § 13. Section 11 of the constitution imposes further legislative duties in these words: "All elections shall be by ballot. The legislature shall provide by law that the names of all candidates for the same office to be voted for at any election, shall be printed on the same ballot, at public expense, and on election day to be delivered to the voters within the polling place by sworn public officials, and only such ballots so delivered shall be received and counted. All voters shall be guaranteed absolute privacy in the preparation of their ballots, and the security of the ballot shall be made compulsory." Our election law was enacted before the constitution went into effect by the admission of Wyoming as a state, but after the constitution had been adopted by the constitutional convention and ratified by vote of the people. It was thus as complete an expression of the will of the people as to the character of election law they desired, and as efficient information to the legislature upon that subject, as it was afterwards when it went into effect as the constitution of the state of Wyoming. And the act in question has been left in force ever since without important change, and no change affecting the questions submitted for our decision, as providing the means for carrying these constitutional provisions into effect. This is an emphatic legislative indorsement of these provisions as they stand to-day; and they follow the constitutional provisions very closely. It will be observed that not a single one of these constitutional provisions is self-executing. There could not be an election by ballot without a law providing means for the polling of the vote by ballot. So as to the other provisions. It was and is necessary, and the constitution expressly requires, that the legislature shall provide by law for the privacy of voters in preparing their ballots, for the compulsory secrecy of the ballot, that the names of candidates shall be printed on the same ballot at public expense, and delivered on election day to the voters within the polling place by sworn public officials, and that only such ballots so delivered shall be received and counted. Legislation was and is necessary to provide the public official to deliver the ballots, and to provide the means of identification requisite to carry out the provision that only such ballots so delivered should be received and counted, and to exclude all others.

If we could entertain a doubt as to the correctness of our conclusion that section 130 of the act of 1890 requires both the official stamp and the name or initials of a judge of the election to make a valid ballot, and that the legislature has not exceeded its authority in enacting the provisions quoted from the act, and that they are not in conflict with the

constitution, there are some further considerations which would suffice to remove all doubt. We have examined a considerable number of cases industriously collated by the chief justice, and fairly collated, without regard to the question of whether they sustain his dissent or not. We have also examined the authorities at hand upon the general question of the authority of legislatures, under constitutions more or less similar to our own, to enact laws resulting in the rejection of illegal ballots, even when involving large numbers of votes, the votes of entire precincts, or districts consisting of a number of precincts, or the validity of an entire election. After such examination, we feel safe in announcing the following proposition: No respectable authority can be found denying the power of the legislature to define and prescribe what shall constitute a lawful ballot. And the further proposition that no respectable authority can be found denying the power of the legislature to enact that none but lawful ballots shall be received or counted. Such provisions our legislature has enacted. The first subdivision of section 164 of the act of 1890 reads: "No officer shall deposit in the ballot box any ballot except a lawful one. A lawful ballot is an official ballot officially stamped and marked with the initials or name of a judge of the election, and offered by a qualified elector during the time of election." And the authorities are unanimous to the effect that an illegal ballot will not be counted. If it be considered doubtful whether section 130 requires both the official stamp and the name or initials of a judge of the election upon the ballot, it cannot be considered doubtful under section 164. And section 128 of the act provides also that "no judge of election shall deposit in any ballot box any ballot upon which the official endorsement hereinbefore provided for does not appear." The official indorsement is the official stamp, with the name or initials of a judge of election written directly under it by himself. The meaning of these three sections taken together is clear. A legal ballot is one with both the official stamp and the name or initials of a judge of the election upon it. No judge of election shall deposit any other ballot in any ballot box, and no other ballot shall be counted. And, if any judge of election deposit any other ballot in any ballot box, the act is highly penal. The eleventh subdivision of section 164 provides: "Any officer violating any of the provisions of this section shall be imprisoned in the penitentiary not more than five years and not less than one year, or be fined not more than two thousand dollars and not less than one hundred dollars, or may be both imprisoned and fined as aforesaid, and shall forever thereafter be incapacitated from holding any civil office or of exercising the elective franchise in Wyoming." The legislature evidently regarded the observance of these provisions as of great importance, and made the penalty

thus severe. But the voter has duties to perform supplementary to that of the officers, and the performance of these duties by the voter constitutes an important part of the scheme of the constitution and the statute to secure the purity of elections, to guard against abuses of the elective franchise, and to secure the secrecy of the ballot. And section 165 of the act imposes a severe penalty upon any person upon whom any duty is imposed by the act "who shall willfully do or perform any act by this act prohibited, or who shall neglect or omit to perform any duty imposed by this act." And the act specifies some things which the elector himself shall do, and some things which he shall not do: "On receipt of his ballot the elector shall forthwith and without leaving the polling place, retire alone to one of the places, booths or compartments provided to prepare his ballot. He shall prepare his ballot by marking a cross before or after the name of the person or persons for whom he intends to vote." Section 120. "No elector other than one who may, because of his disability to read or physical disability, be unable to mark his ballot shall divulge to any one within the polling place the name of any candidate for whom he intends to vote or (to) ask or receive the assistance of any person within the polling place in the preparation of his ballot." Section 127. "After preparing his ballot the elector shall fold it so that the face of the ballot will be concealed, and so that the endorsement thereon may be seen. He shall then vote forthwith and before leaving the polling place." Section 122. What acts of omission or commission will subject the elector to the penalties of section 165 we will not now consider. But we cannot regard the elector who neglects to comply with any of these positive provisions of the statute as blameless, and we think he has no cause of complaint if, in consequence of such neglect, he loses his vote. The positive command of the statute that the elector shall fold his ballot so that the indorsement may be seen implies that he shall look for such indorsement. It cannot be said that it is impossible for him to comply with this requirement when the ballot furnished bears no indorsement. The judges are there with the official stamp. It is little trouble to ask them to indorse the ballot properly. We have no patience to consider the idea that the voters generally have not the intelligence to do this. We will not speculate as to what presumptions may arise from this neglect of duty by the officers of the three precincts named, with the acquiescence of all the voters. But we must say that the effect of such proceeding is to open the door to fraud and abuses of the elective franchise which the legislature has properly sought to close, and to put it in the power of unscrupulous election officers and their confederates to perpetrate the very frauds and abuses which it is the object of the constitution and the statute to suppress.

Such irregularities may occur through negligence in case of a fair election, but we are of the opinion they are not likely to.

But these are minor considerations in the discussion of the questions before us. The description of a lawful ballot is plain. The command to the judges to place no other ballot in the ballot box, and the provision that any ballot not answering to the description shall not be counted, are plain, imperative, and mandatory. The doctrine of all the authorities as to such language in election laws is well summed up in *McCrary on Elections* at section 190. He says: "The language of the statute to be construed must be consulted and followed. If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative, and all considerations of its policy or impolicy must be addressed to the legislature." We are willing to go to the extreme limit of liberal construction in order to save an honest election, or to avoid the loss of votes cast in good faith; but we cannot conceive that it is permissible for this court or any court to set aside positive legislative enactments. The statutes under consideration are too clear in their meaning to require construction. The question is simply whether we will enforce them or not. We are of the opinion that the supreme court of Kansas has well stated the correct principles applicable to such cases in *Boyd v. Mills* (Kan. Sup.) 37 Pac. 16, as follows: "The departure from the law in matters which the legislature has not declared to be of vital importance must be substantial in order to vitiate the ballots." And the following rule from the same case commands our approval: "Where the law is explicit in prohibiting the counting of any ballot which does not conform to the requirements of the statute, that the courts will enforce the law as it stands, without interposing their own judgment as to the reasonableness or unreasonableness of the requirements." We are of the opinion that the statutory provisions under consideration are reasonable, constitutional, and efficient means of the discharge by the legislature of the duty imposed by the constitution to pass laws to secure the purity of elections, to guard against abuses of the elective franchise, and to make the secrecy of the ballot compulsory.

But we are not prepared to give the categorical answer of "Yes" or "No" to the first question reserved for our decision; neither do the facts of the case call for it. We should be loath to say that a defective stamp not containing all the words required by the statute, used upon all the ballots of a voting precinct, would require the rejection of the vote of the precinct cast at an election fairly and honestly conducted. And the facts of

this case do not raise this question. Neither do we decide whether the stamp and the name or initials of a judge of the election must be upon the back of the ballot to authorize its counting. If the stamp and the name or initials of the judge were upon some other portion of the ballot, and the ballot were folded so that this could be seen, but the tickets printed upon the face of the ballot concealed, it might be that this would be a sufficient compliance with the spirit, if not with the letter, of the law, to save the ballot from rejection. This, of course, in the absence of fraud, and when the place of the stamping and the writing of the initials would not be a mark or means of distinguishing the ballot from ballots cast by other persons. But we are of the opinion that the official stamp and the name or initials of a judge of the election must appear upon the exterior of the ballot when it is so folded as to conceal the tickets which it bears upon its face; and if this is not the case the law must be enforced which prohibits the counting of such ballot. We are inclined to regard the name or initials of a judge of the election, written by himself directly under the official stamp, as the statute requires, as the signature of the judge to the words impressed by the stamp, and as the legal means and the best means of certifying to the voter that the ballot is the official ballot of the precinct, and as the legal means and the best means of identification by the judges of the ballot offered and voted by the elector as the identical official ballot furnished to him by the judges of the election.

To the second question we answer that all of the ballots cast at the three precincts named should be rejected.

As to the third question, we are not in position to say whether further proceedings may not lawfully be had prior to judgment. The cause will be remanded for further proceedings in accordance with this opinion.

POTTER, J., concurs. GROESBECK, C. J., dissents.

GROESBECK, C. J. (dissenting). By the decision of the majority of this court, the voters of three election precincts of Converse county have been deprived of the right to have the ballots counted as cast by them, through no fault of their own, but simply and solely through the carelessness or inefficiency of the judges of election. These officers were charged by the law, under heavy penalties, with the duty of placing on the back and near the top of the ballots, with a rubber or other stamp provided for that purpose, the designation "Official Ballot," and the name and number of the polling precinct, the name of the county, the date of the election, and the name and official designation of the clerk furnishing the tickets; and one of the judges of election was required to write his name or initials upon the back of each ballot, and directly under the impression of the official stamp. Sections 110, 119, c. 80, Sess. Laws

1890. In all three of the precincts, the name or initials of a judge of election do not appear on any of the ballots voted, and at two of the precincts the indorsement of the official ballot was not stamped on the back of any of the ballots, although it was printed or stamped on the face of the ballots. The authority for rejecting these ballots and excluding them from the count rests mainly, if not solely, on the provisions of section 130 of the election law, which says that "in the canvass of the votes any ballot which is not endorsed by the official stamp or has not the name or initials of the judge of election, as provided in this act, shall be void and shall not be counted." Counsel for the defendant insists that this act may be so construed as to permit a ballot to be counted which has either one of these indorsements, the official stamp, or the name or initials of the judge of election. Courts have been extremely cautious in construing the Australian ballot law in such a manner as not to disfranchise the voter, where the omission is not through his own fault, and any construction which will uphold the ballot and secure its count is seemingly upheld, though the reasons therefor are not always very satisfactory. The statute of Minnesota provided that the initials of two of the judges of election of opposite political parties should be indorsed on the ballot. It was held that where there was no willful disregard of the statute, and no wrong or fraud intended or perpetrated, the requirement was not mandatory, but was complied with if the initials were those of two judges of the same political faith. But this was mainly upon the ground that the statute, though requiring the indorsement on the ballot by two judges of opposite political affiliations, did not say expressly that a ballot not containing such indorsement should not be counted, although it did say that "no ballot which had not the initials of two judges of election in said judges' own handwriting on the back thereof" shall be placed in the box. The reasoning of the court is not quite clear, as it seems that the statute, strictly construed, would mean that no ballot should be deposited in the box unless it be the identical ballot handed to the voter by the election officer, upon which should appear the initials of two judges of election of opposite political faith. *State v. Gay* (Minn.) 60 N. W. 676. In the case of *Boyd v. Mills* (Kan. Sup.) 37 Pac. 16, the supreme court of Kansas decides a case more nearly in point. The statute of that state provided that the "ballots shall be on plain white paper through which the printing or writing cannot be read." Sample ballots printed on paper of any color but white are directed by the statute of Kansas to be printed and distributed through certain officers for the inspection of candidates and their agents, and these are exact copies of the official ballots printed on white paper. The statute of that state further provided that "no ballot without the official endorse-

ment shall be allowed to be deposited in the ballot box and none but ballots provided in accordance with the provisions of this act shall be counted." In one precinct all the ballots cast were yellow sample ballots, and yet the supreme court held that such ballots should be counted, on the ground that the statute nowhere "explicitly" provided that a ballot printed on paper of a color other than white shall not be counted. With all due deference to the learned court, I think that the only ballot provided for as the official ballot, following the letter of the law, was one printed on white paper.

These provisions from Kansas and Minnesota are recent ones, and illustrate the extreme reluctance on the part of the courts to so construe the Australian ballot law as to deprive any elector of his vote, or of the right to have his vote counted as cast, when the fault is not his own, but that of the election officers. I cite these cases as showing how liberally the statutes are construed in favor of the voter, and against a strict construction that would result in disfranchisement. If these two cases were taken as guides in construing section 130 of our election law, *supra*, it seems to me that if the ballot contains the "indorsement" of the official stamp alone, even if it were not placed upon the proper part of the ballot, the law would be technically complied with, and the ballots should be counted. The court said in *Boyd v. Mills*, *supra*, "We reach the conclusion that the law has not been substantially infringed, because we are unable to see how the purpose of the act can have been impaired in any degree by the mistake made in using the colored ballots." True, the opinion contains some deductions which might be considered as supporting the views of the majority of the court in this case, on abstract questions of law, but this closing extract of the opinion shows the true reason for the decision. I am inclined to the view that the construction of the section should be such as to uphold the legality of the ballots, inasmuch as the disjunctive conjunction "or" is used in two places in section 130, and the ballot must have one of three indorsements,—either that of the official stamp, "or" the name, "or" the initials of the judge of election. I should not be content to rest my view of the case on this matter alone, as the use of the words "or" and "and" are so loose and so frequently inaccurate that their strict meaning is more readily departed from than that of any other words, and one is read in place of the other in deference to the meaning of the context. *Sutherland*, St. Const. § 252. But the next section (131) of the law must be read with its predecessor quoted herein. It relates to the canvass of the ballots cast at the election precinct, and provides that, as soon as the polls of election shall be closed, the judges of election shall immediately proceed to canvass the vote, and shall continue without adjournment un-

til the canvass is completed; and then follows this provision: "The canvass must commence by a comparison of the poll lists and they must be made to agree; the ballot box shall then be opened and the ballots counted by the judges and clerks, unopened, and if there are more ballots than names upon the poll list the ballots must be returned to the box, shaken up, and one of the judges shall draw from such box ballots enough to make the remainder agree with the poll list, which ballots so drawn shall be destroyed, and two or more ballots being found so folded, as to bear the appearance of having been voted by one person shall not be counted, but preserved with the poll books; the poll list and ballots being made to agree the judges and clerks shall then proceed to count and ascertain the number of votes for each person named upon such ballots." It appears to me that this section is either inconsistent with the one preceding it, or, if construed with it, as it must be, effectually neutralizes the provisions of the other. Nothing is said in this section 131 about not counting the ballots denounced in section 130, but only those ballots may be destroyed when there is an excess of ballots over the legal number of votes cast, as shown by the poll lists, and the only ballot that "shall not be counted" is a ballot containing two or more votes folded so as to bear the appearance of having been voted by one person. This section 131 utterly negatives the idea of examining the indorsement on the ballot, because, if that only could be looked to, the ballot containing the doubtful vote would be counted, if properly indorsed as required by section 130, while the others inclosed within would not be. Under section 131, all the ballots, those inclosed with the ballot and the inclosing ballot itself, shall not be counted. By this section no ballots are denounced, but all must be counted, except those drawn from the ballot box to make the number of ballots correspond with the number of voters on the poll list, and ballots inclosing others. If these sections are inconsistent, under well-known canons of construction, the last section in number or position, under some authorities, must prevail. Sutherland, Stat. Const. § 220. At any rate, there would be such a conflict that the sections would be held to neutralize each other, as the legislature has *uno flatu* enacted a contradiction. Perhaps a construction of both of these sections ought to be given so as to exclude all ballots not properly indorsed only where there is an excess of ballots; but it is doubtful if this could be done without rendering nugatory section 131. The safest way, in my judgment, is, where, as in this case, there is no pretense of fraud in the action of voters or election officials, the presumption must be that all of the ballots cast were received from the election judges by the voters and returned after having been prepared, were received by the judges, and should be counted. This is the main purpose

of these sections,—that the elector shall vote only the ticket he has received from the judge of election, and only such tickets shall be counted. The law prescribes minutely the duties of the electors and of the election judges. Cards of instruction printed in English, in clear type, and posted in the election booths, are provided for the voters, and these contain the directions to the voters how to get the ballot,—that is, from a judge of election,—how to prepare it for voting, to vote no other than that received, and to fold the ballot so that the indorsement made by an election judge may be seen, before the ticket is voted. In the majority opinion some stress is laid upon this last direction to the voter, but I do not think it applies here, as there was some sort of an indorsement on the ballot, or one of the indorsements, the official stamp stating that it was the official ballot, etc., and I think that an elector might presume that this was all of the indorsement required, as his attention in the cards of instruction and the sections of the law therein copied is not called to the full indorsement. Nowhere in the law is he required to see that the proper indorsement is made, but only to fold his ticket so as to show the indorsement. In the case of the ballots in the two precincts where the stamp was placed on the face of the ballot, I think it should be presumed, in the absence of any showing to the contrary, that it was on the margin or at the side, and that the voter obeyed the injunction to fold it so as to disclose the indorsement without revealing the ballot as prepared by him. It seems to me that there must have been some purpose on the part of this legislation providing for such minute directions to the voter, and in bringing home to his notice what he should do in obtaining, preparing, and delivering his ballot to the election officials, in which all of his duties are specifically defined. When he has complied with these, this is all that may be required of him. Surely, in all of these directions given to him, nothing is said about the extreme care he is to exercise, according to the majority opinion, in seeing whether the name or initials of a judge of election is on the ballot, but the decision of this court adds another duty not imposed by the law and not brought home to his notice by the instructions given to him pursuant to law,—the duty of scrutinizing the ballot to see if the proper indorsement is made thereon. It is said in the majority opinion: "It is little trouble to ask them [the judges of election] to indorse the ballot properly. We have no patience to consider the idea that the voters generally have not the intelligence to do this." Yet it seems that the judges of election, who must be electors, did not have such "intelligence," for they did not indorse or see to the indorsement of their own ballots, if they voted at all, or those of the electors generally, in strict compliance with the law. They had the law which must be furnished them for

their guidance, but the elector had nothing but the card of instructions required by law to be posted in his booth to guide him, and this does not call his attention to the fact that the name or initials of a judge must be on the ballot. Shall the law mock a voter? Shall he be told minutely what to do by a card of instructions for his guidance, and then have his vote rejected because he has not complied with another part of the law which relates solely to the duties of the sworn officials of the law? Is he to take notice of the duties of an election officer and see that they are performed? As to the indorsement of the ballot, that duty is incumbent upon the county clerk and a judge of an election. If the former neglects something in the stamp, such as the name or number of the precinct, or some other part of the indorsement to be stamped on the ballot, is the voter to be held responsible? If the election officers fail in their duties as to their part of the indorsement, is the elector to be blamed? It was held where one received a majority of the votes cast for the office of township treasurer—it being contended that he was not the nominee of any party, as the ticket was not properly certified, and he was not therefore entitled to a place thereon, and that such tickets should not be counted—that the voter finding the ticket upon the ballot could not be required to determine its regularity at his peril. The court said: "This might involve a necessary knowledge of facts difficult to ascertain. He [the elector] may safely rely upon the action of the officers of the law, whom he has right to suppose have done their duty." *Bragdon v. Navarre* (Mich.) 60 N. W. 277. This was the rule contended for by me in my dissenting opinion in the case of *State v. Barber* (Kan. Sup.) 32 Pac. 23. It is with much pleasure that I notice that the case of *Price v. Lush* (Mont.) 24 Pac. 749, holding to the contrary, which I refused to follow, has been, it is said, "modified," but, as the concurring justice, Judge Hunt, says, "overruled," in a recent case in the same court, in which a masterly opinion was delivered by Mr. Justice De Witt. *Stackpole v. Hallahan* (Mont.) 40 Pac. 80.

I see evidences of returning reason in the more recent construction of the Australian ballot laws, and I am confident that the rule I follow in this case will finally be plainly announced by the courts of the country. The law attempts to prevent former evils in protecting the individual voter from corruption and intimidation, but it should not be so construed as to invite a wholesale disfranchisement of unsuspecting voters, who have relied upon and who have the right to rely upon the faithful performance by election officials of the duties imposed upon them. I cannot insist upon the literal interpretation of the ballot law that may deprive any voter, duly qualified, through the misfeasance, nonfeasance, or malfeasance of any officials, where the elec-

tor has obeyed instructions minutely mapped out for him by the law. The sole object of the sections of the law quoted from is that the elector shall vote only an official ballot delivered to him by a judge of election, after having prepared it, and in this case it seems to me irresistible that the law was complied with on the part of the elector. It is difficult to construe, and the most liberal construction should be given to it, in order to secure freedom and purity of elections, but not to deprive any elector of his vote through the fault of the election officials. To hold to any other rule would be to sacrifice substance to form, and to have our last estate worse than the first. It is safe to say that the framers of the Australian ballot law, as it appears in our statutes, many of them men of prominence in the history of the state, never contemplated the wholesale disfranchisement of electors through the negligence of election officers. I think that they will stand aghast at such an interpretation of their statute. It may be intimated that without a close adherence to the letter of the law, if it can be ascertained, which is to be extremely doubtful, the door to fraud by election officers would be opened, but I think not. In one case in the books the judges of an election precinct stamped and indorsed according to law official ballots after the polls closed, and cast the ballots themselves, and the names of the electors on the poll books showed that, after the judges and clerks voted, the electors, strange to say, were recorded in alphabetical order. *Lloyd v. Sullivan*, 9 Mont. 577, 24 Pac. 218. So it seems that it is very difficult to prevent corrupt officials from voting official ballots, and indorsing them with all of the official indorsements required by law, if they desire to do so. In the case at bar there is a total absence of fraud, and this is, in effect, conceded, as the only matter submitted to us is a technical noncompliance with certain provisions of the law. The dangers afforded by the power conferred upon certain judges under a strict construction and an unreasonable one of the law, by giving undue prominence to certain clauses of it, is greater than would be the liberal construction contended for by me. In one case there is no remedy but the punishment of the judges for failure to indorse properly the official ballot, and no way to count the vote of the defrauded voters. In the other, a judicial investigation can be had to determine the facts and ascertain if fraud actually existed. It is poor compensation to the people who have been defrauded of their rights to have the guilty punished, when they themselves, although innocent, must be punished by having their votes thrown out in the count. I may be pardoned, in closing this branch of the case, to quote, as my brethren have done, from McCrary, Elect.: "Ignorance, inadvertence, mistake, or even intentional wrong on the

part of local officials should not be permitted to disfranchise a district." Section 192, citing *Gilleland v. Schuyler*, 9 Kan. 569.

However, the case might well be disposed of on other grounds. The law was enacted before the constitution went into effect, and if repugnant to that instrument must fail, as only those territorial laws are continued in force that are not repugnant to the constitution, and, if the construction of the statute adopted by this court is the true one, the law is invalid. The constitution provides certain qualifications required of electors, such as age, residence, federal citizenship, ability to read and write the English language, and excludes from the electorate idiots, insane persons, those convicted of infamous crimes, unless restored to citizenship, and certain electors who are not federal citizens. The right of suffrage is called "the right to vote," and certain citizens not falling within any of the classes excluded from the suffrage "shall be entitled to vote" at any election. Article 6, §§ 1, 2. This "right," as it is termed by the constitution, "privilege" as it is sometimes called, is sacredly preserved. It cannot be sacrificed through the fault or neglect of election officials. The right to vote includes and carries with it the right to have the vote cast, counted, or the right to vote is lost. Where the constitution fixes the qualification of voters, it is not in the power of the legislature either to enlarge or abridge them; but legislation may be enacted which merely regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself. *Cusick's Election*, 136 Pa. St. 459, 20 Atl. 574. The legislature has full power to regulate the right to vote, but no constitutional power to restrain or abridge the right, or unnecessarily to impede its free exercise. Under the pretense of regulation, the right to suffrage must be left untrammelled by any provisions or even rules of evidence that may injuriously or necessarily impair it, and so the citizen cannot forfeit the right except by his own neglect, or by such peculiar accidents as are not attributable to the law itself. *Daggett v. Hudson*, 43 Ohio St. 548, 3 N. E. 538. In the note to this case, as found in 54 Am. Rep., at page 843, the language of *Coulter, J.*, in *Brown v. Hummel*, 6 Pa. St. 80, is cited, and I repeat it: "The most important of all our franchises—the right of an elector and citizen—cannot, in a confined sense, be called property. It is not assets to pay debts, nor does it descend to the heir or administrator. But who does not feel its value, and who but would turn pale if he thought he could be deprived of it, without hearing or trial, by act of assembly?" In New York a case arose where the officials charged with the duty of preparing the bal-

lots omitted the name of an office which under the law was to be filed at the election for which the ballot was prepared, and it was held that the voter might write or paste thereon the name of such office and of the person for whom he desired to vote as the incumbent thereof. The court well says: "The constitution confers upon every citizen meeting the requirements specified therein the right to vote at elections for all officers that are elective by the people, and there is no power in the legislature to take away the right so conferred. The legislature may prescribe regulations for ascertaining the citizens who shall be entitled to exercise the right of suffrage, for that power is given to it by the constitution. In prescribing regulations for that purpose, or in respect to voting by ballot, it does so subject to, and, presumably, in furtherance of, the constitutional right, and its enactments are to be construed in the broadest spirit of securing to all citizens possessing the necessary qualifications the right freely to cast their ballots for offices to be filled by election, and the right to have those ballots, when cast in compliance with the law, received and fairly counted. Legislation which fails in such respects and prevents the full exercise of the right as secured by the constitution is invalid." *People v. President, etc., of Village of Wappinger Falls*, 144 N. Y. 616, 39 N. E. 641. Many of the cases are collected to the note to the case of *Daggett v. Hudson* (3 N. E. 538) in 54 Am. Rep., at page 843, and to them may be added *White v. Commissioners*, 13 Or. 317, 10 Pac. 484; *Kellogg v. Hickman*, 12 Colo. 256, 260, 21 Pac. 325; *Kirk v. Rhoades*, 46 Cal. 405; *Eaton v. Brown*, 96 Cal. 371, 31 Pac. 250. In the case at bar, if the law operates to disfranchise any elector, and prevents ballots cast by the elector, received by him from the election judges, from being counted, whether properly indorsed or not, in the absence of fraud, it is repugnant to the constitution. I believe that an "honest ballot and a fair count" is secured by the constitution, and that no law, whether adopted prior or subsequent to the time of the taking effect of the constitution, can step between the voter and the constitution, and that any requirement of any statute that adds to the qualifications of suffrage as enumerated in the constitution itself is void, particularly when it is attempted to impose upon a qualified voter such additional qualifications or restrictions as to make the right of suffrage dependent upon the whim, dishonesty, inefficiency, ignorance, or inadvertence of any election officer.

All the disputed ballots should be counted, and judgment rendered for the defendant; and the district court for Converse county should be so advised.

(5 Wyo. 500)

CHRISTIAN v. McREYNOLDS.¹

(Supreme Court of Wyoming. July 1, 1895.)

Case reserved from district court, Converse county; Richard H. Scott, Judge.

Action by Andrew Christian against William McReynolds. The cause was reserved for decision upon important and difficult questions arising in the case. Reversed.

Lacey & Van Devanter, for plaintiff. R. W. Breckons, for defendant.

CONAWAY, J. This case is in all respects similar to that of Slaymaker v. Phillips (decided at this term) 40 Pac. 971, except that a different county office is involved. The same questions are reserved. The opinion in the case of Slaymaker v. Phillips discusses the questions involved in this case. This case will also be remanded for further proceedings in accordance with that opinion.

POTTER, J., *concura*.

GROESBECK, C. J. I dissent for the reasons given in my dissenting opinion filed in the case of Slaymaker v. Phillips (just decided at this term).

(5 Wyo. 510)

C. D. SMITH DRUG CO. v. CASPER DRUG CO.¹

(Supreme Court of Wyoming. July 1, 1895.)

BILL OF EXCEPTIONS—TIME OF FILING—REVIEW ON APPEAL—DISSOLUTION OF ATTACHMENT.

1. Rev. St. § 2646, provides that time may be given to reduce an exception to writing, and section 2649 provides that the party excepting must reduce his exceptions to writing within the time allowed, when the grounds of objection do not sufficiently appear in the entry, or if the finding is excepted to as against the law and the evidence. *Held*, that when it does not appear in the record that time was either asked or allowed for the filing of a bill of exceptions, proceedings in error will be dismissed, though the allowance of the bill is not contested by the opposite party.

2. A court of error will not reverse a decision of an inferior court upon a question of fact unless such decision appears clearly erroneous.

3. Under Rev. St. § 2809, subd. 9, providing that attachments may issue when the debt was fraudulently contracted, an attachment will be dissolved when the evidence shows that part only of the debt was so contracted.

4. An order dissolving an attachment may be reviewed without bringing up the whole case after final judgment, even though there is no direct statutory provision authorizing an appeal in such cases.

5. An affidavit for attachment, which states substantially in the language of the statute that the debt was fraudulently contracted, is sufficient though it does not show the facts in detail.

Error to district court, Natrona county; J. W. Blake, Judge.

Attachment by the C. D. Smith Drug Company against the Casper Drug Company. A motion to discharge the attachment was sustained, and plaintiff brings error. Proceedings in error dismissed.

C. C. Wright, for plaintiff in error. Chester B. Bradley, for defendant in error.

¹ Rehearing pending.

GROESBECK, C. J. The plaintiff in error, as plaintiff below, obtained an order of attachment against the defendant in error, alleging certain statutory grounds therefor in the affidavit for attachment. Subsequently a motion was made to discharge and dissolve the attachment, and upon a hearing before the judge of the district court in vacation the motion was sustained, and the attachment discharged as to all of the property attached. The bill of exceptions states that the ruling of the judge was excepted to by the plaintiff in error at the time it was made, but there is no such statement in the order discharging the attachment, or elsewhere in the record. Nowhere does it appear, either in a journal entry or in the bill of exceptions, that time was asked or allowed within which to reduce the exceptions to writing, or to prepare and present the bill of exceptions, or that the bill was allowed within the time given by the court or judge for such purpose. The bill was allowed apparently at the term of court following the dissolution of the attachment, but the order of allowance which appears in the bill of exceptions does not state that it was allowed within a time fixed by the court. This, we think, is fatal to the bill. The record must show the order giving the time beyond the term, or, if not made in term time, within the time fixed by the judge in vacation in which to present the bill; and the order must appear by an entry of record. A recital in the bill that time was given is not sufficient. If the bill be presented to the court or judge for allowance within the time prescribed by the order, the party does not lose his right to have the bill signed and filed, but the bill must show on its face that it was presented within the time allowed. Elliott, App. Proc. §§ 801, 802. Our statutes provide that the party excepting to the decision must except at the time it is made, and that time may be given to reduce the exception to writing, but not beyond the first day of the next term. When the grounds of objection do not sufficiently appear in the entry, or if the finding excepted to is asserted to be against the law or the evidence, the party excepting must reduce his exception to writing, and present it to the court, or to the judge thereof in vacation, within the time given for allowance. Rev. St. § 2646, and Id. § 2649, as amended by chapter 23, § 1, Sess. Laws 1890. These statutory provisions are plain, and require no construction. The party excepting must do so at the time the decision is made, and ask time in which to reduce his exceptions to writing, and present them for allowance to the court, or judge in vacation, and this time cannot extend beyond the first day of the next term of court. The common-law rule required that the bill should be completed, filed, and signed during the term, but this has been modified by statute allowing time including the first day of the next ensuing term of court. There is no warrant under the statute for allowing the bill,

unless time is obtained therefor by order of the court, or its judge in vacation. The decisions of this court have been uniform on this point, where the ground is that the judgment or order is not sustained by sufficient evidence, as is the contention in the case at bar. *Roy v. Mercantile Co.*, 3 Wyo. 417, 28 Pac. 996; *Howard v. Bowman*, 3 Wyo. 311, 23 Pac. 68. The allowance of the bill does not appear to have been contested, and nothing is said in regard to this matter in the briefs upon which the cause was submitted, but we cannot disregard such a lack of compliance with the necessary forms of our practice and the provisions of our statute. It is urged that the evidence upon the hearing before the judge upon the motion to dissolve the attachment was sufficient to sustain the attachment, and that the judge erred in discharging the attachment, and this is the only question—a question of fact—that would be presented by the bill. As the record nowhere discloses that time was asked or allowed within which to prepare and present the bill, we have nothing before us to decide, and the proceedings in error must be dismissed.

2. But we have examined the testimony taken upon the hearing of the motion to dissolve the attachment, both oral and in the form of affidavits, and we are unable to say that the decision of the court was incorrect. A court of error, before reversing the decision of an inferior court upon a question of fact involved in a motion to discharge an attachment should be satisfied that such decision was clearly erroneous. *Harrison v. King*, 9 Ohio St. 388. The second ground of attachment is based upon the pending disposition of the property of the debtor by it with intent to defraud its creditors. The only testimony that can be claimed as tending to show this is an offer to mortgage the property to plaintiff in error, including in the mortgage the claim of another creditor, not yet due, which it was stipulated should be paid after the debt due the plaintiff in error was discharged. This showing is not a fraud of the rights of other creditors, and is more favorable to the defendant in error than to the complaining party. The first and remaining ground of attachment (that the defendant fraudulently contracted the debt) is based on certain statements alleged to have been made to the commercial traveler of the plaintiff in error at the time the first bill of goods was sold to defendant in error,—that the corporation had a capital stock of \$5,000 fully paid up, and owed practically no debts, or that there were no debts of importance. The evidence on this point was conflicting, as the statements of the commercial traveler were denied by three witnesses for the defendant in error more or less directly, and positively by the member of the corporation employed as its bookkeeper, who was the one who ordered the goods. The fact appears that the leading incorporators, Lilly and Culver, of the Casper Drug Company,

the defendant in error, took each 77 shares of the capital stock of the corporation in payment of the stock of drugs and fixtures theretofore owned by them, and 20 shares each to be devoted to the purpose of paying their antecedent indebtedness; it being the intention of the incorporators to merge the business of Lilly and Culver into that of the Casper Drug Company. The remaining shares, 6 in number, were distributed among an attorney, for his legal advice; a practicing physician, for his advice and patronage; and to a former employé in payment of his services. The shares of stock were 200 in number, and each was of the face value of \$25. There does not appear any design on the part of any one in this transaction to defraud any of the creditors of the corporation or of the stockholders. About a week after the incorporation, Lilly, the vice president and manager of the corporation, made a statement to the commercial agency of R. G. Dun & Co., stating that the authorized capital stock of the corporation was \$5,000; that it had been subscribed and paid in; that the corporation had cash on hand \$500, stock of goods and goods in transit to the amount of \$4,500, and fixtures amounting to \$500; and that the liabilities were accounts payable to the amount of \$100. This statement does not correctly represent the financial condition of the corporation at the time it was made. \$3,850 of the capital stock represented the stock of goods put into the corporation by Lilly and Culver, which was worth between \$2,800 and \$3,500, according to their testimony, and \$1,000 of the stock was not paid in, but was taken by Lilly and Culver, and was to be applied in payment of their debts in business,—over \$800,—and really represented either unpaid capital stock or stock issued for the stock of goods sold by them to the corporation. The indebtedness upon the goods in transit must have been largely in excess of \$100, as certified in the statement, and the whole statement sent to the commercial agency appears to be false and misleading. It was not communicated to the plaintiff in error until some time after the first bill of goods, ordered from the commercial traveler of plaintiff in error, was shipped, although the testimony is somewhat obscure on this point. The most favorable view of the case that can be taken for plaintiff in error is that the first bill of goods was sold and delivered upon the faith of the statements made to the commercial traveler, which must be held not to be false under the evidence, or not proven according to the evidence; and that the second bill was shipped upon the belief that the misleading and deceptive statement made through the commercial agency was true. The debt, if fraudulently contracted, was not the whole debt, but about half of the whole account, and the amount of the second bill of goods. This is insufficient to sustain the attachment. The ground of the attachment is that the whole debt was fraud-

ulently contracted, while the evidence shows that but part of it can be said to be so contracted, assuming that the statements made to the commercial agency and communicated to the creditor, and upon which he acted as to subsequent transactions, were fraudulent. The framers of the statute undoubtedly recognized that attachment is a harsh remedy, and one which, though proper when the statutory grounds clearly exist, should be confined within the limits of the statute. There must be an affidavit showing the nature of the plaintiff's claim, that it is just, and the amount which the affiant believes the plaintiff ought to recover, and the existence of some of the grounds of attachment enumerated. It is said that under such a statute, these provisions indicate clearly the purpose of the legislature to secure the people against unauthorized and excessive attachments, and that these provisions would afford no protection if a party holding a small claim, upon which an attachment might lawfully issue, may attach it to another claim, upon which, under the law, no attachment could issue, and obtain an attachment for the consolidated and increased amount. That the attachment should be confined to the cause of action upon which an attachment might properly issue, and the increase of the plaintiff's proper claim by adding an amount which, if standing alone, would not be a claim for which the attachment could lawfully issue, would vitiate the whole, was held by the court to be so plain and manifest as to render authorities to that effect of secondary importance. *Mayer v. Zingre*, 18 Neb. 458, 25 N. W. 727. So, in a like case, where two promissory notes of the plaintiff's claim were not fraudulently contracted, it was held that the plaintiff had no right to have his writ for the amounts that were not, nor to have a lien upon the property of the defendant therefor. By including with the claim fraudulently contracted others that were not, if the defendant sought to release his property from the attachment by executing a bond in discharge of the attachment, the officer holding the property seized in attachment could demand a bond in double the amount specified in the affidavit, though but a portion of the debt was fraudulently contracted; and thus the defendant would be forced to give a bond for the entire amount sworn to be due, to secure the immediate restoration of his property. One could attach to his claim any number of assigned claims, and obtain a lien for the whole sum upon the debtor's property, if the contrary rule should be enforced. The court well said that, the remedy being a harsh and extraordinary one, proper when coming within the plain provisions of the statute, the statute should not be extended by construction. It further remarks that "we are cited to no case by counsel which upholds the doctrine for which they contend, and we are satisfied upon principle that none can be found." Est-

low v. Hanna, 75 Mich. 219, 42 N. W. 812. The following cases are cited: *Mining Co. v. Raht*, 9 Hun, 208; *Wilson v. Harvey*, 52 How. Prac. 126; and *Mayer v. Zingre*, supra. The same rule was enforced in *Stiff v. Fisher*, 85 Tex. 556, 22 S. W. 577; *Id.*, 2 Tex. Civ. App. 346, 21 S. W. 291. For the reason that the debt cannot be said to be fraudulently contracted as a whole, and because this court cannot disturb the findings below upon the conflicting evidence as to the first item of the debt, particularly where the preponderance of the evidence shows that such portion of the debt was not fraudulently contracted, the order discharging the attachment would have been affirmed if the bill of exceptions was a proper one, and time had been asked within which to prepare and present it to the court or judge for allowance.

3. An objection is made that no proceedings in error could have been instituted in the case, as the order discharging the attachment was not a final order, and is not appealable under our Code. Under code provisions similar to ours, the courts of last resort in other states have held that the order dissolving or sustaining an attachment is a final order affecting the substantial rights of the parties, and may be reviewed without bringing up the whole case after final judgment; and this is undoubtedly the correct rule, even though there is no direct statutory provision in our Code authorizing an appeal in such cases, except as to final orders generally. *Watson v. Sullivan*, 5 Ohio St. 42; *Harrison v. King*, 9 Ohio St. 388; *Bank v. Morgan*, 26 Neb. 148, 41 N. W. 993.

4. It is contended that the affidavit for attachment is not sufficient, as it states that the debt was fraudulently contracted, without showing in detail the facts relating thereto. But we think that the great weight of authority is in favor of sustaining the attachment where the grounds therefor are stated in the language of the statute, or in equivalent terms. *Hockspringer v. Ballenburg*, 16 Ohio, 304; *Emmitt v. Yeigh*, 12 Ohio St. 335; *Coston v. Paige*, 9 Ohio St. 397; *Harrison v. King*, *Id.* 388; *Creasser v. Young*, 31 Ohio St. 57; *Tallon v. Ellison*, 3 Neb. 63. The ground of the statute is expressed in positive terms, and the criticism of Mr. Justice Saufley in *Bank v. Swan*, 3 Wyo. 372, 23 Pac. 743, does not apply, as in that case the applicant for attachment stated, under the permission of our statute, that he had good reason to believe, and did believe, that the ground of attachment existed, while in the case before us the ground of attachment is stated positively, and not upon belief. Owing to the defect in the bill of exceptions, and in the absence of any showing in the record that time was asked and allowed in which to reduce the exceptions to writing for allowance, the proceedings in error are dismissed.

CONAWAY and POTTER, JJ., concur.

(12 Wash. 272)

**WASHINGTON BRIDGE CO. v. LAND &
RIVER IMP. CO. OF EVERETT et al.**
(Supreme Court of Washington. July 13,
1895.)

**BUILDING CONTRACT—CERTIFICATE OF ENGINEER
—PERFORMANCE—MECHANIC'S LIEN—
WAIVER OF CONDITIONS.**

1. A contract for the construction of a bridge provided for payment on certificate of the engineer that the work had been completed. After the bridge had been practically completed, the contractor demanded payment, and the engineer wrote the owner that the bridge was completed except for some planking which could not be done until low water; that he was willing to accept the bridge as it stood, and advised the owner to retain a certain amount of the contract price to insure the completion of the planking. *Held*, that the letter entitled the contractor to the payment of the price, less a sufficient amount to insure the completion of the planking.

2. Where the certificate of the engineer accepting a bridge as completed recites that certain other work remains yet to be done, and advises the owner to retain a certain amount of the contract price to insure its completion, a claim for a lien filed by the contractor within the statutory time after the completion of the work reserved from the certificate is sufficient.

3. Where the contract for a bridge requires a certificate of the engineer that the work is completed before the price is payable, such a certificate cannot be withheld where the bridge, the contract price of which was \$16,000, was so near completed that an expenditure of \$30 would complete it, it being impossible to finish the work at the time because of high water.

4. Where, in an action on a building contract, evidence of a waiver by the owner of conditions precedent to the payment of the price is admitted without objection, the fact that the waiver was not pleaded, and that other evidence of the waiver was objected to, does not prevent the contractor from taking advantage of the waiver.

Appeal from superior court, Snohomish county; John C. Denny, Judge.

Action by the Washington Bridge Company, a corporation, by Warren A. Worden, receiver, against the Land & River Improvement Company of Everett, a corporation, and others. There was a judgment for plaintiff, and the defendant improvement company and another appeal. Affirmed.

Black & Edwards, for appellants. Stiles, Stevens & Tillinghast, for respondent.

HOYT, C. J. Respondent brought an action against the appellants and other defendants to recover the price agreed to be paid for the construction of a certain bridge, and to foreclose a lien thereon to secure the payment of the judgment. After hearing, judgment and decree were made and entered substantially as prayed for in the complaint, from which the defendants the Land & River Improvement Company of Everett and the Mitchell Land & Improvement Company have sought to appeal. Upon the hearing in this court, the appeal was dismissed as to the Mitchell Land & Improvement Company, so that the only questions to be decided are those arising between the plaintiff and the Land & River Improvement Company. Upon the part of that corporation, it is claimed that the de-

cree should be reversed, for the reason that the written contract under which the bridge was built provided (1) that the last payment should not be made until the superintendent had furnished a certificate that the work had been completed in accordance with the terms of the contract; and (2) that proof should be furnished that all claims for labor and material had been paid, and that no such certificate had been furnished or proofs made. Upon these questions it is contended by the respondent that, as to proofs that all claims for material and labor had been paid, the circumstances under which the bridge was erected were such that no claims could be asserted against the structure, and that the defendants had knowledge of that fact, and for that reason waived the making of any such proofs; and, as to the certificate of the superintendent, that one was furnished, and that, if there was not, it was waived.

The question of the most importance, and that upon which the greatest stress was placed at the hearing, was in relation to the superintendent's certificate. That which was relied upon by the respondent as a certificate was a letter written by the superintendent to the president of the appellant in substantially the following form: "In response to your letter from the Washington Bridge Company of Tacoma, notifying me that they had completed the Everett Avenue bridge, I have this day inspected the same, with a view to acceptance. The planking on the piers still remains to be finished, but this cannot be done until the river is very much lower than it is at present. This work should have been done in August of last year, as the river at that time was very low; but, although I wrote to them several times on the subject, they failed to do the work until it was too late. With this exception, I am willing to accept the bridge as it stands. I should advise you to hold back about three hundred dollars to insure the completion of the planking at such time as the state of water will admit of the work being properly done." The appellant insists that this letter was in no sense a certificate; that, if it was a certificate at all, it was to the effect that the work had not been completed, rather than one that it had. If the letter had to be construed alone, without any aid from surrounding circumstances, it might be difficult to determine therefrom what was intended. But it was made clearly to appear from the proofs that, for some time before this letter was written, the respondent had been claiming that the bridge was entirely completed, and had been pressing the appellant for payment of the balance due; that, during various conversations between the officers of the respondent and of the appellant, there had been claims and admissions tending to show that it was understood that the bridge was substantially completed. And this letter must be construed in connection with the circumstances connected with the subject-matter thus made to appear, and,

so construed, we think it fairly warrants the contention on the part of the respondent that it was intended by the superintendent as a certificate that he had passed upon and accepted all of the work except the planking of the piers, and that as to that he intended to certify that it could not be done at that time on account of the stage of the water; and, further, that it was his intention by this certificate to entitle the respondent to full payment, excepting that enough should be kept back to insure the completion of the work so soon as it could be done; that it was not contemplated that payment should be delayed until a further and additional certificate should be furnished. But the appellant claims that, if this letter be so construed, it shows that the contract was entirely completed on July 12th, the date of the letter, and that for that reason the lien which was not filed until October could not be given force. But, in our opinion, the certificate, if treated as one of final completion, did not prevent the respondent from doing the work which the certificate did not cover; and this work, when done, was as much a part of the contract as though no certificate had ever been furnished; and as the proof shows that work was done upon the planking, as to which the reservation was made in the certificate, on the 29th of September, the lien was filed in time.

We think the respondent was entitled to recover under this certificate and the other proofs introduced at the trial upon another ground. It appeared therefrom that the work under the contract had been substantially completed; and while it is true that the certificate might rightfully have been refused until the work was entirely done, if an exact and full compliance with the contract could then reasonably be required, it could not be so refused if the work had been completed in substantial compliance with the contract, and what remained could not then be reasonably required to be done. All of the cases hold that a certificate cannot be rightfully withheld after the work has been substantially completed, even though the contract may not have been complied with in every detail, if, at the time the work is so substantially completed, it is not reasonable, under all the circumstances, to require a further compliance. In our opinion, the circumstances surrounding this transaction bring this case directly within the rule thus recognized. That the work had been substantially completed was fully established by the proofs, from which it appeared that not more than \$30 would be required to fully complete the work; and, when a structure which has cost \$16,000 or more is so far completed that an expenditure of \$30 will finish it, it is certainly substantially completed; and, as it appeared that it was impossible that this small amount of work could be done at that time, it was not reasonable for the superintendent to withhold his certificate until some indefinite time in the future when it might be possible to complete

the work. Under the circumstances, we hold that the contract had been substantially completed, and that its further completion could not reasonably have been required. This being so, the appellant could not rightfully refuse to pay the balance of the contract price which had been earned, because of the absence of the certificate provided for in the contract.

There was a further ground upon which the respondent was entitled to recover. The conditions of the contract as to the certificate, as well as those as to the proof of the payment of claims, had been waived by the appellant. The appellant contends that the pleadings were such that the respondent could not make available any waiver of the conditions of the contract. The complaint may not have authorized the introduction of any proof of such waiver, but enough evidence of that kind was introduced without objection on the part of the appellant to authorize a finding by the court of the fact of such waiver; and, this being so, the fact that other testimony tending to show such waiver was objected to, or the fact that the waiver was not pleaded, could not prevent a court of equity from giving force to the proofs which had been introduced without objection. Upon one or all of these grounds, the trial court rightfully held that the contract price, less the amount required to complete the work, could be recovered, and that its payment could be enforced by a lien upon the bridge.

It is claimed, however, that the recovery was excessive, for the reason that the court allowed only the sum of \$800 as compensation for the superintendent, growing out of the delay in the completion of the structure, when the proof showed that the amount actually paid to him by the appellant was some \$2,200. Upon this question, the proofs warranted a finding on the part of the trial court that only a reasonable compensation paid the superintendent by the appellant was to be repaid by the respondent, and for that reason we are not disposed to disturb the finding that the respondent was only liable on that account to the amount of \$800.

That written contracts should be given force according to their terms, and that a waiver of any of such terms should only be held to have been established when clear and convincing proof to that end has been introduced, is undoubtedly the rule, and to it we yield the fullest adherence; but, where the circumstances tending to show such waiver are evidenced by written instruments, the danger growing out of the admission of such proof is much lessened. In the case at bar, the written evidence, if considered alone, would satisfy us that it was the intention of the appellant not to hold the respondent strictly to the conditions of the contract; and such written proofs were supplemented by oral testimony which could leave little doubt as to the facts. From what we can gather from the record, the cause was fairly tried, and the

court arrived at the proper conclusion, and its judgment and decree will be affirmed.

ANDERS, SCOTT, and GORDON, JJ., concur.

(12 Wash. 230)

NICOL v. SKAGIT BOOM CO. et al.

(Supreme Court of Washington. July 10, 1895.)

TIME FOR APPEAL—EXTENSION BY MOTION TO VACATE—WHO MAY APPEAL.

1. Where the time within which an appeal from an order confirming a sale by a receiver can be taken has elapsed, a party cannot, by motion to vacate the order of confirmation and appeal from the denial of the motion, bring up the order of confirmation for review.

2. A person neither an active party to the hearing of a motion for confirmation of a sale by a receiver, nor a party to a motion to vacate the order of confirmation, cannot appeal from the decisions thereon.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by A. R. Nicol against the Skagit Boom Company and others. From an order confirming a sale by the receiver appointed for defendant boom company, and from an order refusing to vacate the order of confirmation, defendants appeal. Affirmed.

C. K. Bonnestel, W. H. Pratt, and Richard Saxe Jones, for appellants Skagit Boom Co., E. S. Alexander, E. T. Dunning, and E. C. Foltz. C. Van Horn, Millon & Houser, and Johnson Nickens, for respondent.

HOYT, C. J. One of the defendants, as receiver of the Skagit Boom Company, made a sale, under order of the court, of the property of said company. To his report of such sale, exceptions were filed on the part of the Skagit Boom Company and E. T. Dunning, two of the defendants. Such exceptions, together with a motion for confirmation of the sale, were heard on the 20th day of June, 1894; and, at the time of such hearing, an order was made overruling the exceptions, and confirming the sale. This order was entered on the 23d day of June, 1894. Thereafter a motion was filed on behalf of said defendants, the Skagit Boom Company and E. T. Dunning, to vacate the order of confirmation. This motion was heard on the 2d day of July, 1894; and, at the time of such hearing, an order was made denying the motion, which was duly entered on the 6th day of July, 1894. On the 7th day of July, 1894, the defendant the Skagit Boom Company and E. C. Foltz gave notice of an appeal to the supreme court from the order confirming the sale, and also from the order denying the motion to vacate said order of confirmation; and on the 10th day of July, 1894, the defendants E. T. Dunning, and Edward S. Alexander, as re-

ceiver of the Skagit Boom Company, filed a notice that they join in said appeal.

Upon the record showing these facts, it is urged on the part of the respondent that the orders appealed from must be affirmed, without regard to the question as to whether or not they were rightly made, for the reason that none of the appellants are in a situation to take advantage of the error of the court in making them, if error was committed. With this contention we feel compelled to agree. The order confirming the sale was made at the time of the hearing, and, under the provisions of section 3 of the act of 1893 as to appeals, could only be appealed from within five days after its entry; and as it was entered on the 23d day of June, and the attempt to appeal therefrom was not until July 7th, such attempt was ineffectual. The appeal from the order refusing to vacate the confirmation of sale was in time, but, as to the appellants who were parties to the hearing at the time the order confirming the sale was made, an appeal therefrom could not bring up any question as to the making of such order. By their motion to vacate it, they only sought to have the court rehear the same question upon which the former hearing had been had at the time such order was made; and it is familiar law that one who is in a situation to protect his rights by an appeal from a judgment or order must so protect them, and cannot, by way of a motion, seek to revive the same questions, and from a decision in reference thereto seek relief by appeal. The only remedy of the appellants who were parties to the hearing at the time the order of confirmation was made was by an appeal from that order, and, not having taken it, they are without remedy.

The only other appellant making any claim to relief is E. C. Foltz, but he was an active party to neither the hearing upon motion for confirmation, nor to the one upon the motion to vacate the order then made. So far as he was concerned, the order of confirmation was made without objection,—and, no appeal having been prosecuted therefrom, it became final until set aside by some proper proceeding in the trial court; and until he has set on foot some such proceeding, and has obtained the decision of that court thereon, there is nothing in its proceedings to which he has been such a party as to entitle him to prosecute an appeal from the decision of that court therein. Other reasons might be suggested why these appeals cannot be sustained, but it is unnecessary to refer to them, since what we have said shows that there is nothing in the record which authorizes this court to grant any relief. The orders appealed from must be affirmed.

ANDERS, SCOTT, and GORDON, JJ., concur.

(12 Wash. 254)

STATE v. ISENSEE.

(Supreme Court of Washington. July 13, 1895.)

EMBEZZLEMENT BY MUNICIPAL OFFICER—INDICTMENT.

1. Pen. Code, § 57, provides that, if any public officer shall misappropriate any money, he shall be deemed guilty of a felony. *Held*, that an indictment against a county treasurer for misappropriating county funds is good, though it calls the offense larceny.

2. Pen. Code, § 55, making any agent, clerk, or officer guilty of larceny if he fraudulently converts to his own use money intrusted to him, applies to a municipal officer.

Gordon, J., dissenting.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Philip M. Isensee was convicted of misappropriating public funds, and appeals. Affirmed.

Fairchild & Rawson and Black & Leaming, for appellant. G. V. Alexander, for respondent.

DUNBAR, J. The appellant was city treasurer of the city of New Whatcom, Wash., at the time he was arrested on the indictment contained in the transcript herein. The indictment was substantially as follows: "And said Philip M. Isensee, as such treasurer aforesaid, was charged with the duty of receiving and safely keeping all moneys coming into his hands as such officer and city treasurer; and the said Philip M. Isensee, as such officer and city treasurer of said city of New Whatcom, as aforesaid, was then and there intrusted with, and did then and there have in his hands, possession, custody, and control, by virtue of his said office as city treasurer aforesaid, certain public money, to wit, the sum of \$60,000 of lawful money, the same being money and property of the said city of New Whatcom, and of the value of \$60,000 in lawful money; and the said Philip M. Isensee did then and there, wickedly and unlawfully, fraudulently and feloniously, take, misapply, embezzle, appropriate, and convert to his own use said \$60,000, with the care, custody, and control of which he, the said Philip M. Isensee, as such officer and city treasurer, was then and there so as aforesaid intrusted," etc. The appellant was arrested and arraigned, and demurred to the indictment on the grounds (1) that it did not substantially conform to the requirements of the Code of the state of Washington; (2) that more than one crime was charged in the indictment; and (3) that the facts charged in the indictment did not constitute a crime. The demurrer was overruled. The state presented its testimony in support of the charge, and the defendant was found guilty. Judgment was rendered, and sentence pronounced, from which judgment the appellant appeals to this court.

The only question raised here is as to the sufficiency of the indictment. It is insisted by the appellant that this indictment is not

good under section 55 of the Penal Code, for the reason that said section does not contemplate in its provisions a municipal officer. This section is as follows: "If any agent, clerk, officer, servant, or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert to his own use, or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so intrusting it to him, he shall be deemed guilty of larceny," etc. And it is insisted that it was not the intention of the legislature that this statute should apply to officers of municipal corporations. The statute itself does not undertake to define or restrict the word "officer"; and we do not know by what authority or by what rule of construction the court would be warranted in announcing that the word "officer," as employed in the statute, referred to one character of officers more than another. We are not informed by the appellant what particular officers, in his judgment, are covered by the statute. He is content to insist that he does not fall within its contemplation. It is doubtful if a defaulting officer could be found who thought the statute covered his particular case. We are willing to accept the theory of the appellant, as enunciated by Chancellor Kent, "that, in the exposition of the statute, the intention of the lawmakers will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter." This rule will prevail when there is an evident conflict between the intention of the lawmakers and the literal sense, and between the reason and intention and the strict letter of the law; but it is not pointed out to us, in any satisfactory way at least, that there is any such conflict here. There seems to be no good reason why the legislature should not have had in mind the treasurer of a county or of a municipality when it used the word "officer," as well as any other officer which we can conceive of; and it certainly would have been a reasonable intention on its part to include this particular officer, who is particularly subjected to the temptation of violating this statute; and we do not think that it is the duty of courts to hunt for reasons to limit the scope of the law, when the result of such limitation is to aid embezzlers of public funds to evade their responsibilities, and escape punishment for a violation of their trusts. In Kansas, under a statute (Gen. St. § 2220) which provides that if any clerk, apprentice, or servant of any private person or of any copartnership, or if any officer, agent, clerk, or servant of any corporation, or any person employed in such capacity, shall embezzle, etc., he shall be punished, etc., it was held that a county treasurer was an officer contemplated by such statute. The court in that case noticed the argument of the defense that the law provides that the embezzlement must be without the assent of the employer, and that the treasurer is not

the employé of any one; and, even if it should be held that the county was his employer, it could not in any way assent to an unlawful appropriation of its funds. But the court, notwithstanding this argument, decided, in an able opinion, that a county treasurer was within the meaning and intent of the statute; that the treasurer was an officer contemplated by the statute; and that the county was an incorporation and an employer not assenting to an unlawful appropriation of its funds. It is laid down by Bish. Cr. Law, § 336, that it is possible for an officer of a corporation to be also its agent, servant, or clerk by virtue of his office. Thus, in England, if, pursuant to a statute, the inhabitants of a parish elect an assistant overseer of the poor, and define his duties, and if he is then appointed to the office by warrant from two justices of the peace, as the statute also directs, and then appropriates to his own use moneys received in his office, he may be regarded as a servant of the inhabitants of the parish, and be convicted of the embezzlement. Under the doctrine announced in *State v. Smith*, 13 Kan. 274, and indorsed in Bish. St. Crimes, p. 212, the appellant is an "officer" within the meaning of section 55, and the city of New Whatcom is "a person intrusting," etc., within the meaning of said section. But, whether the indictment is good under section 55 or not, it certainly is under section 57, which provides that, if any state, county, township, city, town, village, or other officer elected or appointed under the constitution or laws of this state shall, in any manner not authorized by law, use any portion of the money intrusted to him for safe-keeping, in order to make a profit out of the same, or shall use the same for any purpose not authorized by law, he shall be deemed guilty of a felony.

It is insisted by the appellant that this indictment was drawn under section 55, and that, for that reason, the appellant should not be called upon to answer under the provisions of section 57. There is nothing in the record, except the indictment itself, to indicate under what section it was drawn, and we think it sufficiently charges a crime under section 57. It is true that the indictment charges the appellant with the crime of larceny, but with the name of the crime the appellant has no concern. He is charged with the commission of certain acts. These acts are specifically set forth in the indictment, and he is notified just what he has to defend against, viz. he is notified that he has unlawfully and fraudulently appropriated and converted to his own use \$60,000, described in the indictment. The charge is brought home to him by the statement of facts, so that he cannot mistake his defense. Whether it be called larceny or embezzlement can be of little aid to him in preparing his defense to the acts charged. The law intends to throw around every person who is charged with crime all the safeguards necessary to protect him from surprise, and to prevent him from being misled to his peril;

but certainly it was not the intention of the law and is not the province of the courts to allow officers who are intrusted with public funds to plunder the funds so intrusted to them, and to escape answering on the merits, by raising technical objections, which tend to prevent an honest investigation of the crime charged. The judgment will be affirmed.

HOYT, C. J., and SCOTT, J., concur.

ANDERS, J. I think the indictment is good under section 55 of the statute, and I therefore concur in the result.

GORDON, J., dissents.

(12 Wash. 241)

SQUIRES v. ZUMWALT et ux.

(Supreme Court of Washington. July 10, 1895.)

SUIT BY LESSOR—FORCIBLE ENTRY BY LANDLORD—COMPLAINT—DESCRIPTION OF PREMISES.

1. In an action for forcible entry by a lessee against a lessor, the description in the lease, "Lot 1, block 12, Gates' Second addition to Mount Vernon," is sufficient, though it is not stated where said addition was located, it being alleged in the complaint, and appearing from the proof, that possession was taken under the lease.

2. In an action for forcible entry by the lessee of a skating rink against the lessor, a complaint which contains a proper description of certain land, and alleges that the building, situated on the land so described, is the building covered by the lease, is sufficient.

3. Where there is no substantial conflict in the proof relating to the issues raised by the pleadings the court may take the question from the jury.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action for forcible entry by C. H. Squires against J. W. Zumwalt and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

C. C. Bitting, for appellants. Million & Houser, for respondent.

HOYT, C. J. But two substantial questions are presented by the record on this appeal. The first is as to the sufficiency of the complaint, and the second as to whether or not such facts were shown by the proofs as to entitle the plaintiff to a peremptory instruction to the jury to find in his favor. The alleged insufficiency of the complaint grows out of the description, in the lease, of the property to obtain damages for the detention of which this action was brought. In said lease the property was described as "Lot 1, block 12, Gates' Second addition to Mount Vernon," but there was no statement as to where said addition was located. It appeared, however, from the complaint, and from the lease itself, that it had been recorded in Skagit county, and we are not satisfied that, in view of this fact, and of the further fact that the court will take judicial notice of the county in which Mount Ver-

non is situated, the description was insufficient. But, however this may be, it was alleged in the complaint, and clearly appeared from the proofs, that possession of the building was taken under said lease. The complaint also contained a proper description of lot 1, block 12, in Gates' Second addition to Mount Vernon, showing the county and state in which the property was situated, and it was alleged therein that the building situated on the lot so described was the building covered by the lease. Under these circumstances the court rightfully held the complaint to be sufficient.

Upon the other question the appellants claim that they were entitled to have the jury pass upon the issues raised by the pleadings, and that the court committed reversible error when it practically took from it the questions thus presented. This claim must be sustained if there was any substantial conflict in the proofs relating to such issues, but, in our opinion, there was no such conflict. The only question upon which there was even a semblance of a conflict was the one relating to the circumstances surrounding the detention of the building by the appellants, and upon that question the testimony of the respondent was abundantly sufficient to show that such detention was forcible and unlawful, and this testimony was substantially confirmed by that of the appellants, and there was nothing in the circumstances surrounding the transaction disclosed by the proofs to in any manner contradict the testimony on the part of the respondent.

It is further suggested by the appellants that there was no proof of the amount of damages suffered by the respondent. In view of the allegations in the complaint and of the denials in the answer, it was not necessary for the respondent to introduce any proof upon that question; and, even if it was, the finding by the court as to the amount of such damages was, under all the circumstances, so favorable to the appellants, that the judgment should not be reversed on account of the ruling of the court upon that question, even if it was erroneous. In the brief of the appellants there are other suggestions of error, but they are all founded upon the alleged insufficiency of the complaint, or the invalidity of the lease, or the action of the court in taking the case from the jury, and require no detailed consideration. The judgment will be affirmed.

ANDERS, SCOTT, DUNBAR, and GORDON, JJ., concur.

(12 Wash. 266)

HART et al. v. MANEY.

(Supreme Court of Washington. July 13, 1895.)

ACTION AGAINST PRINCIPAL—AGENT'S PROMISE TO PAY—WRONGFUL ACT OF AGENT—ESTOPPEL TO DENY CONTRACT.

1. In an action for a sum paid by plaintiff for board at defendant's request, evidence that

defendant's foreman asked plaintiff to procure board for himself and a gang of men in defendant's employ, and that the foreman would see that it was paid, is not sufficient to entitle plaintiff to judgment.

2. Where an employé, without his principal's authority, loans goods in the principal's possession, belonging to another, the principal is not liable for damage to the goods by the borrower.

3. Where an agent, authorized so to do, contracts to deliver a certain quantity of lumber for the construction of a railroad trestle, and the principal sues a person for a portion of the lumber contracted for, and a counterclaim for breach of the contract is set up, the principal is estopped to claim that the contract was not made with such person.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by J. F. Hart and another against J. J. Maney. Judgment was rendered for defendant, and plaintiffs appeal. Affirmed.

Headlee, Allen & Headlee, for appellants.
A. K. Delaney, for respondent.

DUNBAR, J. This appeal is brought here only on the errors alleged in the instructions of the court to the jury. It is difficult to tell, however, from the transcript, or from appellants' brief, what the instructions objected to really are. The instructions given by the court do not appear in the transcript. There appears a set of instructions denominated "Plaintiffs' Instructions to Jury," commencing with instruction No. 2 and ending with instruction No. 1. Then follow instructions entitled "Instructions Asked for by Defendant," and these are all the instructions that appear in the record. On page 42 of the record, however, it is stipulated that plaintiffs duly excepted to the giving by the court of instructions numbered 1, 2, 3, 4, 5, and 8, asked by defendant and given by the court, and also excepted to the refusal of the court to give instructions numbered 6 and 7, asked by the plaintiffs. This court really ought not to enter upon an investigation of the case at all upon such a record; especially inasmuch as the brief of the appellants does not refer to the particular instructions excepted to by number, but mixes the discussion of the instructions and the testimony in such a manner that it is difficult for the court to follow it. We will, however, undertake to decide the questions which we think were attempted to be raised by the appellants. The first instruction objected to is as follows: "You are also instructed upon this [the first] cause of action that if you find from the evidence that the alleged conversation testified to by the plaintiff Hart as occurring between him and the witness Goerig, the agreement, if any, was that Goerig instructed Hart to engage board for the men, and he, Goerig, would see that it was paid, then upon such evidence the plaintiff is not entitled to recover for anything on the first cause of action." In this case the first cause of action was for a board bill, the plaintiffs alleging that they, at defendant's special in-

stance and request, paid board for the defendant's employes to the amount of \$36.25, which defendant agreed to pay. Hart & Co., the plaintiffs, were engaged in the mill business. J. J. Maney was engaged in contracting work, and the witness Goerig was his agent in such business. The testimony of plaintiff Hart on the first cause of action was as follows: "We were doing a sawmill and lumber business at the times mentioned. In October, 1891, J. J. Maney had a contract of driving some piles at what is known as 'Hart's Sawmill' on the Snohomish river. * * * Al. Goerig, who was then foreman for J. J. Maney, asked me to engage board for himself and the other men running the pile driver, at the sawmill boarding house, as he was not acquainted with J. O. Jelleberg, who was keeping the boarding house. I told him that I would do so, and went and saw the boarding-house keeper, and made arrangements with him to board the men, becoming personally responsible for the bill. Goerig told me that if I would engage the board he would see me paid. I afterwards paid the bill, which amounted to \$36.25." Goerig testified that he never made any such arrangements, or any arrangement at all, with Hart, concerning the boarding of the men. But taking the testimony of Hart alone, uncontradicted, it seems to us that it in no way tends to establish a liability on the part of Maney, and that therefore the instruction is not objectionable. At most this testimony only constitutes Hart the agent of Goerig to engage the board for the men, and there is nothing in the record to show that it was within the scope of Goerig's authority or employment to make Maney responsible for this contract. In fact, Hart does not testify that the contract with Goerig was that Maney should become responsible for the board of the men, but parenthetically states that Goerig was Maney's foreman in the business of pile driving. But the testimony is that Goerig was to pay for the board of the men if Hart would make arrangements with the boarding-house keeper for their board. There must be something more than this to constitute Goerig such an agent of Maney as would bind him in such a transaction.

As to the second cause of action, the jury received proper instructions, and, under the conflicting testimony in relation to the contract, this court must assume that they came to a correct conclusion. It seems that while a scow belonging to the plaintiffs was in the possession of Maney, according to the testimony of the plaintiffs, it was loaned by Goerig to one Montandon, and, according to the testimony of the plaintiffs, became damaged. The court, in relation to this phase of the case, instructed the jury as follows: "If you find from the evidence that the witness Goerig was the agent of the defendant, Maney, and, without any authority from the defendant, took the scow mentioned and described in the third cause of action set forth

in plaintiffs' complaint, then, although the plaintiffs may be entitled in law to waive the tort, and sue for the use of such scow, the plaintiffs cannot recover any amount except a reasonable compensation for the use of said scow while it was actually being used by the defendant. The plaintiffs are not entitled to recover for any damages done to said scow, as in law the master is not liable for the tortious acts of his agent or servant, although he may be liable for the use of property taken by his agent, and put to the use of the master or principal by such agent or servant." All the instructions actually given by the court not appearing in the record, we are not able to tell how this instruction may have been modified by some other instruction; but, considering the testimony in this case, the instruction was evidently intended to bring the case within the rule that the master is not liable for the acts of a servant done without the scope of his authority. There is a difference between the negligent acts of a servant acting within his authority and the negligent acts of a servant acting without his authority. There is nothing in this record to show that Goerig had any authority whatever, and it cannot be presumed in the absence of proof that he had authority, from Maney to loan a scow which belonged to these plaintiffs to a third person. If he did this, he did it upon his own responsibility, and for any damages which flowed from the wrongful act he alone is responsible to the plaintiffs in this case. "When a servant acts under the special orders of his master, the master is not liable for his negligence in doing business not ordered." *Wilson v. Peverly*, 2 N. H. 548. "Where a person employed by one as a servant is using the team of his master for his own purposes and benefit, * * * without any directions from the master, and he uses the team so negligently as to occasion injury to a third party, the master is not liable for such injury." *Bard v. Yohn*, 26 Pa. St. 482. The doctrine which we wish to express, however, and which we think is the doctrine governing this case, is that the master is not chargeable with the acts of the servant unless he acts in the execution of authority given by the master. In such case the act of the servant is the act of the master, and not otherwise. *Middleton v. Fowler*, 1 Salk. 282.

The eighth instruction which was objected to by the appellants is as follows: "You are further instructed that, if you find from the evidence that the witness Uphus was the agent of the plaintiffs, having power to sell lumber and manage the business of the plaintiffs, and that he made a contract to furnish the lumber necessary to construct and complete the trestle of the said railway company, and plaintiffs furnished a part thereof, to the amount of \$82.86, which amount plaintiffs claim in their complaint, then, on such state of facts, I charge you that the plaintiffs are estopped from now denying that the

contract was made with the defendant, Maney. Having recognized the contract as being with the defendant, by suing him in this action for the lumber delivered, the plaintiffs cannot repudiate the rest of the contract, and thus escape their liability for a breach of same. The law will not permit a party to accept the benefits of a contract and escape at the same time the liabilities and obligations it imposes. Therefore, if you find that the contract to furnish and deliver the lumber for the trestle was made at all, I charge you that you must find that it was made with the defendant." There can be no doubt of the correctness of the law enunciated in this instruction. We think the law, considering the testimony in this case, was substantially given by the instructions; and, especially considering the condition of the record, and the fact that it does not appear that all the instructions are set forth in the transcript, we would be unwarranted in reversing the case. The judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(21 Colo. 357)

NEW MERCER DITCH CO. v. ARMSTRONG, Water Commissioner.

(Supreme Court of Colorado. July 1, 1895.)

RIGHT TO USE WATER—EFFECT OF DECREE—ABANDONMENT OF RIGHTS—DISCRETION OF REFEREE—REOPENING HEARING.

1. In an action to restrain a water commissioner from interfering with plaintiff's right to water in a ditch, evidenced by a decree made under the acts of 1879 and 1881, providing for settling priorities to use water for irrigation, it was within the discretion of the referee to reopen the hearing to allow defendant to introduce the statements of plaintiff's grantor, which were filed with the referee who heard the evidence on which such former decree was founded, when they could not have been discovered before.

2. When, under the acts of 1879 and 1881, providing for settling priorities to the use of water for irrigation, a certain quantity of water has been decreed to plaintiff, he cannot, by making a beneficial use of a portion of it, assert, against subsequent appropriators, a claim to the excess over that used by him, when, for 18 years after the original diversion by him, and for more than 9 years after his rights were established by the decree, he did not make any use of the excess.

Appeal from district court, Larimer county.

Action by the New Mercer Ditch Company against John L. Armstrong, water commissioner. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

This action was to restrain the water commissioner of water district No. 3, in division No. 1, from interfering with the flow of water into the headgate of plaintiff's ditch. The complaint alleges that the plaintiff is the owner by purchase of priorities Nos. 1 and 8 to the use of water out of the Cache le Poudre river, the first of which entitles it to 24.81, and the latter to 8.7, cubic feet of water per

second of time, both of which priorities were duly decreed to its grantor, Joshua Yaeger, in April, 1882, by the district court of Larimer county, in proceedings instituted under the acts of 1879 and 1881, providing for settling of priorities of right to the use of water for irrigation. The complaint charges that the defendant, as water commissioner, refuses to recognize the plaintiff's rights under the decree, and declines to turn into the headgate of its ditch the water which these priorities give, and which it needs to irrigate its lands. The first defense of the answer is a general denial. The second defense alleges, in substance, that the priorities mentioned were awarded to Yaeger to be used to irrigate only 120 acres of land by means of the Yaeger ditch, and that it never has carried, and never could carry, more than $2\frac{1}{2}$ cubic feet of water per second of time, and that the land intended to be irrigated thereby does not require for proper cultivation to exceed the said quantity. During all the times since, as well as before, the decree was rendered, all the residue of the waters of the stream is averred to have been diverted and continuously used by subsequent appropriators, whose rights the water commissioners have recognized in distributing water under the decree. The third defense alleges that Yaeger, the then owner of these rights, wholly and voluntarily abandoned them in the year 1882, and that since said time no use thereof has ever been made by him, or by any one claiming under him. A replication was filed, traversing these affirmative defenses of the answer. The court referred the cause to a referee, who heard evidence, made findings of fact, and stated conclusions of law therefrom, and reported the same to the court, accompanied by his recommendation that the complaint be dismissed. Among the findings of fact is one to the effect that, since the date of the decree, and up to May 18, 1891, when he attempted to sell and convey these rights to the plaintiff, Yaeger did not at any time divert or use water to exceed in amount 3.5 cubic feet of water per second of time, and, as to the excess, there was an abandonment by him, which thereafter had been legally appropriated by others. There was also a finding that, after Yaeger conveyed both these priorities to the plaintiff, the latter, before the beginning of this suit, reconveyed to him the 3.5 cubic feet of water, the same being, in amount, equal to the quantity which, and which only, he had at any time applied to beneficial use. From these findings the referee concluded, as a matter of law, that, as to any water in excess of 3.5 cubic feet per second of time, a failure by Yaeger to make any use of the same within a reasonable time after the original diversion should be treated as an abandonment. The court approved the findings of the referee, adopted his conclusions of law, as well as of fact, and entered a judgment dismissing the complaint, from which judgment the plaintiff appeals.

George W. Bailey and E. A. Ballard, for appellant. J. W. McCreery and Robinson & Love, for appellee.

CAMPBELL, J. (after stating the facts). The controversy can best be presented by giving a brief statement of the contentions of the respective parties. The appellant asserts that the decree of the court awarding these priorities in 1882 is an absolute verity, and cannot be questioned in the manner attempted by the appellee; that the two years have elapsed since the date of the decree, within which time, upon a proper showing, it might be reviewed, as provided in the irrigation act, as have also the four years therein limited as the time within which priorities to the use of water might be established by appropriate actions existing previous to the passage of said act; that there never has been an abandonment of the rights decreed to Yaeger; and that no rights of subsequent appropriators have been injuriously affected by the sale of these rights to the plaintiff and the change of the place of diversion and use sought to be made by the plaintiff after its purchase in 1891. The appellee's position is that, while the decree is a verity, yet that it is so, as to the quantity of water, only to the extent to which the water has been applied to a beneficial use; and that the law under which the decree was rendered must be so interpreted, and the decree itself expressly so provides; that the rights of subsequent appropriators would be infringed, not by the sale of Yaeger's priorities, but by the change of the point of diversion and place of use attempted to be made by his grantee. The object of these irrigation statutes was to settle the questions of the relative priorities of the claimants of water for the purposes of irrigation. The decrees rendered thereunder do not purport to grant any new property rights, but rather embody in a permanent form the evidence of those previously acquired. While the statutes further provided certain regulations for the distribution by the state of the water according to the priorities thus ascertained, yet, after the expiration of the time limited by the act, the decree cannot be reopened by a party thereto, in the absence of proof of fraud, for the purpose of reducing the quantity of water therein awarded, or for any other material change or correction. But we do not understand the object of the defense here to be a setting up of any claims to a priority of rights to water for irrigation in this water district adverse or contrary to the effect of the decree. Priority No. 1 dated from June, 1860; No. 8, from June, 1863,—the latter being virtually acquired and enjoyed through an enlargement of the earlier ditch. After awarding to the Yaeger ditch the priorities mentioned, the decree contains this clause: "No part of this decree shall be taken or held as adjudging to any claimant, or present or future representatives of any claim to any ditch or canal or reservoir, or

party holding, using, or controlling the same, any right to take and carry, by means of any canal, ditch, or reservoir herein mentioned, or by virtue of any appropriation herein adjudged, any water from any natural stream, except to be applied to the use for which such appropriation has been made; nor to allow any excessive use or waste of water whatever; nor to allow any diversion of water except for lawful and beneficial uses." The defendant introduced in evidence the statement and amended statement of Yaeger, which were filed with the referee who took the evidence upon which the decree in question was founded, from which it appears that the land intended to be irrigated, and for the irrigation of which Yaeger claimed a priority, consisted of about 120 acres. To the introduction of these statements, as well as to the action of the referee in reopening the case in order to enable the defendant to introduce the same, the plaintiff objected. The action of the court, however,—which, upon a proper showing by affidavits, after the defendant had rested his case, was the reopening of the hearing, that defendant might introduce these statements, which theretofore could not be discovered,—was within the reasonable discretion of the referee, and it was not abused. These statements may be likened to a pleading upon which a judgment is based, and they are proper to be introduced along with the decree, to enable the court to interpret or construe the latter in the light of the claimant's own assertion of his demand. Both the law under which this decree was rendered, and the decree itself, contemplate that no claimant shall be entitled to the use of a quantity of water in excess of that actually needed for the purpose for which the appropriation was made. These statements of Yaeger show that he claimed the right to the use of water to irrigate 120 acres of land, and not that he was diverting water for purposes of sale. The finding of the referee, which is supported by the evidence, is that at no time since the decree was rendered has he ever used more than 3.5 cubic feet of water per second of time, and the record also clearly shows that never since the original diversion has he used water in excess of that quantity. In 1882 he ceased to use either of his ditches in which theretofore the water was carried. He claims that, by reason of seepage water coming upon his bottom land, he did not need any water direct from the stream from 1882 to 1884; and we think it is true that, as to this quantity of water, found by the referee to have been necessary to irrigate his farm, and which had been thus used, there was no waiver of Yaeger's rights thereto by this, or any other, act of his. In addition to this, however, he asserts that he really enjoyed the use of all this water as the result of an agreement with the Pleasant Valley & Lake Canal Company, made in 1884, whereby he gave to it the right to use his priorities in excess

of the quantity needed by him to irrigate his own farm, in return for the carrying by the company through its ditch of all the water covered by these priorities. But this claim is not borne out by the evidence. There is a failure to show that this alleged agreement was ever entered into, or ever carried out, or that any such excess of water was ever turned into that company's ditch or enjoyed by it.

Upon the foregoing facts neither Yaeger nor his grantee can be heard to assert a claim to the full quantity fixed in this decree,—not because the decree is in any way set aside, but because, by its very terms, as well as by the general law upon this subject, no claimant of any of the priorities therein established can maintain a claim to an excessive quantity of water. There is an entire failure of proof that either Yaeger or any one in his behalf has made any beneficial use of the excess of water to which now the plaintiff asserts its right. The appellant argues that a corporation, under our laws, is allowed to divert from a natural stream water for a speculative purpose,—that is, to divert it for the purpose of selling it to anticipated purchasers,—although the corporation itself has never made any beneficial use of any part thereof. By analogy, therefore, he contends that the same power should be given to a natural person. We have no hesitation in accepting this conclusion, and holding that a natural person in this respect would have the same rights as a corporation, and that either might, in accordance with the doctrine announced in *Strickler v. City of Colorado Springs*, 16 Colo. 61, 26 Pac. 313, sell the right to use water. This, however, is not the question here. But, if it were, we apprehend that a corporation may not divert water from a stream and make beneficial use of a portion thereof, and, as to the residue so diverted, never make any use whatever, for over 20 years from the time of the original diversion, for more than 18 years from the time of an additional diversion, and for more than 9 years after its rights to the quantity thereby diverted have been judicially established, and then be heard to assert its claim to such excess after subsequent appropriators had continuously, adversely, openly, and notoriously been enjoying the use thereof for such length of time. We are cited by appellant to the case of *Wimer v. Simmons* (Or.) 39 Pac. 6, as an authority for the proposition that nonuse of a portion of a ditch for 14 years is not conclusive evidence of abandonment of water right. Nonuse, alone, is not sufficient evidence thereof. The intention to abandon must also be present. But the facts of that case were that the owner of the ditch and the water right ceased to use only a small portion of his ditch for that length of time; but, during all of such time, he actually used all the water to which he was entitled, in other parts of the ditch. As has been said by this court: "A distinction must be observed between the abandonment

of an irrigating ditch and the abandonment of the right to the use of water for irrigation." *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278. Besides, other acts and declarations of the owner were in evidence in the case cited, from which it clearly appeared that there was no intention upon his part to abandon his right to the use of water. In that case, indeed, there was shown neither a nonuser of water nor an intention to abandon the same, but only a nonuse of a portion of the ditch through which the water was carried. Under the facts of the case, the court properly held that an abandonment was not proven, and that, consequently, the defendant being the owner of the water, a change of the place of use by him could be made, notwithstanding this change deprived subsequent appropriators of the use of a certain portion of the water which, during the 14 years, they had enjoyed by reason of its not having been used by defendant in that portion of the ditch which he abandoned,—upon the theory that the existence of such right followed as a necessary incident of ownership, and to deny the right to change the place of use would be inconsistent therewith. The case is quite dissimilar to the case at bar; for Yaeger never made use of any portion of either of his ditches for more than 9 years, and of no part of this water in excess of 3.5 cubic feet per second of time during a period of from 18 to 21 years; and this was an unreasonable length of time for an owner of a water right not to make any use thereof, to entitle him afterwards to reclaim it as against intervening rights. The evidence upon this point was sufficient to support the finding of the referee that Yaeger had abandoned such excess, and that it had been thereafter legally appropriated by others, whose rights were evidenced by this decree. *Davis v. Gale*, 32 Cal. 26; *Union Water Co. v. Crary*, 25 Cal. 504; *Ortman v. Dixon*, 13 Cal. 33; *American Co. v. Bradford*, 27 Cal. 360; *Atchison v. Peterson*, 20 Wall. 507-514; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Dorr v. Hammond*, 7 Colo. 79, 1 Pac. 693.

As this conclusion deprives plaintiff of all the water claimed under these priorities in excess of 3.5 cubic feet per second of time, and as the latter amount was reconveyed by plaintiff to Yaeger before this suit was brought, it is unnecessary to determine whether or not the proposed change in the point of diversion and place of use injuriously affects subsequent appropriators; for any use at any place of such excess by plaintiff would violate their rights. In this connection it is pertinent to observe that, were the decree not in this case, and the rights of the plaintiff resting solely in grant, the claim certainly could not be successfully maintained, merely because the deed of conveyance passed to the grantee a given quantity of water, that, as against the world, such amount would forever remain his, unless voluntarily disposed of; nor would the

deed protect the grantee if he had not, for a long series of years, made any beneficial use of the waters diverted. In principle, the case cannot be different when a claimant's rights are derived from an appropriation. The policy of our law is to enforce an economical use of the waters of our natural streams. They are the property of the people, subject to appropriation for beneficial use. The acquisition of the right to the use thereof results from such appropriation, and not from a grant by the state. But one may not, as against subsequent appropriators, divert, and indefinitely, or for an unreasonable length of time, hold water, for purposes of mere speculation, and make no beneficial use of it while so holding; nor may he divert more than he needs for the purpose for which the diversion was made, though he may change the use or sell his right to another. So that this decree, as to a claimant thereunder (no more than does a deed of conveyance to a grantee from one unquestionably the owner), affords no protection as to the waters thus diverted, if they are not within a reasonable time applied to a beneficial use. Nor does the decree—being, as is a deed, merely one kind of evidence of a right to the thing owned—possess such verity as to protect a claimant thereof against the consequences of an abandonment, applicable as well to this class of property obtained by appropriation as to other kinds of property acquired by grant.

We must not be understood as resting this decision solely; or even necessarily, upon this decree. Even were the clause quoted limiting the claimants to an economical use of water, and to a quantity necessary only for the purposes of the appropriation, absent from the provisions of the decree, the result would be the same. The law of the case, independent of the decree, is to this effect, and would be read into the decree by this court. We repeat that this ruling does not overturn the decree; but it is in accordance with the decree, and the law upon which it is founded. It follows that, whether we adopt the conclusion of the court below, to the effect that an abandonment of this excess of water was made by Yaeger and acquired by subsequent appropriators, or whether we hold, with the trial court, that the decree itself gave him only sufficient water with which properly to irrigate 120 acres of land,—both of which conclusions we do affirm,—in either case, or in both cases, as to the quantity of water decreed to Yaeger, only such portion thereof as has been used by him, either for the purposes of irrigation or for the purposes of sale, within a reasonable time after the original diversion, can now be enjoyed by him or by his grantee. We consider the true intent and the meaning of the decree itself, as well as the law, to be in accordance with these conclusions. The judgment of the court below should be affirmed. Affirmed.

(1 Kan. App. 10)

STEELSMITH vs UNION PAC. RY. CO.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

DEMURRER TO EVIDENCE—AUTHORITY OF AGENT.

1. A demurrer to the evidence should not be sustained when there is some proper evidence to establish every material allegation of the petition.

2. The fact that a station agent of a railway company had, on several prior occasions, employed physicians, including the plaintiff, to treat employees of the railway company who received injuries while in the performance of their duty as such employees, and that all bills rendered for such services were afterwards paid by the railway company without objection, is some evidence going to establish the authority of the agent to bind the company by the employment of a physician under similar circumstances.

(Syllabus by the Court.)

Error from district court, Dickinson county; M. B. Nicholson, Judge.

Action by S. Steelsmith against the Union Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. H. Mahan and J. P. Campbell, for plaintiff in error. A. L. Williams, for defendant in error.

CLARK, J. This was an action brought by the plaintiff in error to recover from the defendant in error for a surgical operation performed upon, and medical services rendered to, one A. C. Staker, an employé of the Union Pacific Railway Company, who received fatal injuries at Abilene, while in the performance of his duty as a brakeman on a freight train of the defendant. The court sustained a demurrer interposed by the defendant to the plaintiff's evidence, and gave judgment against the plaintiff for costs; and the only question necessary for our consideration is as to whether or not the court erred in sustaining the demurrer to the evidence.

The petition alleged that the plaintiff was called by the duly-authorized station agent and general agent of the defendant at Abilene to render medical and surgical aid to the injured employé; that he attended to the injuries, and performed a surgical operation upon the employé, by direction and at the request of the defendant. It appears from the evidence that the defendant had a local physician at Abilene, who was absent at the time medical and surgical treatment was required in this case. The plaintiff testified that the station agent at Abilene, one W. N. Hendricks, asked him to go down and see what was the matter with the injured man, which he did, and informed Mr. Hendricks as to his apparent condition, and what he thought was necessary to do in the case; that the station agent told the plaintiff to go ahead and do whatever he thought was best for Mr. Staker, and the Union Pacific Railway Company would see that he was paid for his services. It was admitted at the trial that the services were performed by the plaintiff, and were worth the amount charged; but the defendant denied all liability for the payment of the same. The liability of the defendant hinges upon the question as to the authority of the said station agent to bind the company by such employment. It was shown at the trial that the plaintiff had been similarly employed by the same station agent in another instance, and had been paid for such services by the defendant. It was also shown that the same agent had employed other physicians to render like services under similar circumstances, and bills therefor were afterwards paid by the defendant. The station agent testified: "In a case such as that of Staker's, I generally called a physician; the

company's, if I could get him, and, if not the company's, why, I employed the first physician I could get. I generally sent their bills to the superintendent, by whom they were approved. Before this time, all the bills rendered were paid." And, again, he testifies: "The reason I call a surgeon in extreme cases, where the local surgeon is not around, is that you may send a telegram to the superintendent asking for instructions, and it might be five or six hours before you would get an answer, and in the mean time the man would die." In answer to the question, "Was there a time during the injury of Staker that you telegraphed for instructions as to what physician you should employ?" Mr. Hendricks testified, "I did not telegraph, as I did not think it necessary to do so."

As was said in *Cain Bros. Co. v. Wallace*, 46 Kan. 138, 26 Pac. 445: "The fact and scope of an agency may be determined, not alone by what the principal may tell the agent to do, but also from what he knows, or, in the exercise of ordinary care, might know, as to what the agent is doing." And in *Railroad Co. v. Johns*, 36 Kan. 769, 14 Pac. 237, the court held that as the servants of the company were on the company's premises, performing a certain duty for the company, and as they had performed similar services on prior occasions, it will be presumed that they were acting within the scope of the authority given to them by the railroad company. The supreme court of the United States in *Bronson's Ex'r v. Chappell*, 12 Wall. 683, said: "The inference to be drawn is that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned." In *Railroad Co. v. Mahoney*, 82 Ill. 73, the court held that "where a surgeon has been employed by a station agent of a railway company to attend an employe injured while in the service of the company, although he may not have express authority to do so, yet slight acts of ratification by the company will authorize a jury in finding the employment was the act of the company."

The question presented in this case is as to whether the plaintiff introduced some evidence to prove the authority of the station agent to employ the plaintiff, on behalf of the railroad company, to render the services that were performed. We think the fact that the agent had, several times prior to the date that Staker received the injuries mentioned, employed physicians, including the plaintiff, to treat persons receiving injuries, and that the defendant company had paid for such services without objection, was some evidence of the authority of the agent to bind the company in this case, and was competent evidence to go to the jury, and the court erred in sustaining the demurrer to the evidence. In support of these views, we cite the authorities above referred to, as well as *Whart. Ag. §§ 122, 127; Gilbraith v. Lineberger*, 69 N. C. 145; *Rowland v. Shaw*, 29 Kan. 438; *Railway Co. v. Winterbotham*, 52 Kan. 433, 34 Pac. 1052. The judgment of the court below is reversed, and a new trial awarded. All the justices concurring.

(1 Kan. App. 131)

WURMSER v. STONE.

(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1895.)

ABUSE OF PROCESS BY OFFICER—LIABILITY OF PLAINTIFF IN PROCESS.

1. An officer forfeits the protection which the proper execution of legal process affords, and becomes a trespasser ab initio, when he is guilty of such an improper and illegal exercise
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of authority under it as warrants the conclusion that he intended from the first to use his legal authority as a cover for his illegal conduct.

2. A plaintiff in replevin, who does not direct or participate in a malicious abuse of the writ of replevin by the officer in whose hands it is placed for service, is not liable for the damages sustained by reason or the unlawful acts of the officer.

3. In an action of trespass, in which the alleged trespass consists of an abuse of legal process, subsequent irregularities in the action in which the process is issued, for which the party proceeded against is not responsible, cannot be considered for the purpose of characterizing the previous act.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by M. A. Stone against A. C. Wurmsers. Plaintiff had judgment, and defendant brings error. Reversed.

Van Syckel & Littick, for plaintiff in error. True & Foster, for defendant in error.

GARVER, J. The briefs of counsel have been of little practical aid to the court in this case, and the brief of counsel for plaintiff in error especially has been prepared with such an utter disregard of the rules of this court as to warrant an affirmance of the judgment without an examination of the record for the alleged error. There is general confusion of statement of facts, assignments of error, and argument, and an entire failure to set out instructions and evidence objected to. The rules of this court as to briefs were prescribed that questions of fact or law to be considered might be presented in a systematic manner, and to so far as possible relieve the court of the tedious labor of searching voluminous records for the purpose of ascertaining the ground of complaint. The rules of the court are plain, and it is hoped that attorneys will appreciate their importance sufficiently to observe them.

This action is peculiar in that it seems to have been tried in the district court by counsel for both parties without much regard to the rules of pleading or to the principles of law applicable to the issues made by the pleadings. Even in this court, the nearest approach to an agreement of counsel as to the kind of action this is is to characterize it as a "civil action." While there are allegations in the petition more especially pertinent to an action of trespass to real estate, or of trover, we presume that the action intended is what is known in law as "trespass de bonis asportatis." The reply introduces allegations peculiar to an action for malicious prosecution. The gravamen of the charge is the wrongful and unlawful taking and carrying away of the personal property of the plaintiff. The Code, in abolishing all forms of action, does not do away with the necessity of distinguishing between the different kinds of actions for the purpose of measuring existing rights. The petition alleges an unlawful and malicious

taking and carrying away of household goods of the plaintiff by the servants and agents of the defendant, one of such agents being named as G. B. Anderson. In his answer the defendant admits taking of the goods, and justifies by alleging that said Anderson was a constable, and took the goods under and by virtue of a writ of replevin, issued by one I. F. Bradley, a justice of the peace in Wyandotte county, in an action brought by the defendant against the plaintiff for the recovery of the possession of said goods. The answer also alleges that said action of replevin was afterwards tried, and went to judgment before said justice of the peace; that it was therein adjudged that said defendant was entitled to the possession of the property until the value of the special interest which he had therein was paid by the plaintiff; that such interest was thereafter paid for pursuant to said judgment, and the goods returned to the plaintiff. For reply the plaintiff admits the commencement of the replevin action before I. F. Bradley, justice of the peace, but alleges that the action was commenced wrongfully and maliciously before the justice by falsely alleging that the goods were of the value of only \$32.50, when the defendant knew that they were of the value of more than \$200, and beyond the jurisdiction of the justice. Also "that said process, a writ of replevin, was given to said G. B. Anderson, constable, who, instigated by G. W. Littick (defendant's attorney), and assisted by agents and servants of the defendant, broke and entered the dwelling house of the plaintiff, without first demanding entrance, and removed the goods mentioned in said writ, together with other articles not mentioned therein, but which are embraced in plaintiff's petition." The reply also alleges that the plaintiff appeared in and contested said action before the justice of the peace, and that the judgment therein was irregular and void, because not in the form required by law. Other allegations not material to be considered at this time were also made. The action before the justice of the peace was commenced, and the writ of replevin served, on the 30th day of October, 1890. It was tried, and judgment rendered about November 21st, 1890. This action was commenced on the 3d of November, 1890, and was tried by a jury in April, 1891, resulting in a judgment in favor of the plaintiff for \$325. Both actions were pending at the same time.

The issues thus joined by the pleadings with reference to the taking complained of are simply as to the validity of the acts of the constable under the writ of replevin, and the defendant's connection therewith. The only allegation in the reply important to be considered in determining this question is that which charges upon the constable and others unlawful acts in the execution of the writ, such as the breaking into the dwelling house of the plaintiff, and the taking and destruction of property not included in the writ; whether there was an abuse of the pro-

cess in the hands of the constable, and such connection of Wurmser therewith, as to make them trespassers ab initio. It is well to observe the difference between a malicious use and a malicious abuse of process. The former exists when legal process, civil or criminal, is used out of malice and without just cause, but only its regular execution is contemplated. There is a malicious abuse of process where a party, under process legally and properly issued, employs it wrongfully and unlawfully, and not for the purpose it is intended by law to effect. *Wood v. Graves*, 144 Mass. 363, 11 N. E. 567. The malicious use of process, either civil or criminal, is reached by an action for malicious prosecution; but such action cannot be commenced until after the maliciously prosecuted action has terminated in favor of the defendant therein. *Plummer v. Dennett*, 6 Greenl. 421; *Hayden v. Shed*, 11 Mass. 500; *Marbourg v. Smith*, 11 Kan. 554; *Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804. Where an officer acting under process is guilty of such an improper and illegal exercise of authority under it as will warrant the conclusion that he intended from the first to use his legal authority as a cover for his illegal conduct, he becomes a trespasser ab initio, and is liable the same as if he had acted without process. *Barrett v. White*, 3 N. H. 210; *Breck v. Blanchard*, 20 N. H. 823; *Grafton v. Carmichael*, 48 Wis. 660, 4 N. W. 1079; *Ross v. Philbrick*, 39 Me. 29; *Stoughton v. Mott*, 25 Vt. 668. If goods are taken by an unlawful breaking into a dwelling house, legal process is no justification. *Isley v. Nichols*, 12 Pick. 270; *Welsh v. Wilson*, 34 Minn. 92, 24 N. W. 327; *People v. Hubbard*, 24 Wend. 389; *Freem. Ex'rs*, § 256; *State v. Beckner* (Ind. Sup.) 31 N. E. 950. The rigor of the common law is changed, in respect to breaking into a dwelling house, by the statute, which authorizes an officer to break open any building for the purpose of seizing the property called for by a writ of replevin, after he has demanded entrance into the building, and delivery of the property, and the same has been refused. *Gen. St. 1889*, § 4918. What constitutes a legal demand for entrance will depend upon the circumstances of each case.

It is not every irregularity in the execution of process that will deprive the officer of its protection. To have that effect, it must be an act of such gross delinquency as to clearly point to the wrong intent. *Taylor v. Jones*, 42 N. H. 25. If there was no abuse of the process at the time of the taking, subsequent irregularities in the proceedings in the replevin action could not affect the previous taking so as to make it a trespass. *Gardner v. Campbell*, 15 Johns. 402; *Grafton v. Carmichael*, 48 Wis. 660, 4 N. W. 1079.

Conceding that the conduct of the constable was such as to make him a trespasser ab initio, and therefore liable in a proper action for damages, yet, before the plaintiff in that action can be made liable for the same acts, it must appear that he controlled, directed, or

counseled the unlawful use of the process. There is no legal presumption that one concurs in the unlawful act of another. *Snydacker v. Broose*, 51 Ill. 357; *Abbott v. Kimball*, 19 Vt. 551; *Welsh v. Cochran*, 63 N. Y. 181; *Hyde v. Cooper*, 26 Vt. 552. In the case last cited, *Redfield, C. J.*, in rendering the opinion of the court, said: "When the party does not direct or control the course of the officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser even by relation, the party is not affected by it, even when he receives money, which is the result of such irregularity, although he was aware of the course pursued by the officer. He is not liable, unless he consents to the officer's course, or subsequently adopts it." There is an entire absence of competent testimony in this case to show that the plaintiff in error authorized, or had knowledge of, any improper conduct of the officer, if there was any, and therefore nothing upon which to base a verdict against him for damages for any trespass then committed. Before he can be so held, it must appear (1) that there was such an abuse of the process by the constable as to make him a trespasser, and to forfeit all protection which his writ otherwise would give; and (2) that plaintiff in error either directed or counseled such wrongful conduct, or thereafter consented thereto by accepting the benefits resulting therefrom, with full knowledge of the facts. The instructions which were given by the court at the special instance of the defendant in error ignored these principles, which lie at the foundation of the liability of the plaintiff in error, and are erroneous.

The merits or demerits of the replevin action cannot be tried in this case, nor relief obtained which was properly obtainable there. *Mullen v. Mullock*, 22 Kan. 598. Neither can there be a recovery herein for any depreciation in the value of the property taken, or damage to it, at the time of its return. If the property was damaged by improper handling or storing, the owner, by a proper proceeding, was entitled to recover therefor. Whether the plaintiff in the replevin action was entitled to the possession of all the goods taken should have been, and probably was, determined before the justice in that case. There is no evidence showing that any goods taken were not included in the writ. Some controversy exists as to the identity of a few small articles, but these were also questions to be decided in the other action. In no event is the plaintiff entitled to recover the full value of any property wrongfully taken which the pleadings and evidence show were returned to her. Some of the special instructions authorize such recovery, and in this respect are erroneous. The measure of the recovery, if the facts warrant anything, is such amount as will give full compensation for all loss and injury actually sustained by reason

of the trespass, and, if it was grossly oppressive or malicious, an additional sum as exemplary damages. We think the verdict and judgment in this case are unsupported by the evidence, and unauthorized by law. The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

(1 Kan. A. 138)

ATCHISON, T. & S. F. R. CO. v. MIDGETT.
(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1896.)

INJURY OF EMPLOYEE—ASSUMPTION OF RISK—ELEMENTS OF DAMAGES—INSTRUCTIONS.

1. A servant may rely upon the duty of a master to furnish him with reasonably safe tools and machinery for his use, and should not be held to assume all risks of danger as soon as defects in such tools or machinery are discovered. After knowledge of defects which may render the employment dangerous, unless the danger is imminent and obvious, the servant may continue in his employment a reasonable time, in reliance upon a promise of the master to repair.

2. Instructions of the court must be taken together, and considered and construed as a whole.

3. Pain and anxiety of mind, in an action for personal injury, is a proper element of damages when connected with physical pain or injury, and the direct result of the injury.

4. Where it appears from an examination of the entire record that no prejudicial error was committed by the trial court, the judgment will be affirmed.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by James Midgett against the Atchison, Topeka & Santa Fé Railroad Company. Plaintiff had judgment, and defendant brings error. Affirmed.

A. A. Hurd and W. Littlefield, for plaintiff in error. Parker & Seaton, for defendant in error.

CLARK, J. The defendant in error, James Midgett, brought this action against the railroad company, plaintiff in error, to recover damages for an injury alleged to have been sustained through defects in a hand car on which he was riding while in the employ of the company. He obtained a verdict and judgment in the district court of Johnson county for \$400.

The first error assigned and relied upon is in the overruling of the demurrer to the evidence of the plaintiff. It is contended for the plaintiff in error that defendant in error knew of the defects in the hand car, and continued working therewith after the danger was as obvious to him as to the company, and that it must therefore be held that he fairly assumed whatever risk of danger there was. There was evidence introduced tending to prove the existence of defects in the car, the knowledge of the company thereof through the foreman in charge of the work, the promise of the foreman to have the defects repaired, and the injury of the plaintiff

below without fault on his part. A general verdict being returned by the jury, all these questions are presumed to have been decided on the evidence against the plaintiff in error. Such decision, we think, was authorized by the evidence. It is the duty of a railway company not only to furnish its employes with reasonably safe tools and machinery to be used in the work required of them, but also to exercise reasonable care and diligence to keep such tools and machinery in safe and serviceable condition. *Railroad Co. v. Holt*, 29 Kan. 149; *Railroad Co. v. Jones*, 30 Kan. 610, 2 Pac. 657; *Railroad Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204. While it is true that an employe, by virtue of his employment, assumes all the ordinary risks incident thereto, he is not required, immediately upon the discovery of defects in tools or machinery, to quit work, and leave his employment, unless the danger from such defects is so imminent as to make it gross carelessness or recklessness for him to continue therein. Where no such danger is apparent, and the employe is justified in believing that the defect will soon be remedied by his employer, he may continue in his employment for a reasonable length of time after acquiring knowledge of the danger, without himself assuming the risks thereof. *Railway Co. v. Croker*, 41 Kan. 747, 21 Pac. 785; *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582; *Railroad Co. v. Sadler*, 38 Kan. 128, 16 Pac. 46; *Morbach v. Mining Co.*, 53 Kan. 731, 740, 37 Pac. 122. It was for the jury to say from the evidence what the facts were with reference to promises to repair, as well as what influence such promises may have had in inducing the plaintiff to continue at work. Whether the plaintiff was guilty of contributory negligence by continuing work for an unreasonable time after he knew the defects in the car was a question of fact for the jury. The foreman in charge of the work who hired Midgett and other employes, and directed them about their work, stood in place of the company, as its representative, and his knowledge and neglect bind the company. *Railroad Co. v. Moore*, 29 Kan. 632; *Railroad Co. v. Fox*, 31 Kan. 536, 3 Pac. 320; *Railroad Co. v. Sadler*, supra. The evidence shows that Midgett had been in the employ of the company only a short time, and first discovered the defects in the car which are claimed to have been the cause of its leaving the track only two days before the time of the accident. We think the questions pertaining to this branch of the case were properly submitted to the jury under the instructions of the court, and in this respect no error was committed.

The objections made and urged to the admission of certain medical expert testimony are without merit. The hypothetical questions put to the witnesses were based upon competent testimony, and had direct reference to issuable facts in the case.

Certain instructions of the court are complained of, and error assigned upon them.

One of these instructions was as follows: "If you believe from the evidence that the plaintiff was injured by being thrown from a hand car, furnished by the defendant company for the use of the plaintiff and other employes while in the employ of the defendant, and while in the line of his duty, and that the accident happened by reason of the defective car; and if you further find that the foreman, King, knew of the defects, and had promised to repair such defects, then the plaintiff is entitled to recover: provided, you further find from the evidence that the plaintiff did not, by his contributory negligence, contribute to said accident; and the burden of the issue is upon the defendant to prove by a preponderance of the evidence the contributory negligence of the plaintiff." We think this instruction is subject to some criticism for not fully stating the facts necessary to be proven in order to make the defendant liable. Before an employe who, with knowledge of the dangerous condition of the machinery with which he is working, continues in his employment, can be relieved from the charge of contributory negligence by reason of promises to repair the known defects, it must appear that such promises were to repair in a reasonable time, and that the employe continued at work relying thereon, and believing that the employment would probably be safe until the repairs were made. The rule holding an employe to an assumption of all risks of danger of which he has as full notice as his employer rests upon the principle that if it is negligence for the employer to furnish defective tools or machinery it is also negligence for the employe to use them. Both being equally informed of the facts, each is held to be equally guilty of negligence, and no liability therefor exists from the one to the other. However, out of consideration for the necessities of one who is thus employed, the law overlooks any act of imprudence on his part when he continues to work in reliance upon the promise of his employer, and reasonably expecting that the cause of the danger will be soon remedied. To have this effect, the promise must have been of such a character as to warrant the belief that the necessary repairs would soon be made; and it must also have been brought to the knowledge of the employe, otherwise it cannot be said he was influenced thereby. In addition to the cases above cited upon this proposition, see *Counsell v. Hall*, 145 Mass. 463, 14 N. E. 530; *Hough v. Railway Co.*, 100 U. S. 224; *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. 884.

The charge of the court might have been fuller and more explicit on this feature of the case. Other parts of the instructions, which also bear upon the risks and duties of the employe, must be read in connection with this part of the charge, and the whole construed together. The evidence upon these points is without material conflict, and does not present a case of obvious and imminent dan

ger. Only one day intervened from the discovery by the plaintiff of the defect and the accident; certainly not an unreasonable time. We do not think the jury could have been misled in this respect. If, when thus construed together, the instructions state the law correctly, inaccuracy in a detached portion thereof is not ground for reversal. *Railroad Co. v. Andrews*, 41 Kan. 370, 21 Pac. 278; *Cain Bros. Co. v. Wallace*, 46 Kan. 138, 26 Pac. 445.

As to measure of damages, the court instructed the jury as follows: "If the plaintiff is entitled to recover, he may recover such damages in this case as will compensate him for his pain and suffering, and for his anxiety of mind, and for any permanent injury he may have sustained in said accident, and for loss of time, both past and future, as well as for the physician's bill which he may become liable to pay." This instruction is objected to on the ground that it allowed the jury to give damages for anxiety of mind, in addition to mental pain and suffering, and therefore authorized double damages for the same thing. The only allegation in the petition with reference to pain is, plaintiff "in all said time suffering great pain," without in any way distinguishing between physical and mental pain. "Damages for mental suffering can be recovered in cases of this kind where such mental suffering is an element of the physical pain, or is a necessary consequence of the physical pain, or is the natural and proximate result of the physical injury, and can be recovered in cases of this kind only under such circumstances." *City of Salina v. Trosper*, 27 Kan. 544. Compensation for such suffering is recoverable under the general allegation of damages. It is not matter of special damage, and need not be specially alleged. *Wright v. Compton*, 53 Ind. 337. Of course, there cannot be damages recovered for mental suffering, and also for anxiety of mind as an independent element of damages. Under the evidence in the case, the jury no doubt understood the words "pain and suffering" to refer exclusively to physical pain and suffering, without regard to the mental effects of the injury, and it is evident that the court used the expression in that sense. At least, suffering and anxiety of mind had reference to but one mental condition. The meaning of the trial judge might have been more clearly expressed, but this court is not prepared to say that the jury could have been misled thereby into awarding double damages for the same thing. Unless it appears that the jury may have been misled to the prejudice of the plaintiff in error, any error in this respect does not warrant a reversal of the judgment. *Railroad Co. v. Hay*, 31 Kan. 177, 1 Pac. 768; *Railroad Co. v. Karracker*, 46 Kan. 511, 26 Pac. 1027. No claim is made that the verdict is excessive, nor is there reasonable ground for such complaint, in view of the evidence in the case. The verdict is for a sum unusually

moderate for this class of cases. We are of the opinion that a fair trial has been had of the issues joined in this case, and that no reversible error appears in the record. The judgment is affirmed.

(55 Kan. 536)

CAMPBELL v. KANSAS CITY, FT. S. & M. R. CO.

(Supreme Court of Kansas. July 6, 1895.)

ACTION AGAINST RAILROAD COMPANY—INJURY TO PERSON ON TRACK—EVIDENCE.

1. When an engineer sees an adult person walking upon the railroad track in front of a moving train, who appears to have the use of his senses, and not to be under any physical or mental disability, he has a right to presume that the trespasser will heed the warnings given, and will step from the track in time to avoid injury.

2. C., a man of mature years, and in the possession of his faculties, went upon a railroad track where there was no crossing, about the time that a passenger train was due to pass over the same; and, while walking between the rails, the passenger train approached, going in the same direction as C.; and, when he was seen by the engineer, the whistle of the engine was repeatedly sounded, and the speed of the train checked, but it was not stopped until it came in contact with C., and killed him. *Held*, upon the testimony, that C. was a conscious trespasser, and that there can be no recovery for his death unless the injury was willfully or wantonly inflicted; that, under the circumstances, willful or wanton negligence on the part of the engineer could not reasonably be inferred; and that the trial court ruled correctly in sustaining the demurrer to plaintiff's evidence.

Allen, J., dissenting.

(Syllabus by the Court.)

Error from district court, Johnson county; J. T. Burris, Judge.

Action by James M. Campbell, administrator of the estate of David G. Campbell deceased, against the Kansas City, Ft. Scott & Memphis Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

A. Smith Devinney, for plaintiff in error. Wallace Pratt, I. P. Dana, and Charles W. Blair, for defendant in error.

JOHNSTON, J. James M. Campbell, as administrator of the estate of David G. Campbell, deceased, brought this action to recover damages for the death of David G. Campbell, alleged to have resulted from the gross negligence of the railroad company. In the petition it was averred that on November 11, 1890, in the daytime, David G. Campbell was walking upon the railroad track of the company, near the village of Merriam, but not at or upon any railroad crossing; and that, while so walking, a passenger train approached on the same track, and going in the same direction; and that the persons in charge of the train managed it in a grossly negligent, reckless, willful, and wanton manner, and at a high, unusual, and reckless rate of speed, so as to run against, knock down, and run over David G. Campbell in a violent and forcible manner, causing injuries from which he died after a lapse of about 10 minutes. The an-

swer of the railroad company was a general denial, and an averment that the injury and death of Campbell were due to his own negligence. When the testimony of the plaintiff was finished, the court sustained a demurrer to the same, holding it to be insufficient to warrant a recovery.

It appears that Campbell resided with his family upon a farm about one-fourth of a mile from the railroad track and the town of Merriam, where he had resided for many years. A highway, called "Main Street," running east and west past Campbell's farmhouse, crossed the railroad track, to the post office and other buildings. The railroad runs north and south through Merriam. Between the Campbell farm and the railroad was a highway, running parallel with the railroad, from the town to Merriam Park. On November 11, 1890, at about 10 o'clock a. m., Campbell came from the post office, east of the track, walked west on Main street until he arrived at the railroad track, and then turned south towards Merriam Park. The track had recently been changed, and men were then engaged in ballasting and surfacing a portion of the track over which Campbell was walking. A passenger train, going south, was due about that time; and, as the line of the road was straight, there was an unobstructed view for a considerable distance up and down the track. A passenger train came from the north, traveling in the same direction that Campbell was, composed of an engine, tender, baggage car, mail car, and four or five passenger coaches. It did not stop at Merriam station, but, as it approached Main street crossing, it gave the usual whistle; and, while running over the new track, the speed of the train was somewhat slackened. When within about 364 feet of the place of accident, the engineer discovered that Campbell was walking upon the track, and several blasts of the whistle, in the nature of danger signals, were given. After running a short distance further, other blasts or danger signals were given, and the speed of the train was slackened; but, as Campbell did not leave the track, he was struck by the engine, knocked down, and the front wheel of the engine ran upon or over him. At that time the engine had come to a full stop, when the engine was backed off, releasing him. Campbell walked between the rails of the main track, with his head down, only stopping for a moment at one time to speak with a workman who was engaged in ballasting the track. He did not look backward to see if a train was following, and, although the day was clear, it appears that he did not hear the warning signals that were given. He was 65 years of age, in good health, and appeared to be in the full possession of his faculties. He lived in plain view of the railroad track, and as he often passed along or over the road, and saw trains frequently pass over the same, he was necessarily familiar with the situation and its surroundings. A few feet away and parallel

with the railroad was a highway, upon which he could have walked with safety to his destination.

It is clear from the testimony that he was a conscious trespasser, and that, under the circumstances, his conduct was recklessly negligent. A railroad track, between crossings, belongs exclusively to the railroad company; and it is well settled that all persons who venture along the same do so subject to the risks incident to so hazardous an undertaking, and, if injured by a train of the company, there is no liability, unless the injury was willfully and wantonly inflicted. In *Mason v. Railway Co.*, 27 Kan. 84, it was said that "a railway company has exclusive right to occupy, use, and enjoy its railway track; * * * and such exclusive right is absolutely necessary to enable it to properly perform its duties; and any person walking upon a railroad track * * * without the consent of the company is held in law to be there wrongfully, and therefore to be a trespasser; and, in case of an injury happening to such person while so trespassing upon it from the movement or operation of the cars of the company over it, he is without remedy, unless it be proved by affirmative evidence that the injuries resulted from negligence so gross as to amount to wantonness." See, also, *Railway Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Tennis v. Railway Co.*, 45 Kan. 503, 25 Pac. 876; *Railroad Co. v. Todd*, 54 Kan. 558, 38 Pac. 804.

We are unable to find testimony sustaining the view that Campbell's death was due to the intentional or wanton negligence of the engineer. It is contended that Campbell was seen 500 feet ahead of the engine, and therefore the engineer should have stopped the train before reaching him. An engineer, however, is not bound to stop a train whenever he sees a person ahead upon the railroad, but has a right to assume that an adult person, apparently in the possession of his faculties, will exercise his senses, and step out of the way of danger before the engine reaches him. The engineer is required to keep a reasonable lookout for trespassers upon the track, and to exercise such care as the circumstances require to prevent injury to them. Campbell was undoubtedly seen by the engineer several hundred feet away; but he was awake and moving, and appeared to be in the full possession of all his senses and faculties. Although there were some piles of ballast along the track, he could have stepped aside without difficulty; and, as there was no apparent disability, the engineer had a right to presume until the last moment that he would heed the warning which had been given, and leave the track in time to avoid injury. The engineer gave the usual signals for the crossing; and we have seen that, as the engine approached Campbell, danger signals, or what one witness called "screeching whistles," were repeatedly given. The speed of the train was finally slackened, and, although not in time to save his

life, the conduct of the engineer does not evince a wanton and reckless disregard for human life, nor an intention to inflict a willful injury. One of the men at work upon the track testified that he saw Campbell's danger, and ran towards him, shouting, and that he believes the engineer must have seen him. The action of this witness, if seen by the engineer, would do no more than to notify him that Campbell was upon the track, and from the warnings that the engineer had already given it is plain that he saw Campbell before that time. It is true the train might have been stopped 100 feet or more away if there had been any apparent necessity for stopping. If Campbell had been lying or sitting upon the track, apparently intoxicated or asleep, it would have been the duty of the engineer to have made an earlier effort to stop the train. Where the appearances indicate that a person upon the track is in such a condition as to be either insensible of his danger or unable to avoid it, those in charge of the train must use all available means consistent with the safety of those on the train to stop. The same rule is applied with reference to a young child, who is unable to understand the peril of being upon a railroad track. In the case of *Railway Co. v. Whipple*, supra, a little boy nine years of age, who was deaf and dumb, wrongfully went upon a railroad track, and was run down and seriously injured. Those upon the train had no knowledge of the infirmities of the boy until after he was struck; and, while warnings were given and precautions taken which would have been sufficient if the person upon the track had been an adult, it was not sufficient care and attention towards an infant of tender years, who might not fully comprehend his peril. It was said that the engineer must have seen that he was a child of tender years, and that it was incumbent upon him after he saw the boy upon the track, ahead of the engine, to use reasonable care to avoid doing him any injury. In that case, however, the following language was used by the court: "If in this case the plaintiff were an adult, we might perhaps say, as a matter of law, upon the facts disclosed upon the trial, that he could not recover." Campbell was a man of mature years, who had the use of his faculties; and, as he was moving and apparently capable of taking care of himself, the engineer had a right to presume until the last moment that he would leave the track, and not be run over. As was said in a somewhat similar case decided by the supreme court of Minnesota: "Even if he erred in his judgment as to the probability that the plaintiff heard the signals, and would step aside before the train should reach him, and hence erred as to the time when he ought to have reversed his engine and applied the brakes, there is nothing to warrant the belief that he acted in reckless disregard of the plaintiff's safety." *Johnson v. Truesdale*, 46

Minn. 345, 48 N. W. 1136. See, also, *Railway Co. v. Judd* (Ind. App.) 36 N. E. 775, and cases cited; *High v. Railroad Co.*, 112 N. C. 385, 17 S. E. 79; *Finlayson v. Railroad Co.*, 1 Dill. 579, Fed. Cas. No. 4,793; *Railroad Co. v. Harman* (Va.) 8 S. E. 250; *Reardon v. Railway Co.*, 114 Mo. 384, 21 S. W. 721; *Beach*, Contrib. Neg. 394; 2 Ror. R. R. 1027, 1032.

The train was running at a diminished rate of speed. Repeated warnings had been given, and that the engineer was endeavoring to stop and to save him is shown by the fact that the engine was stopped about the time the deceased was struck. Under the circumstances, we think willful and wanton negligence on the part of the engineer cannot be reasonably inferred, and therefore the trial court correctly ruled that the evidence was insufficient to establish a liability against the company for Campbell's death. The judgment of the district court will be affirmed.

ALLEN; J. (dissenting). The evidence offered by the plaintiff tending to show gross negligence on the part of the engineer is very weak; yet I am not prepared to say that it is wholly wanting. It is clear that the engineer saw the deceased on the track, and also observed that he did not heed the first signals that were given, and that he could have avoided running over him. So much being shown, I think the question should have been left with the jury to say whether or not there was gross negligence. But the proposition advanced in the opinion to which I desire to enter my especial dissent is that the engineer had a right to presume until the last moment that Campbell would leave the track, and not be run over. I am aware that this statement finds support in the authorities, but I cannot yield my assent to it. The slight inconvenience arising from the stoppage of a train is not to be weighed at all against a human life. An engineer who sees a person on the track ahead of him should take all necessary precautions to avoid killing him, and should resolve all doubts as to whether a person will take care of himself or not in favor of the person in peril. It might be wise for the legislature to prevent people from trespassing on railroad tracks, and to impose even severe penalties on those who do so; but the mere fact that a person is a trespasser walking along a railroad track, in my judgment, furnishes absolutely no excuse for wantonly running over him, nor for the adoption of so barbarous a rule as that the engineer may omit all precautions, and rely on the trespasser getting out of the way at the last moment it is possible for him to do so, and when it is beyond the power of the engineer to save him.

MARTIN, C. J. (concurring). I concur in the syllabus and in the opinion of Mr. Jus-

tice JOHNSTON, and I do not think that either is justly subject to the criticism made by Mr. Justice ALLEN; and yet the doctrine stated in the opinion to the effect that "the engineer had a right to presume until the last moment" that Campbell would heed the warning, and leave the track in time to avoid injury, although well supported by the authorities, might easily be misinterpreted in some cases. I do not understand it to mean that the engineer need not check the speed of the train until it has actually come upon the trespasser, but he may presume that such person will get off until the last moment in which it would or ought to seem practicable to stop the train before colliding with such trespasser; and for a slight error of judgment on his part he ought not to be held culpable, nor the railroad company responsible. In this case, if the engineer erred as to the time when he should have commenced to use the appliances to check the speed of his train, his delay was for a fraction of a second only, and this would not indicate wantonness nor recklessness.

(55 Kan. 606)

STATE v. PRICE. (No. 10,231.)

(Supreme Court of Kansas. July 6, 1895.)

CRIMINAL LAW—INDORSEMENT OF NAMES OF WITNESSES—CONSTITUTIONAL LAW.

1. Permission to indorse names of additional witnesses on an information, even after the commencement of the trial, being within the sound discretion of the court, a judgment will not be reversed on account of such permission unless the grant of it be an abuse of such discretion.

2. Section 26 of the Code of Criminal Procedure, authorizing a prosecution in either county where property is stolen in one and taken into another, is not in conflict with that clause of section 10 of the bill of rights which accords to the accused a "trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

(Syllabus by the Court.)

Appeal from district court, Reno county; F. L. Martin, Judge.

W. E. Price was convicted of grand larceny, and appeals. Affirmed.

Davidson & Williams and W. H. Lewis, for appellant. F. B. Dawes, Atty. Gen., L. M. Fall, and Z. L. Wise, for the State.

MARTIN, C. J. At January term, 1895, of the district court of Reno county the defendant was tried on the charge of feloniously stealing, taking, and carrying away on November 12, 1894, certain neat cattle from the premises of Charles E. Fox, in McPherson county, and bringing them into the county of Reno, where they were found in his possession; said cattle being the property of John H. Cox and Frank Cox. After the jury had been impaneled and sworn, and the county attorney had stated the case to the jury, he asked leave of court to indorse the names of John Cox and Frank Cox upon the informa-

tion, to which the defendant objected, for the reason that plea had been entered, the jury impaneled, and no showing made to the court of the location of said witnesses, and that their testimony was not known to the state prior to the trial, nor any reason given why said indorsements should not have been made at an earlier time, which objection the court overruled, and leave was granted to indorse said names upon the information, for the reason that they were stated therein, and that was actual notice to the defendant that these men were witnesses in the case. The defendant excepted to this ruling. Objection was made in several forms to the jurisdiction of the court, the defendant claiming that he could not be placed on trial in Reno county for an offense alleged to have been committed in McPherson, said counties being in different judicial districts. The defendant was convicted of grand larceny, as charged in the information, and was sentenced to the penitentiary for the term of five years, and he appeals from this judgment.

1. This court in *State v. Cook*, 30 Kan. 82, 1 Pac. 32, held it within the discretion of the court to permit the name of a witness known to the prosecuting attorney at the time of filing the information to be indorsed thereon after the commencement of the trial, and to permit such witness to testify on the part of the state in a criminal prosecution over the defendant's objection, and this authority was followed in *State v. McKinney*, 31 Kan. 570, 576, 3 Pac. 356, *State v. Dowd*, 39 Kan. 412, 18 Pac. 483, and *State v. Adams*, 44 Kan. 135, 24 Pac. 71. Of course, the trial courts ought to be very careful in the exercise of a discretionary power like this to require the county attorney to act fairly; and, in the event of surprise of the defendant by the bringing in of witnesses that he could not anticipate, time should be granted even to the extent of a continuance if necessary to the ends of justice. But it is only where the court abuses its discretion in this respect that error will lie, and we cannot say that there was any abuse of discretion in the present instance.

2. The defendant contests the validity of section 26 of the Code of Criminal Procedure, to the effect that, when property taken in one county by burglary, robbery, larceny, or embezzlement has been brought into another county, the jurisdiction for the trial of the offense is in either county; the contention being that this is in conflict with that part of section 10 of the bill of rights which provides that the accused shall be allowed "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The theory of the statute is that a thief is stealing the property from the time he takes it up until he lays it down, although several counties may intervene between these points; and this principle is very generally recognized in the criminal jurisprudence of this country. Each asportation from one county to another is a fresh

theft, and a prosecution may be maintained in either county. Rap. Larceny, § 63; 1 Whart. Cr. Law, § 928, and cases cited. By section 274 of the crimes act of 1859, ever since in force, and now published as section 419 of the crimes act, it has been punishable as larceny to bring any stolen property from another state, territory, or country into this jurisdiction, and in such case the offense may be charged to have been committed in any county of this state into or through which such stolen property shall have been brought; and this section was held to be valid in the early case of *McFarland v. State*, 4 Kan. 68, and this upon the principle that every asportation *animo furandi* is regarded as a new taking, and to be punished accordingly. See, also, *State v. Hunter*, 50 Kan. 303, 306, 32 Pac. 37, and section 27 of the Code of Criminal Procedure. As the offense in this case was committed in Reno county, as well as in McPherson, the defendant has had a trial by a jury of the proper county and judicial district. The judgment of the district court must therefore be affirmed. All the justices concurring.

(55 Kan. 610)

STATE v. PRICE. (No. 10,230.)

(Supreme Court of Kansas. July 6, 1895.)

CRIMINAL LAW—INSTRUCTIONS—ALIBI.

In a criminal prosecution, the mere statement by the court in the charge to the jury that an alibi is a good defense if proven is not erroneous or misleading, where the jury are directed in the same connection that, if they have a reasonable doubt as to the presence of the defendant at the time and place when and where the crime was committed, they must acquit.

(Syllabus by the Court.)

Appeal from district court, Reno county; F. L. Martin, Judge.

W. E. Price was convicted of grand larceny, and appeals. Affirmed.

Davidson & Williams and W. H. Lewis, for appellant. F. B. Dawes, Atty. Gen., L. M. Fall, and Z. L. Wise, for the State.

ALLEN, J. The principal question presented in this case has been disposed of in another case between the same parties, just decided. 40 Pac. 1000. The only further question necessary to be now considered arises on the eleventh instruction given by the court to the jury. If nothing more had been given than is quoted in the brief of counsel for appellant, error would have been committed; but the whole instruction is as follows: "One of the defenses made by the defendant in this case is what is known as an alibi; that is, that the defendant was in another place at the time of the commission of the crime. This is a proper defense, if proven; and if, in view of all the evidence, the jury have a reasonable doubt as to the presence of the defendant at the time and place when the crime was committed, they should give the defendant the benefit of the doubt, and find

him not guilty." This instruction, taken as a whole, did not cast on the defendant the burden of proving his absence from the place where the crime was committed, but distinctly told the jury that, if they were in doubt as to his presence, they should give him the benefit of that doubt. It would be hypercritical to hold this instruction erroneous merely because a disconnected portion of a sentence would be erroneous standing by itself. The judgment is affirmed. All the justices concurring.

(55 Kan. 611)

STATE v. BROWN.

(Supreme Court of Kansas. July 6, 1895.)

LARCENY—EVIDENCE OF VALUE—INSTRUCTIONS—REASONABLE DOUBT.

1. In determining whether the theft of a quantity of wheat constituted grand or petit larceny, testimony of the market value of the wheat at the time and place of the theft was competent to establish the value of the property stolen; but, as a thief is stealing the property from the time he takes it up until he lays it down, he has no cause to complain if the value of the property is measured by the market value at the place to which it was taken by him and sold.

2. In explaining the rule of reasonable doubt, and as part of a definition, an instruction was given by the court that it did not mean "that the state should demonstrate to a mathematical certainty the defendant's guilt. That would be scarcely possible in any human trial." Held not to be misleading or prejudicial when considered in connection with the remainder of the definition.

(Syllabus by the Court.)

Appeal from district court, McPherson county; Lucien Earle, Judge.

Frank Brown was convicted of larceny, and appeals. Affirmed.

W. J. Travis, for appellant. F. B. Dawes, Atty. Gen., and C. W. Webster, for the State.

JOHNSTON, J. Frank Brown was convicted of grand larceny in the district court of McPherson county, and the punishment adjudged was imprisonment in the penitentiary for a term of one year. In the information he was charged with stealing 55 bushels of wheat, of the value of \$22, which was the property of E. A. Alger. That a quantity of Alger's wheat was stolen by the defendant appears to have been conceded, and the only contention at the trial seems to have been in regard to the quantity and value of the wheat stolen. The jury found that the defendant stole 51 bushels of wheat, of the market value of \$20.40.

It is first contended that the court erred in admitting evidence of a confession of the defendant. Alger, the owner of the wheat, was allowed to testify that Brown admitted the stealing of the wheat in question, and that the quantity was about 55 bushels. The confession appears to have been freely and voluntarily made. The defendant was a witness, and admitted, not only the taking of the wheat, but also that he made a confession to

Alger that he had participated in the theft. He denied, however, that he made a statement to Alger in regard to the quantity of wheat taken. Under these circumstances, no substantial question can be raised on the admission of the confession.

The second objection of the defendant is that he was not permitted to offer evidence as to the market value of the wheat taken. The wheat was taken from the premises of the owner, in an open wagon box, and most of it was carried about 10 miles across the country to the town of Galva. The load appeared to be too heavy for the team, and at two different places wheat was thrown upon the ground. Testimony was introduced tending to show that there were from eight to ten bushels so left upon the ground, and that, when the defendant and his associate reached Galva, there remained in the box 45½ bushels, which they sold for 40 cents per bushel. There was testimony to the effect that the wagon box used was 10 feet long, 3 feet wide, and a fraction over 26 inches deep; and some of the witnesses testified that such a box would hold from 55 to 60 bushels of wheat, depending upon the quality. Wheat of the quality stolen was worth at the neighboring towns from 40 to 42 cents per bushel, and there was testimony offered showing that wheat was worth 40 cents per bushel at the bin or place from which the wheat was taken. The defendant did not offer to prove the market value of the wheat at the bin, but did undertake to prove what it would cost a bushel to haul the wheat from the bin to the nearest railway station. The market value, if it had one, at the place from which it was taken, was certainly competent, and perhaps the best testimony in regard to its actual value. And the testimony offered by the state showed that wheat had a market value at that place, which was 40 cents per bushel, and that was the value found by the jury. The defendant claims that it was worth only 40 cents per bushel at the railway station where it was sold, and he insists that a man cannot steal his own labor, and therefore the cost of hauling it from the bin to the railway station should be deducted from the price at which it was sold. The defendant can gain nothing by this contention. It was Alger's wheat which was taken from the bin, and it was his wheat when it was delivered at Galva. If the thieves had been overtaken, and the wheat recovered at that place, why would not the value at that place be competent in determining the grade of the offense? "A thief is stealing the property from the time he takes it up until he lays it down, although several counties may intervene between these points; and this principle is very generally recognized in the criminal jurisprudence of this country." *State v. Price* (just decided) 40 Pac. 1000. In view of the testimony that was given regarding the market value at the place from which the wheat was stolen, and the fact that the court instructed

the jury that they could not convict the defendant of grand larceny unless "the reasonable and fair market value of the wheat at the time and place stolen was \$20 or more," the defendant has no cause to complain.

The final complaint is in regard to the following language used in an instruction given by the court: "It does not mean that the state should demonstrate to a mathematical certainty the defendant's guilt. That would be scarcely possible in any human trial." It is said that the effect of this instruction is to take away from the jury the mathematical evidence given on the trial in regard to the quantity of wheat which the wagon box would contain. We think the jury could not have been misled by the statement to which objection is made. As counsel for the state claimed, there was no real contention between the parties as to how many bushels of wheat could be held in a wagon box of certain dimensions, but the dispute arose upon the size of the box that was actually used by the defendant. The statement about which complaint was made is taken from an explanation or definition by the court as to the meaning of the words "reasonable doubt." It is doubtful if any definition which may be given of these words will aid a jury in understanding their import; and while the attempt of the court in the present instance may not have been necessary, and did not result in making it any clearer to the minds of the jury, we are unable to see that the definition could have resulted in any prejudice to the rights of the defendant. The judgment of the district court will be affirmed. All the justices concurring.

(56 Kan. 631)

LEASE v. CLARK.

SAME v. ALBAUGH et al., Board of Trustees.
(Supreme Court of Kansas. July 6, 1895.)

TRUSTEES OF STATE CHARITABLE INSTITUTIONS—
TERMS OF OFFICE.

1. Where several persons were nominated by the governor and confirmed by the senate as members of the board of trustees of state charitable institutions, and the terms to be so filled were not of the same duration, and did not begin and end at the same time, and the nominating message to the senate was indefinite and ambiguous as to tenure and succession, and did not show when the term of each appointee began and ended, the records in the offices of the governor and secretary of state in regard to such appointments, as well as the commissions issued to and accepted by the appointees, are competent evidence in determining the succession and terms of those appointed.

2. The evidence in the present cases examined, and it is held that the plaintiff was appointed for an unexpired, instead of a full, term, and that the defendant C. was duly chosen as her successor.

(Syllabus by the Court.)

Quo warranto by Mary E. Lease against George A. Clark, and by Mary E. Lease against Morton Albaugh and others, members of the board of trustees of the state charitable institutions. Judgment for defendants.

G. C. Clemens and Eugene Hagan, for plaintiff. F. B. Dawes, Atty. Gen., and Milton Brown, for defendants.

JOHNSTON, J. The plaintiff brought an action in quo warranto against George A. Clark, who claims to have succeeded her in the office of member of the board of trustees of the state charitable institutions, to determine who is entitled to the office. She has also brought another action of mandamus against three members of that board, to compel them to recognize her instead of George A. Clark as a member of such board. The purpose of both proceedings appears to be to regain the possession of the office formerly occupied by her as a member of the board, and both may be disposed of upon the same consideration. On April 25, 1893, the plaintiff was appointed by the governor as a member of the board, and on February 28, 1893, the appointment was confirmed by the senate, and she entered at once upon the discharge of her duties as such member. She contends that her appointment was for a full term, commencing April 1, 1893, and ending April 1, 1896. On March 5, 1895, the governor, proceeding upon the theory that the plaintiff was only appointed for an unexpired term, ending April 1, 1895, appointed George A. Clark as her successor for a full term of three years from April 1, 1895, and his appointment was duly confirmed by the senate. He qualified and entered upon the discharge of his duties on April 1, 1895, and was recognized by the board as the successor of the plaintiff. The nominating message of the governor, upon which the plaintiff largely relies in her contention, is as follows: "I have this day appointed M. A. Householder, Mrs. Mary E. Lease, and W. S. Walte as members of the board of charities of the state of Kansas, to succeed L. K. Kirk, T. F. Rhodes, and W. W. Miller, and would respectfully ask your concurrence in such appointments." The persons so appointed by the governor were confirmed by the senate without definitely fixing the succession or tenure of the appointees. At that time it was the province of the governor to appoint at least three members of the board, and probably it was within his power to have appointed four members. L. K. Kirk, who was named in the message, was not then a member of the board. He had previously resigned, and Adrian Reynolds had been appointed as his successor. The senate not being in session, the appointment of Reynolds was not confirmed. W. W. Miller, a member of the board, had been appointed in the absence of the senate, and hence he was holding under an unconfirmed appointment and for an unexpired term. It was the duty of the governor to appoint successors to Reynolds and Miller, whose appointments had not been confirmed. Under the law, the terms of two of the members regularly expired on April 1, 1895, and it was also the duty of the governor to ap-

point two members for the terms beginning at that time. The board, under the statute, consists of five persons, who are to be appointed by the governor with the advice of the senate. It was provided that, beginning in 1876, two should be appointed for one year, ending April 1, 1877; two for two years, ending April 1, 1878; and one for three years, ending April 1, 1879; and their successors were each and all to hold their positions for the term of three years, the terms ending April 1st, the succeeding year. Laws 1876, c. 130, §§ 1, 2. In case of vacancies, appointments are to be made to fill the same, but only for the unexpired terms; and when a vacancy occurs when the legislature is not in session, the governor is authorized to make the appointment; but it is provided that the appointee cannot hold longer than the third week after the convening of the next legislature. There has been some confusion in the past with respect to the tenure and succession of those appointed, and it is also manifest in the appointments made in 1893. The plaintiff contends that the nominating message upon which action was taken by the senate is controlling, and that the arrangement of the names and the grammatical interpretation of the language employed therein makes her the successor of T. F. Rhodes, whose term ended April 1, 1893. In her behalf it is argued that the only rational rule of construction which can be adopted is that the names in one series of the message are to be paired with those in the other in the order in which they stand, and that when the appointments were confirmed by the senate the governor was powerless to change the legal effect of the nomination and confirmation. On the other hand it is contended that the message to the senate is obscure and does not undertake to prescribe when the terms begin and end, and hence we must look to the records in the offices of the governor and secretary of state, as well as to the commission that was issued to and accepted by plaintiff, to determine the tenure and succession of the several persons who were then appointed. The record of the appointment, in the governor's office, shows that the plaintiff was appointed for an unexpired term, ending April 1, 1895. The executive order to the secretary of state directed that officer to issue a commission to plaintiff for the unexpired term. A commission was issued to plaintiff in accordance with the order, which was signed by the governor and countersigned by the assistant secretary of state, and a record of the commission was made in the office of the secretary of state. The commission and the record thereof specified the person to whom issued, the office conferred, with the date and tenure of the commission, showing that the plaintiff was appointed for an unexpired term, ending April 1, 1895. The commission so recorded and issued was delivered to and accepted by the plaintiff; and, instead of waiting until April 1, 1895, when a regular term would have com-

menced, she entered at once upon the discharge of her duties, evidently assuming that she had been appointed for the unexpired term. For a month or more she served as a member of the board, in connection with Rhodes, whom she now claims to have succeeded, and during that time the record of the meetings of the board repeatedly showed that they regarded the plaintiff as having been appointed for the unexpired term, and that M. A. Householder was appointed as the successor of T. F. Rhodes. The plaintiff was appointed as president of the board on March 14, 1893; and, as the supervision and signing of the records devolved upon her, the recitals with reference to the succession could not have escaped her attention, and it indicates the view which she then held respecting the tenure of her office.

We incline to the opinion that the view presented by the defendants is the better one. If the nominating message to the senate had specifically and clearly fixed the terms and tenure of the several persons nominated, it might have been controlling; and, if there was no other evidence of the intention of the governor in that respect than the arrangement or sequence of the names in the message, it might be sufficient to determine the terms and succession of the several appointees. The message, however, we have seen, was indefinite and ambiguous, and did not specify the beginning or ending of the terms of those mentioned therein. Kirk, who was named as one whose place was to be filled, was not and had not been a member of the board for several months. No attempt appears to have been made by the senate to have the terms of the several appointees definitely specified before or at the confirmation of the same. If a member of the senate, desiring to learn the terms and tenure of each member named in the message, had gone to the governor's office, he would have ascertained from the register of appointments that the plaintiff was appointed for the unexpired term ending April 1, 1895. There is a claim that this register was purposely mutilated after the appointment was made, so as to give Householder the long term, which it is claimed was originally given to the plaintiff, but we think that the testimony fails to sustain this claim. The records may be examined to determine the intention and action of the governor. The statute provides that the governor shall keep a record in his office of his official acts. Then there is a provision that commissions shall be issued, specifying the person to whom issued, the office conferred, with the date and tenure of the commission. The commission is to be recorded, after which it is to be transmitted by the secretary of state to the person commissioned. It is also provided that the appointment and commission shall not be deemed to confer any office or right thereto until a bond is given, as provided by law. Gen. St. 1889, par. 6565. As the statute contemplates that

a record of the action of the governor in making appointments shall be made, and that a commission shall be issued, they are competent evidence to determine what the purpose and action of the governor was with respect to the terms and tenure of those appointed. An examination of these records leaves no doubt that the governor intended to appoint Householder for the full term of three years, beginning April 1, 1893, and to appoint the plaintiff for the unexpired term, ending April 1, 1895. There is just as little doubt that the plaintiff herself, as well as the other members of the board with whom she was associated, understood and acted upon the theory that she was appointed for the unexpired term. It appears that, at some time, another commission was issued to the plaintiff, reciting an appointment for a full term, but this commission, whenever issued, was never delivered to the plaintiff. Taking all the testimony together, we are constrained to hold that the term for which the plaintiff was appointed expired on April 1, 1895, and that George A. Clark was legally appointed as her successor, and is entitled to the possession of the office. Judgment will therefore be rendered in favor of the defendants in each case. All the justices concurring.

(55 Kan. 630)

KANSAS BREEZE CO. v. EDWARDS, Secretary of State.

(Supreme Court of Kansas. July 6, 1895.)

PUBLIC PRINTING—COMPENSATION.

The rates of compensation for publications made in the "official state paper" are those fixed for seventh-class work in section 8 of chapter 132, Session Laws 1876 (paragraph 6085, Gen. St. 1889), and not those prescribed by section 17, c. 39, Gen. St. 1868 (paragraph 3040, Gen. St. 1889). Johnston, J., dissenting.

(Syllabus by the Court.)

Mandamus by the Kansas Breeze Company against William C. Edwards, secretary of state. Judgment for defendant.

J. B. Johnson and Albert H. Horton, for plaintiff. F. B. Dawes, Atty. Gen., for defendant.

MARTIN, C. J. It was a requirement of section 4 of article 15 of the original constitution that all public printing should be let on contract to the lowest responsible bidder; but in 1868 this section was amended so as to require the work to be done at the capital by a state printer elected by the legislature in joint session, the price for the same to be regulated by law. In pursuance of this amendment, the legislature passed an act, being chapter 78, Sess. Laws 1869, providing for the election of a public printer, and prescribing the duties of his office. He was therein directed, among other things, to "publish in a weekly newspaper to be printed at Topeka all laws ordered to be printed in a newspa-

per, all proclamations, orders, notices, and advertisements" of a defined character. Section 8 of the act divided the state printing into nine classes, and specified the rate of compensation to be paid to the public printer for each. The eighth class was defined as "all printing ordered and required to be done in a newspaper," and compensation was prescribed at the rate of \$1 per square of 250 ems for the first insertion and 50 cents per square for each subsequent insertion, but not more than \$1 per 1,000 ems for publishing all decisions of the supreme court and the laws. This stood until the enactment of chapter 142 of the Session Laws of 1875. By section 5 of said chapter the state printer was required, between the 1st and 10th of July in every year, to designate some newspaper printed and published at Topeka as the "official state paper," and to certify such designation to the secretary of state. The paper was to be designated for one year, and the state printer was to cause to be published therein all laws which should provide for their publication in any newspaper, the official syllabi of decisions of the supreme court, and all proclamations, orders, notices, and advertisements, with certain exceptions therein named. Section 8 of this act divided the public printing into eight classes, and provided compensation to the state printer for each. The seventh class in the act of 1875 corresponded to the eighth class in the act of 1869, but the rate to be paid to the state printer was reduced to 50 cents per square of 250 ems for the first insertion and 25 cents per square for each subsequent insertion, and not more than \$1 per 1,000 ems for the publication of syllabi of decisions of the supreme court and the laws. The act of 1875 was superseded and repealed by chapter 132, Sess. Laws 1876, but the classification and the rates to be paid for publication in the official state paper remained unchanged. In 1879, by section 104 of chapter 166 of the Session Laws of that year, in relation to state departments, the executive council was required at its regular meeting in March of each year to designate the official state paper for the year from April 1st next ensuing; and by section 105 of the same chapter the publications to be made in said newspaper were enumerated, and it was provided that payment therefor should be made by the state "at the rates prescribed by law." By section 133 of said chapter, sections 1-5 of said act of 1876 were expressly repealed, said section 5 being that which required the designation of the official state paper by the state printer. Sections 6-18, both inclusive, of said act of 1876, were not expressly repealed, but it is claimed by the plaintiff that all that part of section 8 which regulated the price to be paid for publications in the official state paper was repealed by implication; and on August 5, 1879, the Honorable Willard Davis, attorney general, gave to the secretary of state his written opinion to that effect, and that such work must be paid

for at the rates prescribed by section 17 of chapter 39 of the General Statutes of 1868, which is now published as paragraph 3040 of the General Statutes of 1889, the part of said section claimed to be applicable being as follows: "For publishing any legal notice or any order, citation, summons or any other proceeding or advertisement required by law to be published in any newspaper at a rate not exceeding one dollar per square of 250 ems for the first insertion and fifty cents per square of 225 ems for each subsequent insertion." The Kansas Breeze was duly designated by the executive council as the official state paper for one year from April 1, 1895, and it has made certain publications as such, which have been paid for at the rates prescribed by said act of 1876, but the plaintiff company, as the owner of said newspaper, claims additional payment, based upon said section 17 of the act of 1868. We are of opinion that the clause in section 8 of the act of 1876, prescribing the rates to be paid for publications in the official state paper, was not repealed by implication by said act of 1879, but that the same remains in force, and governs the compensation to be paid for that service. Repeals by implication, although not forbidden by the fundamental law, are not to be favored, especially in view of said section 16 of article 2 of the constitution; and this court said in the case of *Stephens v. Ballou*, 27 Kan. 594, 600, 601, that, in order to declare any legislation repealed by that method, the court "should be satisfied that such has been so done beyond all reasonable doubt." The fact that the law was so changed as to vest the power of designation of the official state paper in the executive council instead of the state printer should have little, if any, weight in determining the rate of compensation to be paid for services performed, for, in the nature of things, the mere change as to the repository of power to make the designation could have no effect upon the rates at which such work could be afforded by the publisher, nor the value of the service to the public. But it is said that under the act of 1876 the compensation was payable to the state printer, while by that of 1879 it goes direct to the publisher. Certainly the latter would have no reason to complain of direct payment by the state instead of indirect requital through the state printer. When it was provided by section 105 of said act of 1879 that payment for publications in the official state paper should be "at the rates prescribed by law," we think the legislature had reference to those rates then in force, and did not intend to double nor quadruple them. Besides, the compensation for the public printing had never been regulated by the act of 1868, which was approved before the state had a public printer or an official paper. That act seems to have been intended to regulate the fees and salaries of the several county officers, justices of the peace, constables, notaries public, referees, appraisers,

witnesses, jurors, and printers; but, as to the latter, the county printing and legal notices and work of like character chargeable to private persons must have been chiefly, if not wholly, in contemplation, for, except as to the publication of propositions to amend the constitution, and perhaps some other extraordinary matters, printing done for the state was then let by contract, as before stated. It was held by this court in *City of Pittsburg v. Reynolds*, 48 Kan. 360, 29 Pac. 757, that a city ordinance requiring publication in order to make it effective was not a "notice or advertisement," within the meaning of chapter 156, Sess. Laws 1891, and, if the same rule is applicable to section 17 of chapter 39, Gen. St. 1868, then the question might well arise whether, under it, the publisher of the official state paper would be entitled to any compensation for printing the supreme court syllabi and the laws, since no specific provision is made therefor in said section, and it being very doubtful if such work would come within any of the general terms employed therein. The argument in favor of the plaintiff's contention seems to be based wholly on the two circumstances that the power to designate the official state paper was changed by the act of 1879 from the state printer to the executive council, and that the act of 1876 made the compensation payable to the state printer, while under the act of 1879 it should be paid direct to the publisher of the paper; but neither circumstance would necessarily affect the rate of compensation to be paid, and when it was provided in section 105 of the act of 1879 that payment should be made "at the rates prescribed by law," we think it evident that the legislature meant the rates then in force for publications in the official state paper, there being no apparent intention to repeal that part of the act of 1876. It would be in the nature of a solecism to say that the provision of the statute fixing the rates for this particular work for several years next prior to the act of 1879 was repealed by its implication, notwithstanding the express declaration therein that payment should be made "at the rates prescribed by law." Instead of a repeal by implication, it appears to be a plain assertion by the legislature, to prevent any misapprehension growing out of the change of power to designate the state paper and awarding the compensation direct to the publisher in place of the state printer, that the rates then prescribed by law should remain in force.

It was developed in the oral argument that section 105 of the bill as reported to the legislature of 1879 expressly provided that the rates for the printing should be the same as prescribed by the act of 1868, relating to fees and salaries, but this was stricken out, and the section was adopted in its present form. This is certainly strong, if not conclusive, evidence that the legislature did not intend to adopt the rates fixed by the act of 1868, but left them to be governed by the act

then in force, which remained unrepealed. The motion to quash the alternative writ will be sustained, and judgment will be entered in favor of the defendant.

ALLEN, J., concurs.

JOHNSTON, J. (dissenting). I am unable to concur with my brethren in the view that has been taken. In effect it is held that a statute which prescribes the duties and fixes the compensation of the state printer applies to another person in no way connected with that officer, and who performs services not required from the state printer. It is true that prior to 1879 a large share of the printing now required to be done by the publisher of the official state paper was done under the control and direction of the state printer. His work was classified, and a definite rate of compensation was prescribed for each class and kind of work. He was required to designate a newspaper in which all publications required to be printed in a newspaper should be published. The duty, however, of procuring the work to be done was imposed upon him alone, and the compensation was to be paid to him and to no one else. Laws 1876, c. 132, § 8. In 1879 this duty was taken from him, and imposed upon another. All official publications required to be printed in a newspaper were directed to be published in an official state paper, to be designated by the executive council. Laws 1879, c. 166, § 105. By this provision that class of publications was extended beyond what it was when the duty of printing the same devolved upon the state printer. The statute, however, did not provide that the compensation that had been paid to the state printer for the work should be the compensation to be paid to the publisher of the official state paper, and I have heard no satisfactory argument advanced why the compensation of one officer should apply to another, even for the same kind of service, in the absence of an express provision to that effect. It is not uncommon for the legislature to provide that services theretofore performed by one officer, whose compensation is received in fees, shall be performed by another officer who likewise receives compensation in fees; but who would suppose that the legislature intended that the statutory fees for the former officer should be the rule of compensation for the latter, unless it had expressly declared that to be its purpose? The law of 1879, after including printing which had not been within the control and direction of the state printer, provided that payment should be made to the publisher of the official state paper at the rates prescribed by law. At that time there was a general statute on the subject of printing, applicable alike to all newspapers of every class in the state, and certainly broad enough to include the compensation to be paid for the printing and other work performed by the official state paper. Gen. St. 1889, par. 3040. When the

legislature of 1879 took from the state printer the duty of procuring public newspaper printing to be done, it also took from him the right to receive compensation therefor, and by the clearest implication repealed both the provision prescribing that duty and the one fixing the fees for the performance of the same. The general law relating to fees and salaries is prospective and perpetual in character, and intended to be applicable to all officers, and for all kinds of services that may fall within its terms and provisions. The class of printing under consideration is fairly included within its terms, and, in my view, the legislature intended that to be the rule of compensation for publications in the official state paper. Immediately after the passage of the law the attorney general of the state so interpreted the statutes, and this has been the unvarying construction of the same by his successors in office and by the different incumbents of the office of secretary of state for a period of 16 years. That this rule had been adopted and acted upon was shown by public opinions and by the public records. With this knowledge the legislature has repeatedly appropriated money to pay for this service at the rate prescribed by the general law, and in that way has approved and adopted the interpretation of the officers who had control of the printing and the appropriations to pay for the same. The fact that this has been the unvarying construction of the executive and legislative departments of the government from 1879 to 1895, although not controlling, is a weighty argument in favor of such a construction. Apart from that, however, I am clearly convinced from the language of the statutes referred to that the legislature did not intend that the fee bill prescribed for the state printer should be the measure of compensation for the publisher of the official state paper. I therefore think that judgment should be awarded in favor of the plaintiff.

(55 Kan. 589)

ROUSE v. HARRY.

(Supreme Court of Kansas. July 6, 1895.)

INJURY TO RAILROAD EMPLOYE—NEGLIGENCE OF COEMPLOYEE—LIABILITY OF RECEIVER—INSTRUCTIONS—NEGLIGENCE OF PLAINTIFF.

1. The liability of a receiver operating a railroad to an employé who is injured in the service, through the negligence of a coemployé, is determined by the same rules of law as the liability of the company would be, and paragraph 1251 of the General Statutes of 1889 applies.

2. Where the jury, in answer to special questions, find that the plaintiff was free from any negligence contributing to the injury for which he sues, and that such injury resulted from the culpable negligence of a coemployé, the mere reference by the court to the abstract rule that if the negligence of the plaintiff is only slight, or remotely contributory to the injury, if otherwise entitled, he may still recover, cannot be held prejudicial because not applicable to the facts, especially where the court instructs the jury fully and properly on the law applicable to the facts as presented by the evidence.

3. The testimony examined, and found sufficient to support the verdict.

(Syllabus by the Court.)

Error from district court, Neosho county; L. Stillwell, Judge.

Action by F. O. Harry against Henry O. Rouse, receiver. Judgment for plaintiff, and defendant brings error. Affirmed.

F. O. Harry, the plaintiff below, was a brakeman, employed by the receivers of the Missouri, Kansas & Texas Railway Company, on the line of road running from Coffeyville to Paola. On the 7th of December, 1889, his left arm was caught and crushed while he was attempting to couple two freight cars at Coffeyville. This action was brought to recover compensation for the injury, and resulted in a verdict in his favor for \$5,000. The train on which the plaintiff was working arrived in Coffeyville from Paola after dark, and the same crew made up the train going back north, Coffeyville then being the end of the line. The plaintiff was hind brakeman, and Charles Canaga was front brakeman. The main line of the railroad runs on the east side of the depot, and what is termed the "house track" on the west side. The switch from the main line to the house track is located about 100 yards north from the depot. When the train first pulled into Coffeyville on that night, the head brakeman cut the engine off, and turned the switch after the engine had passed, so that the freight cars and caboose ran in on the house track, while the engine ran on down by the depot. The engine was then run back up the track, coupled onto the rear end of the caboose, which was pulled out onto the main track and run down past the depot. The engine was then taken to the roundhouse, where there is a turntable, and turned around, preparatory to making the return trip. The engine was then brought back, and an Armour Bros. refrigerator car loaded with wheat was dropped down to the caboose. Two cars were then set on the house track for loading. Instructions were given by the conductor to the plaintiff with reference to making up the train, and he had charge of the switching, the conductor being engaged at the depot. The plaintiff testifies that he told Canaga to cut off behind the front box car, and come out on the main line and back down on the train, and he would couple them up. Plaintiff then walked across from the house track to the main line. The night was very dark, and he had a lantern in his hand. The grade descended from the switch stand southward. Instead of obeying the instructions of the plaintiff, Canaga cut the car loose from the engine, and "kicked" it down, unattended. The plaintiff took his position next the refrigerator car to make the coupling. As he saw the car approaching he gave the proper signals, with his lantern, to slow up. Holding his lantern in his right hand, he made the coupling with his left; but, owing to the rapid rate at

which the car was coming, his arm was caught, and badly crushed. The negligence charged in the petition is that Canaga carelessly allowed the car to run at a dangerous rate of speed down against the car to which it was to be coupled, and that the defendants negligently used cars with cast-iron extension deadwoods projecting from the ends of the cars on either side of the drawheads, rendering it unnecessarily dangerous to make couplings. In addition to rendering a general verdict, the jury also, at the request of the plaintiff, returned answers to special questions, among which are the following: (5) Was not said Canaga, at the time of the injury, an inexperienced, careless, extra brakeman, and did not defendants know that fact? A. Yes. (7) Do you not believe and find that Canaga, from inexperience and lack of practice as a front brakeman, and from negligence, cut the car loose, and permitted it to run violently down grade to the car where plaintiff was to make the coupling? A. Yes. (12) Was not plaintiff, Harry, using ordinary care and prudence in trying to make the coupling at the time of his injury? A. Yes. (13) Do you not find that Mr. Harry was an experienced, careful, and prudent brakeman? A. Yes. (14) Was Mr. Harry guilty of any negligence which, directly or proximately, contributed to his injury? A. No. Special questions were also submitted on the part of the defendant, among which are the following: (12) Could not the plaintiff, by the exercise of his sight and hearing, have informed himself as to the speed at which the car was approaching? A. He could not. (19) Was it not the duty of Charley Canaga, the front brakeman, to remain with the front end of the train after cutting off and kicking down the last car on the main line? A. No; having cut the car loose and kicked it with the force shown, owing to the darkness he should have ridden the car down. (27) Was plaintiff's injury caused to some extent by his own want of attention? A. No. (28) Was plaintiff's injury caused partly by his own want of attention, and partly by the speed of the approaching car? A. It was caused by the speed of the approaching car in the darkness.

T. N. Sedgwick, for plaintiff in error. C. A. Cox, for defendant in error.

ALLEN, J. (after stating the facts). The first claim of error is in admitting testimony to prove that the refrigerator cars were constructed with deadwoods which rendered it more dangerous for brakemen to make couplings than ordinary cars. It is said that the defendants were not bound to furnish any particular kind of cars, and the plaintiff, knowing the construction of the cars, assumed the extra hazard. After hearing the testimony on this point, the court instructed the jury that the plaintiff had assumed this risk. It is contended, however, that, notwithstanding this instruction, the jury were

prejudiced by the evidence, and led to believe that such cars were unnecessarily dangerous, and that the court should not have permitted the jury to hear such testimony at all. We are unable to perceive how the court could have ruled that the plaintiff had assumed the extra hazard until such facts were developed by the evidence as showed the assumption by the plaintiff of this particular hazard.

It is next contended that the accident was occasioned by the plaintiff's own negligence; that he did not, immediately after the injury, attribute any fault to Canaga; that it was not the duty of Canaga to ride the car down, but to stay with the engine; that there was, in fact, other switching to do, rendering it necessary for him to accompany the engine. It is very clear to our minds that there is ample testimony to sustain the findings of the jury, as well on the question of the negligence of Canaga as on that of contributory negligence on the part of the plaintiff. The jury have answered, clearly and unequivocally, that Canaga was negligent in allowing the car to run down grade to where the plaintiff was to make the coupling, unattended by any one in a position to answer signals or check its speed. They have also found that the plaintiff could not by the use of his senses determine the rate of speed at which the car was approaching in the darkness; that the plaintiff was free from fault or negligence, and that the injury was occasioned by the negligence of Canaga. The testimony is ample to support these findings, and we find nothing in the record requiring us to interfere with them.

Complaint is made of the eleventh instruction, by which the jury were told that if the plaintiff's negligence was only slight, or the remote cause of the injury, he might recover. If otherwise entitled to a verdict. Under some circumstances, such an instruction is misleading. We have held it to be so in the case of *Railroad Co. v. Prouty* (decided at this term of the court) 40 Pac. 909. It is true, if the plaintiff was negligent in attempting to make the coupling as he did, such negligence was proximate and not remote; but we have no difficulty to contend with in this case on that point, for the jury have expressly found that he was not negligent at all, and that he could not have ascertained, by the use of his senses, the rate of speed at which the car was approaching, and that he used all reasonable and necessary care in making the coupling. The instruction complained of would also appear more objectionable standing alone than it does in connection with the very full and clear instructions accompanying it, by which the attention of the jury was called to the specific claims of negligence, and fairly explaining to them the questions of fact presented by the evidence which they were called on to decide. They have found the

plaintiff free from any negligence contributing to the injury. We therefore have no question presented to us, as to the effect on the plaintiff's right of recovery, of slight or remote negligence on his part, for he was guilty of none.

The seventh instruction is also criticised, but we find no fault in it.

We now proceed to consider the most important question presented by the record in this case, namely, whether paragraph 1251 of the General Statutes of 1889 applies as well to receivers operating railroads as to railroad companies. The section reads: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employees, to any person sustaining such damage." The trial court charged the jury that this section did apply in this case. It is contended with great earnestness, on behalf of the plaintiff in error, that this section of the statute does not, in terms, apply to receivers; that it gives a cause of action where none existed at common law; that such a statute must be strictly construed; that it cannot be extended to embrace parties not included within its terms; that receivers are not railroad companies, but officers of the court, and cannot be held liable for injuries received by one employé through the negligence of another. The argument in support of this contention by the learned counsel for the plaintiff in error is clear and forcible, and presents in all its strength, as it appears to us, that side of the question, and his position is sustained by decisions of the supreme court of Georgia and Texas under very similar statutes. It is contended that to include receivers is to interpolate, by judicial legislation, that which the legislature has omitted from the statute. Many authorities are cited denying to the court any such power. It is also urged that this court, in the case of *Beeson v. Busenbark*, 44 Kan. 669, 25 Pac. 48, has practically decided this question in accordance with that view. That was an action against *Beeson & Selden*, who were contractors engaged in the construction of a railroad. They used engines and cars for the transportation of materials, and other purposes connected with the construction of the road, and the plaintiff in that case was injured while employed in cleaning the ash box of an engine. The defendants were not a corporation, but a firm composed of private persons, and were not engaged in the operation of a railroad as common carriers, and it was held that they did not fall within the statute. We are entirely satisfied of the correctness of the decision in that case. The distinction between contractors employed in the construction of a railroad, or of some portion of a road, and a railroad company, operating under a

charter from the state, as common carriers of freight and passengers, is broad and well marked. The position of a receiver, however, is in many respects anomalous. He is not, in any just sense, the owner of the property; nor is he personally interested, except in the compensation he receives for his services. On the one hand, he represents the court by which he was appointed; and the property in his charge is, in some sense at least, in the custody of the law. On the other hand he represents the interests of the corporation, and also of its creditors. The business which he carries on is public, so far as railways are highways open to the public. It is private, so far as the profits derived from it are concerned. It is somewhat anomalous for courts, through the instrumentality of receivers, to conduct private business for profit; yet the public exigencies and necessities for the continued operation of the great public thoroughfares of the country, no matter what the conflicting rights and interests of stockholders and creditors may be, have been regarded as of such force as to require the continued operation of railroads through the instrumentality of receivers, while the rights of parties litigant are being adjusted through the medium of the courts. There is no transfer of interest from the corporation to the receiver, but only a transfer of management. The business is carried on, so far as owners and creditors are concerned, for the purpose of securing a profit. This profit goes into the hands of the receiver, to be applied in accordance with the principles of law, and paid to the parties justly entitled to it. The surplus, if any, over operating expenses goes exactly where it would go if the business of the company was honestly conducted by its officers. There is still the same necessity for a multitude of employés to keep its properties in repair and working order, to operate its train service, to collect and disburse its revenues, to keep its accounts, and to protect its interests. Receivers must, in the first instance, always assume control and generalship over the army of workers they find in the employ of the company. While they have the power to employ and discharge, the general rule is that the force they find already organized is retained and used, except where found incompetent or inefficient. The receiver becomes, in effect, the general manager, charged with the general supervision of the interests of the company, not through election by the stockholders or board of directors, but by appointment of the court. He stands charged with the performance, then, of the corporate functions of the railroad company. He causes trains to be run, and freight and passengers, mails, and express matter to be transported for hire. He collects all the revenues derived from the service. From them he pays all the employés for their services, and discharges all other operating ex-

penses. In substance, then, the business of a railroad corporation in the hands of a receiver moves on as though under the direction of a general manager, to accomplish the same public purposes, to perform the same services for its patrons, to obtain for its bondholders and stockholders the same revenues as before. The receiver, when acting in pursuance of and in obedience to the orders of the court, incurs no personal liability, and has no personal interest in the profits or losses of the business. The substance, then, of the whole matter is that the railroad corporation is neither dead nor dormant. It is, in fact, alive, active, and performing its proper functions, as much as before. Its properties are in existence and utilized for the same purposes as ever. Does, then, the mere shadow of a receivership operate to completely transform the relations its employes sustain to each other and to the assets of the company? For the life and body of a corporation are its franchises, its business, and its property. It is not a sentient being, and has no tangible or personal existence. A suit against a receiver is in form against an individual, but in substance it is against the corporate property in his charge. It is, in all essential particulars, in substance against the corporation itself. We think this is the view best sustained by the authorities, and most in consonance with reason and sound principles. "It is not the words of the law, but the internal sense of it, that makes the law; and our law, like all others, consists of two parts, viz. of body and soul. The letter of the law is the body of the law, and the sense and reason of the law are the soul of the law. *Quia ratio legis est anima legis.*" *Intoxicating Liquor Cases*, 25 Kan. 763, citing *Eyston v. Studd*, 2 Plow. 465. The case of *Trust Co. v. Thomason*, 25 Kan. 1, was an action against the trust company by an employe to recover damages under the same section of the statute now under consideration; and, although the question as to the applicability of the statute to the case of a trustee operating the road is not much discussed in the opinion, the principle on which a liability was sustained in that case is very similar to that under consideration in this. The Union Trust Company was not a railway company, and therefore not within the letter of the statute; but it was operating a railroad, and the liability, which could arise only by force of the statute, was maintained in that case. In the case of *Hornsby v. Eddy*, 5 C. C. A. 560, 56 Fed. 461, the identical question now before us was passed on by the United States circuit court of appeals for the Eighth circuit. The statute was held to apply, notwithstanding the Georgia and Texas cases, which are cited in the opinion. The case of *Trust Co. v. Thomason* was regarded as, in effect, a construction of the statute in favor of the liability of a receiver. This decision was on

a demurrer to the petition. The case was afterwards tried, a verdict and judgment rendered against the receivers for \$15,000, the case again taken to the court of appeals (67 Fed. 219), and the judgment affirmed. Judge Caldwell, in delivering the opinion, says: "An elaborate brief is filed by the plaintiffs in error in support of the contention that the section of the Kansas statute referred to does not apply to receivers operating a railroad, and that, as to them, the fellow-servant rule as to the common law still obtains. This question was carefully considered when the case was first here. We are entirely satisfied with the result then reached." Although the construction placed on the statute of this state by the federal court is not binding on us, the views of a court of such high character are entitled to most respectful consideration. The Iowa statute, which in terms applies not only to the corporation, but to lessees and other persons owning or operating railroads, was held by the supreme court of that state in the case of *Sloan v. Railway Co.*, 62 Iowa, 728, 16 N. W. 331, to include receivers. In the case of *Railway Co. v. Cox*, 12 Sup. Ct. 905, the supreme court of the United States held that, as the statutes of Louisiana authorized an action against the receivers of a railway company for wrongfully causing the death of a brakeman, an action might be maintained in Texas against the receivers for acts done in Louisiana, notwithstanding the decision of the supreme court of Texas in the case of *Turner v. Cross*, 18 S. W. 578. For other cases bearing more or less directly on this question, see *Little v. Dusenberry*, 46 N. J. Law, 614; *Farrell v. Trust Co.*, 77 Mo. 477; *Klein v. Jewett*, 28 N. J. Eq. 476; *Murphy v. Holbrook*, 20 Ohio St. 137. Complaint is made that the verdict is excessive, but we cannot say that it is so. The judgment is affirmed. All the justices concur.

(28 Or. 34)

FELDMAN et al. v. NICOLAI et al.

(Supreme Court of Oregon. July 22, 1895.)

FRAUDULENT CONVEYANCES—CONSIDERATION.

A deed from a debtor in failing circumstances to a creditor, who was the grantor's son-in-law, which was immediately recorded, will not be set aside as fraudulent to creditors when the evidence shows that the consideration was adequate, and the conveyance made in good faith.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by Maria Feldman and others against Adolph Nicolai and others to set aside two deeds. From a decree confirming defendants' title and dismissing the suit, plaintiffs appeal. Affirmed.

E. B. Watson, for appellants. A. H. Tanner and O. F. Paxton, for respondents.

MOORE, J. This is a suit to set aside two deeds, and subject the real property therein

described to the payment of certain judgments rendered against the grantor. The facts are: That on April 1, 1890, the defendants Adolph Nicolai and Karoline, his wife, for the expressed consideration of \$8,500, executed to their son-in-law, the defendant W. W. McGuire, a warranty deed, which purported to convey the following described real property, to wit: "Beginning at a point in the north line of block 194, in the city of Portland, Oregon, which is 45 feet westward from the northeast corner of said block, and running thence southward, parallel with Sixth street, 95 feet; thence westerly, parallel with Jackson street, 55 feet; thence north, parallel with Sixth street, 95 feet; and thence easterly, 55 feet, to the place of beginning;" and on October 20th of that year the said Nicolai and wife, for the expressed consideration of one dollar and other good and valuable considerations, executed to their daughter, Rosalia McGuire, wife of the defendant W. W. McGuire, a warranty deed, subject to certain mortgages, which purported to convey the following real property: Lot 1, in block 16, in Couch's addition, and the west half of lots 7 and 8, in block 194, in said city. That at the date of the latter conveyance the defendant Nicolai was indebted in various amounts to the several plaintiffs, who thereafter obtained judgments against him upon their respective demands, and had executions issued thereon, and delivered to the sheriff of Multnomah county; but that officer, being unable to find any property of the defendant in the writs upon which he could levy, returned them wholly unsatisfied. The plaintiffs, uniting their claims in this suit, allege, *inter alia*, that the defendant Nicolai is insolvent, and that said deeds were executed without any consideration, and with a fraudulent intent to hinder, delay, and defraud his creditors, and that they were accepted by the defendants W. W. and Rosalia McGuire with full knowledge and notice of Nicolai's insolvency and intention, for the purpose of aiding him in carrying said intention into effect. The defendants deny this allegation, and for a further defense allege that the lots conveyed to Rosalia were subject to two mortgages securing an indebtedness of \$16,000, the payment of which they assumed, and which, together with judgment liens and street assessments against the property, and certain indebtedness due and owing from Nicolai to W. W. McGuire for money paid out, advanced to, and expended for him, and certain of his indebtedness which they assumed and agreed to pay, amounting at the time of the sale and conveyance to \$30,000, constituted and was a full and adequate consideration therefor; and that they purchased said property in good faith, and paid therefor the consideration aforesaid, without any intention to hinder, delay, or defraud any of the creditors of Nicolai. The court, before the cause was submitted, granted leave to amend the answer by adding an allegation to the effect

that the deed from Nicolai to Rosalia McGuire was executed in pursuance of an agreement between herself and husband that she should hold the title to the premises in trust for him. A reply having put in issue the allegations of new matter contained in the answer, a trial was had before the court, resulting in a decree confirming the defendants' title to the property, and dismissing the suit, from which decree the plaintiffs appeal.

A careful examination of the evidence shows that on April 1, 1890, the defendant Adolph Nicolai owed various persons about \$25,000, of which sum \$4,437.55 was due the defendant W. W. McGuire, to pay which Nicolai and his wife executed their deed of that date. While there is a controversy about the amount due McGuire at that time, we think the evidence fully shows that it was the sum stated above, and that no actual fraud was intended by either party to the deed; and hence the only question to be considered is whether the grantee paid a full consideration for the premises. The value of the property conveyed is estimated by two witnesses at \$4,000 and by three others at \$4,200, \$4,300, and \$5,000, respectively. The \$8,500 mentioned in the deed appears to have been adopted by the parties as the amount to be inserted as the consideration therefor before the interest had been computed upon the sum due McGuire, without any intention of defrauding Nicolai's creditors. The right of a debtor to prefer a particular creditor is not prohibited by statute, but, where such creditor is a relative or member of the debtor's family, the court will examine the evidence relating to the transfer of the debtor's property in satisfaction of the preferred creditor's claim with greater care. *Jolly v. Kyle* (Or.) 39 Pac. 999. Tested by this rule, we conclude the defendant W. W. McGuire has paid an adequate consideration, and clearly established his title to the premises conveyed to him.

The evidence also shows that the lots conveyed to Rosalia McGuire were subject to the following liens: Mortgages and interest, \$16,230; street assessment, \$191; judgments, \$3,152; and that in consideration of \$4,261.75, due from Nicolai to McGuire, and the latter's agreement to assume and pay off said liens, Nicolai and wife, on October 20, 1890, conveyed the premises to Rosalia, in trust for her husband. The plaintiffs dispute an item of \$2,100, claimed to have been loaned by McGuire to Nicolai, but McGuire shows from whom he obtained it, and his bookkeeper testifies that he drew a note for this amount, which Nicolai signed, and that he saw McGuire pay Nicolai quite a sum of money. We think it clearly appears from the evidence that between April 1 and October 20, 1890, McGuire loaned to, and assumed the payment of debts for, Nicolai, amounting to \$4,261.75. The deed to Rosalia was immediately recorded, and the parties took possession of the premises under it; and, while there are

some circumstances connected with the transfer that would seem to indicate fraud, we are convinced from the evidence that no actual fraud was intended, and that the conveyance was made in good faith, and with no intention upon the part of McGuire or his wife to defraud the creditors of Nicolai. The value of the lots conveyed to Rosalia McGuire is estimated at from \$18,500 to \$36,000, in which latter sum two witnesses agree, while six others place the value below \$23,834, the amount paid and assumed by McGuire. From this evidence we think an adequate consideration was paid, and hence the decree must be affirmed, and it is so ordered.

(27 Or. 315)

ROBINSON v. LAURER.

(Supreme Court of Oregon. July 20, 1895.)

BOUNDARIES — CONFLICT BETWEEN FIELD NOTES AND MONUMENTS—COMMISSION TO LOCATE BOUNDARY.

1. Where there is a conflict between field notes and the original monuments, the field notes must yield to the monuments.

2. Where stakes are found at points so as to conflict with the field notes, the burden of showing that the stakes were monuments of the original survey is on the party claiming to the stakes.

3. Under Hill's Code, § 508, requiring the court, at the time of entering a decree locating a boundary, to appoint a commission to mark out on the ground the boundary as ascertained by the court, it is error not to appoint such commission, though the evidence showed that the boundary was already plainly indicated by a fence.

Appeal from circuit court, Umatilla county; James A. Fee, Judge.

Action by Mark S. Robinson against Fred Laurer to ascertain and locate a boundary line. From a decree dismissing the complaint, plaintiff appeals. Modified.

J. J. Balleray, for appellant. A. D. Stillman, for respondent.

MOORE, J. This is a suit to ascertain and locate the common boundary between the N. W. $\frac{1}{4}$ of section 11 in township 5 N., of range 36 E., in Umatilla county, owned by the plaintiff, and the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2 in said township, the property of defendant. The complaint contains the allegations necessary to give the court jurisdiction, and prays that the boundary be established on a line 20 rods north of a certain fence, claimed to be on plaintiff's land. The defendant denies that the said boundary is uncertain, or that it should be established at any other place than along the said fence, which he alleges is located on the line of the original survey. A reply having put in issue the allegations of new matter contained in the answer, the case was referred to R. M. Turner, who, having taken the evidence, found the fence to be on the boundary line

between said premises, and that the complaint should be dismissed. The court affirmed the report of the referee to that effect, and rendered a decree dismissing the suit, from which plaintiff appeals.

The evidence shows that monuments are placed at the northwest corner of section 2 and the southwest corner of section 11, as originally set by the government surveyor, and that, measuring from these points, the said fence is about 20 rods south of the section line as evidenced by the government field notes; that no stake or mound could be found at the northwest corner of section 11, or at the quarter post on the north side of said section, as indicated by the field notes, but that such stakes and mounds are found and have been known to exist for about 20 years at the east and west ends of the fence line; that surveyors, in the presence of others, upon digging into these mounds, just before this suit was commenced, recovered the ends of stakes which were much rotted and indicated that they had been there many years. The evidence, in our judgment, shows that these stakes were the ones originally set by the government surveyor, and the points at which these monuments were placed must control in ascertaining the true boundary. The object of the field notes is to furnish a record by means of which the lines can be retraced, and it is presumed that the record so made furnishes a history of the survey (*Cadeau v. Elliott*, 7 Wash. 205, 34 Pac. 916); but, where the original monuments or the points at which they were placed are discoverable, the field notes must yield to the official survey made upon the ground. There being a conflict between the field notes and the survey, the burden was upon the defendant to show that the stakes set at the points indicated were the monuments of the original survey, and we think he has fully established this fact.

It is contended that the court erred in dismissing the suit, and in not appointing a commission to locate the line upon the ground. The statute (section 508, Hill's Code) requires the court, at the time of entering a decree, to appoint a commission whose duty it shall be to mark out upon the ground the boundary as ascertained or determined by the court. The evidence shows that the line was plainly indicated by the fence, and no doubt the court thought the appointment of a commission would entail additional expense, and be of no practical benefit; but since the statute requires the appointment of a commission for that purpose, the court erred in neglecting this duty, for which reason the decree must be modified accordingly, and the cause remanded to the court below, with instructions to enter the decree fixing the location of the disputed line, and to appoint a commission to mark the boundary as established by the decree.

(27 Or. 311)

McFERREN v. UMATILLA COUNTY.

(Supreme Court of Oregon. July 20, 1895.)

DAMAGES—DEFECTIVE ROADS AND BRIDGES.

An act (Laws 1893, p. 141) making counties liable for damage sustained in consequence of defective county roads and bridges, section 1 allowing compensatory damages to be recovered in the circuit court, "or in a justice's court if the amount of damages sued for be less than \$1,000," gives a remedy for compensatory damages to the extent of the injury sustained in the circuit court, and enlarges the jurisdiction of justices' courts in such cases to any less sum than \$1,000.

Appeal from circuit court, Umatilla county; M. D. Clifford, Judge.

Action by Laurena McFerren against Umatilla county for damages caused by defects in a bridge. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

J. J. Balleray, for appellant. Stephen A. Lowell, for respondent.

WOLVERTON, J. This is an action to recover damages for injuries to the plaintiff, caused by defects in a bridge upon a public highway under the control of defendant, from which she was precipitated while lawfully traveling thereon with a team and wagon, which bridge, it is alleged, was, at the time of the accident, out of repair, and in a dangerous and unsafe condition, and suffered to become and remain so through the gross carelessness and neglect of the defendant county. The plaintiff prays judgment for the sum of \$10,000, the further sum of \$365, and for costs and disbursements. The case comes here upon the demurrer to the complaint, which being sustained by the court below, the plaintiff appeals.

The only question involved is the construction of an act entitled "An act to make counties liable for loss or damage sustained in consequence of defective and dangerous county roads and bridges" (Laws 1895, p. 141). It reads as follows: "Section 1. Whenever any individual, while lawfully traveling upon any highway of this state, the same being a legal county road, shall, without contributory negligence on his part, and not having been warned of the defect or danger by notice or otherwise, sustain any loss, damage, or injury, in consequence of the defective and dangerous character of such road or bridge, either to his property or person, he shall be entitled to recover compensatory damages therefor off the county in which such loss, damage or injury occurred, by an action in the circuit court of such county, or in a justice's court therein if the amount of damages sued for be less than one thousand (\$1,000) dollars." This statute imposes a new liability upon the counties of the state, and should therefore receive a strict construction. Elliott, Roads & S. 324. Such is the rule for the construction of statutes creating a liability where otherwise none would exist. Suth. St. Const. § 371. The primary purpose

of this statute is without doubt to give a remedy against the county for injuries sustained upon the public highways over which it has supervision and control. This much is clear, and that the statute has effected this purpose is also clear. But the extent and manner of enforcing the remedy by reason of the inapt use of words and syntax of expression is left in some doubt. It is always a legitimate inference, where a remedy is provided, that the legislature intended it should be adequate unless limited, qualified, or controlled by apt and appropriate words. The word "compensatory," as used in this act, was evidently employed as a limitation, whereby the county is protected from the recovery of any damages for such injuries of a punitive or exemplary character. Further than this we are unable to see that this word is of controlling force, except as it may indicate in some measure the legislative intent by the use of the language employed in the later clauses of the act, viz. "by an action in the circuit court of such county, or in a justice's court therein if the amount of the damages sued for be less than one thousand (\$1,000) dollars." Without these latter clauses, the remedy would undoubtedly have been adequate for the recovery of compensatory damages commensurate with the injury sustained.

We are now to discover what the legislature meant by the use of these latter expressions of its will. The legislative intent can only be derived from the words and language employed in the act itself, and we cannot speculate beyond the reasonable import thereof. The spirit of the act must be extracted from its several provisions, and not from conjectures aliunde. *Gardner v. Collins*, 2 Pet. 93; *Tynan v. Walker*, 35 Cal. 642; *Suth. St. Const. § 236*. And, as has been concisely stated by Parke, B., in *Becke v. Smith*, 2 Mees. & W. 194: "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." It is contended for this act that it limits the amount of recovery to \$1,000 in any case, and that the jurisdiction of the justice's court is not thereby enlarged; that is to say, damages may be recovered in a justice's court for such injury to the extent of \$250,—the limit of its jurisdiction in ordinary cases,—and that the jurisdiction of the circuit court is circumscribed so as to limit the amount of recovery to a sum less than \$1,000. This result counsel would accomplish by eliminating in effect the words, "by an action in the circuit court of such county, or in a justice's court therein," from the statute. Except as to the enlargement of the jurisdiction of justices'

courts in the action, the same result would follow from a transposition of the latter clauses of the act so as to read as follows: "Shall be entitled to recover compensatory damages therefor off the county in which such loss, damage, or injury accrued if the amount sued for be less than one thousand dollars, by an action in the circuit court of such county, or in a justice's court therein." But we cannot eliminate these words without doing violence to the act itself, nor can we transpose them unless their present position renders the sense absurd, or clearly without the intention of the legislature as gathered from a consideration of the whole act. The statute has enlarged the jurisdiction of the justice's court in this particular without question. The language employed refutes the presumption which ordinarily prevails against the intention of the legislature to increase the jurisdiction of inferior tribunals. Upon the other hand, the presumption against limiting the powers of a court of general jurisdiction subsists as an element in the construction of this statute. The language and grammatical arrangement of the words and phrases used, when read in the order in which they appear in the act, do not render the law absurd nor nonsensical, however peculiar and strange the particular combination may seem. The literal and natural reading of the act clearly indicates that the legislature intended to give a remedy for compensatory damages commensurate with the injury sustained, to be recovered by an action in the circuit court of the county, and to enlarge the jurisdiction of justice's courts in this class of cases so that compensatory damages for any sum less than \$1,000 could be recovered therein. We cannot see that any other intention is manifest, and therefore conclude that such is the effect of the act. "To warrant the change of sense, according to the natural reading, to accommodate the broader or narrower import of the act, the intention of the legislature must be clear and manifest." *Suth. St. Const.* § 241; *Holbrook v. Holbrook*, 1 Pick. 250. The judgment of the court below will be reversed, and the cause remanded.

(28 Or. 9)

SCHMIDT v. OREGON GOLD-MINING CO.

(Supreme Court of Oregon. July 22, 1895.)

AUTHORITY OF ATTORNEY—REVIEW.

Where the record fails to show that an attorney had no express authority to enter a consent decree by which a definite fee was given him, the objection that an attorney cannot have implied authority to consent to such decree cannot be urged.

On rehearing. Denied.

For former opinion, see 40 Pac. 406.

WOLVERTON, J. A motion for rehearing having been filed in this case, and with it a vigorous and very able brief by Messrs.

Dolph, Nixon & Dolph, of counsel for appellants, we have been impelled to review with much care and pains our former opinion, but with the same result. When the former opinion was rendered we had some misgivings as to whether we were right in holding that the provisions of the decree concerning attorney's, referee's, and stenographer's fees were not so entirely without the scope of the pleadings as to render them void, simply because we had been cited to no adjudicated cases that seemed to bear directly upon the question, and were unable to find any at the time that were in point, but believed the opinion to be founded upon sound principles of law. Further research has confirmed us in this view. The authorities will be cited and discussed later on.

Counsel do not controvert the soundness of the decision in *Rader v. Barr*, 22 Or. 495, 29 Pac. 880, but contend that it has no application to the case at bar, and assign as the sole ground for this contention that the provisions of the decree to which they take exceptions are without the scope of the pleadings. But, conceding the premises to be true, non constat that the conclusion contended for would follow. Let us examine the premises and determine their effect in a case of this nature. As a general proposition, all provisions of a decree outside of the issues raised by the pleadings are void, but this cannot be predicated of a consent decree. All the authorities cited by counsel support the general proposition, but are not applicable to consent decrees. Nor is any allusion made in these authorities to such decrees, except in *Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570. This was a suit to set aside a deed to certain real property, as fraudulent and void as against creditors. The complaint also contained a general allegation that a certain 100 shares of bank stock had been transferred in fraud of the creditors. The lower court by its decree set aside the deed, but refused to disturb the transfer of bank stock for the reason that the allegations of the complaint were insufficient to show a fraudulent disposition of such stock. Afterwards an amended decree was entered under the same pleadings by consent of the parties, as of the date of the original, decreeing that the transfer of the stock was also fraudulent. Subsequently, however, upon application to the same court, the decree, as so amended, was declared to have been irregularly entered, and for that reason set aside. Upon appeal to the supreme court, *Van Fleet, V. C.*, said of this proceeding: "There can be no doubt that that decree was an absolute nullity. The principle is authoritatively settled that a decree or judgment on a matter outside of the issue raised by the pleadings is a nullity, and is nowhere entitled to the least respect as a judicial sentence." But a consent decree is not in a strict legal sense a "judicial sentence." "It is," says Mr. Gibson, in his excellent treatise entitled "*Suits in Chancery*"

(section 558), "in the nature of a solemn contract, and is in effect an admission by the parties that the decree is a just determination of their rights upon the real facts of the case, had such been proved. As a result, such a decree is so binding as to be absolutely conclusive upon the consenting parties, and it can neither be amended or in any way varied without a like consent, nor can it be reheard, appealed from, or reviewed upon a writ of error. The one only way in which it can be attacked or impeached is by an original bill alleging fraud in securing the consent." Mr. Beach, in his *Modern Equity Practice* (section 792), says: "Parties to a suit have the right to agree to anything they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings." See, also, *Railroad v. Ketchum*, 101 U. S. 297. In *Schermerhorn v. Mahaffie*, 34 Kan. 108, 8 Pac. 100, it was held that a decree rendered by consent of the parties was not void as between themselves because it did not give to each just what the petition called for, and what ought as a matter of right to have been given to each of them. Chancellor Walworth, in *Bank v. Widner*, 11 Paige, 533, says: "An agreement to refer a suit pending to an arbitrator, and that a judgment shall be entered in the cause in conformity with his decision, will justify the entry of a judgment accordingly, which judgment will be binding upon the parties, as a judgment by consent." Chief Justice Waite, in *Railroad v. Ketchum*, supra, after giving utterance to the language quoted above from Beach's *Modern Equity Practice*, says: "It is within the power of the parties to this suit to agree that a decree might be entered for a sale of the mortgaged property without any specific finding of the amount due on account of the mortgage debt, or without giving a day of payment. It was also competent for them to agree that, if the property was bought at the sale by or for the bondholders, payment of the purchase money might be made by a surrender of the bonds. * * * All these were matters about which the parties might properly agree, and, having agreed, it does not lie with them to complain of what the court has done to give effect to their agreement." *Fletcher v. Holmes*, 25 Ind. 458, was a case wherein suit was brought to foreclose a mortgage in which neither the mortgage nor the complaint to foreclose showed any right to a personal decree against the defendant, but he appeared and with his consent one was rendered. Regarding such decree the court says: "It cannot be doubted that, without May's consent, such a judgment against him, upon that complaint, would not have been warranted. We need not say whether or not it would have been void. But he consented to it. Was it then void, as against May, because the complaint did not allege sufficient facts to justify

it without such consent? We can conceive of no reason why a judgment entered by agreement by a court of general jurisdiction, having power in a proper case to render such a judgment, and having the parties before it, should not bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment. The object of a complaint is to inform the defendant of the nature of the plaintiff's case. It is for his protection that it is required. If he wishes to waive it, or agrees to the granting of greater relief than could otherwise be given under its averments, without amendment, and such relief is given by his consent, we think that the judgment is not even erroneous, much less void as to him."

A judgment or decree entered upon the pleadings or after contest must fall within the issues raised by the pleadings, but a consent decree will be valid and binding upon the parties if its provisions fall within the general scope of the case made by the pleadings. This distinction is clear and inclusive, and, it will be seen by the foregoing authorities, is recognized both by the text writers and the courts. In a recent case, just reported, a suit was instituted by the Central Trust Company of New York to foreclose a mortgage given by the Marietta & North Georgia Railway Company, with which was consolidated a creditors' suit by V. E. McBee and others against the trust company and others to restrain the prosecution of the foreclosure suit and the enforcement of other liens claimed upon the mortgaged property, and praying for a sale and payment of their claims from the proceeds. It was decreed, among other things, "that the counsel representing the claimants in the original bill of V. E. McBee & Co. et al. v. Knoxville Southern Railroad Company et al., viz. Washburn & Templeton, are entitled to compensation out of the general fund arising from the sale of said road for their services in bringing said railroad to sale, and administering the assets of said insolvent railroad company, and a lien is declared upon said fund in their favor." This portion of the decree was approved by the circuit court of appeals of the United States, Sixth circuit. Taft, J., speaking for the court, says: "The complainants who filed the creditors' bill and brought in all the lienholders did a work in the administration and direction of the assets of the railroad company beneficial to all concerned. For services in filing the bill, therefore, and bringing in all lien claimants, it was not improper for the court to order a fee paid to complainants' counsel out of the fund realized from the sale." See *Trust Co. v. Condon*, 14 C. C. A. 314, 67 Fed. 84, 110. In *Railroad Co. v. Pettus*, 113 U. S. 124, 5 Sup. Ct. 387, which was a creditors' suit, it was held that "when an allowance to the complainant is proper on account of solicitors' fees, it may be made directly to the solicitors themselves, without any application

by their immediate client." This doctrine was based upon the authority of *Trustees v. Greenough*, 105 U. S. 527. So that we here find authority for entering a decree directly in favor of the attorneys for the plaintiff. These were creditors' bills, it is true, but the decrees were rendered in contested cases without issues being formed under the pleadings by the attorneys or solicitors as parties litigant. Now, in the light of these authorities, can it be said that the decree here purports to adjudicate matters outside of and beyond the general scope and purview of the case made by the pleadings? As was said in the former opinion, the plaintiff sues as trustee, each step taken by him was in the capacity of a trustee, and whatever sum of money he may realize by a sale under the decree of the court would come into his hands as trust funds, to be distributed to the bondholders in just proportion to their several demands. Under the terms of the mortgage he is entitled to recover a reasonable attorney's fee, together with his costs and disbursements. Now if, by his direction and with the consent of the defendant, it is decreed by the court that he recover the attorney's, referee's, and stenographer's fees in trust for the very persons whom he has employed, and who have rendered him services in his capacity as trustee, there exists no good and sufficient reason why it should not be binding upon all the parties interested, and the right to have execution issue at their instance would not affect its legality. The decree of the court has, at his instance, only extended his trusteeship as regards the funds to come into his hands, so that he has become trustee to the use of his attorneys and the officers of the court, as well as the bondholders, of a fund in which they are all entitled to share; and whether the property brings a small or large sum cannot change the situation. Aside from all this, when it is determined that plaintiff is party to a decree from which there is no appeal, a determination of this question upon either contention would still leave this court powerless to relieve him in this proceeding. We still adhere to the opinion, and the reasoning upon which it is based, that plaintiff is without a remedy by appeal, and no good results could come of enlarging upon it here.

Another question, briefly. It is insisted "that an attorney at law has no implied authority to enter a consent decree, or to consent to a decree by which a definite fee is given to him and made a first lien upon the property which is the subject of the action." Conceding the soundness of this proposition, it is not apparent how it can aid the appellant, in the absence of proof that the act complained of was done without express authority. We cannot say here, in this proceeding, that Messrs. Crawford & Hyde acted only upon their implied authority from Schmidt. There is not a scintilla of evidence in the record to show whether they

acted with or without authority, and for all that appears they may have had the most ample and complete power and authority to request, consent to, and have entered just such a decree as was entered, and which he now seeks to have reviewed on appeal by this court. In *Railroad v. Ketchum*, supra, Chief Justice Waite says: "A solicitor may certainly consent to whatever his client authorizes, and in this case it distinctly appears of record that the company assented through its solicitors. This is equivalent to a decree finding by the court, as a fact, that the solicitor had authority to do what he did, and binds us on appeal so far as the question is one of fact only. The remedy for the fraud or unauthorized conduct of a solicitor, or the officers of a corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and facts ascertained." The law governing the reciprocal and correlative duties of attorney and client is well settled, and if these attorneys have exceeded their authority, to the injury of the appellant, he is not without a remedy; but it is not by an appeal, unless facts accompany the record to show the dereliction of duty. A rehearing is denied.

(22 Nev. 376)

LOBENSTEIN v. STOREY COUNTY. (No. 1,434.)

(Supreme Court of Nevada. July 20, 1895.)
JUSTICES OF THE PEACE — FEES FOR REGISTERING VOTERS.

Under Act March 12, 1885 (consolidating certain county offices, and fixing the salaries thereof), § 11, providing that the salaries named "shall be in full for all services and all ex-officio services required of the officers herein named," a justice of the peace in Storey county, who is ex officio registry agent thereof, is not entitled to the compensation provided for in Act March 5, 1869, § 12, to be paid registry agents, in addition to the justice's salary provided for in the act of 1885.

Appeal from district court, Storey county; C. E. Mack, Judge.

Action by L. Lobenstein against the county of Storey for services as registry agent. From a judgment on demurrer for plaintiff, defendant appeals. Reversed.

F. P. Langan, Dist. Atty., and E. D. Knight, for appellant. W. E. F. Deal, for respondent.

BONNIFIELD, J. The plaintiff, as justice of the peace and ex officio registry agent of township No. 1 in said county, registered the names of 1,415 voters for the general election held in the year 1894. For this service he presented his claim to the board of county commissioners for the sum of \$361.25. The board refused to allow the same, and the plaintiff brought suit in the district court of the state of Nevada in and for Storey county against the defendant to recover said sum. The defendant, by its district attorney, demurred to the complaint on the ground that

it does not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendant refused to answer, but elected to stand on its demurrer, and judgment was given against it for the amount claimed in the complaint. This appeal is taken from the judgment.

The contention of the district attorney is that the act of the legislature entitled "An act consolidating certain county offices in the state of Nevada and fixing the salaries of the officers thereof and all other matters relating thereto," approved March 12, 1885, and the acts amendatory thereof, fix the salary of the justice of the peace of said township, which is in full for all services and ex officio services required of that officer, and that therefore the complaint shows no cause of action, and the judgment is erroneous. These several acts apply only to Storey county. Before the act of 1885 took effect, the officers therein named were under the fee system. Section 1 of said act makes the sheriff ex officio assessor; the county clerk, ex officio treasurer; the district attorney, ex officio county superintendent of public schools; and the justice of the peace of township No. 1, ex officio coroner. The plaintiff was the justice of the peace of said township in the years 1893 and 1894. Section 12 of the act provides that the "officers of Storey county shall receive in full payment for all services rendered by them the following salaries:" The sheriff, for services as sheriff and ex officio assessor, \$3,000; the county clerk, for services as county clerk and ex officio treasurer, \$3,000; the county recorder, for services as county recorder and ex officio auditor, \$2,400; the district attorney, for services as district attorney and ex officio county superintendent of public schools, \$2,500; and the justice of the peace, for services as justice of the peace and ex officio coroner, \$2,000. "Sec. 4. The salaries in this act provided shall be the whole and only compensation allowed and paid to the officers herein named for all official services by them rendered as such officers." Section 11 provides that the salaries named in the act "shall be in full for all services and all ex-officio services required of the officers herein named." Counsel for respondent claims that the justice's salary is for services as justice of the peace and for services as ex officio coroner, and not for services as ex officio registry agent. He argues: "It will be observed that the registry agent is not named in this act at all, and there is no statute which by its terms expressly provides that the compensation provided by section 12 of the act of March 5, 1869 (Gen. St. § 1512), shall not be paid the justice as registry agent. It will also be observed that as to every other officer mentioned in the act, except as to the justice of the peace, all ex officio offices held by them are mentioned. * * * So that the question for the court to decide is, has the section of the act giving the compensation as registry agent been repealed by implication? * * * The office of

registry agent being established by law, and its duties having been imposed upon the justice of the peace, the mentioning of the office of justice of the peace and coroner in the statute, and the omission of that of registry agent, exclude that office and its compensation from the statute." There would have been no propriety in consolidating the offices of justice of the peace of said township and registry agent by this act, because they had been consolidated by the registry act. Counsel is mistaken in saying "that as to every officer mentioned in the act, except as to the justice of the peace, all ex officio offices held by them are mentioned." The office of "collector of licenses" is an ex officio office held by the sheriff, and it is not mentioned in the act. The office of "clerk of the district court" and the office of "clerk of the board of county commissioners" are respectively ex officio offices held by the county clerk. Const. art. 4, § 32. Neither of them is mentioned in the act, and "there is no statute which by its terms expressly provides that the compensation provided" for these offices "shall not be paid" to the officers performing the duties thereof. But we do not think that counsel would seriously contend for a moment that the sheriff is entitled to a percentage of the amount of his collections for licenses, or that the county clerk, in addition to his salary of \$3,000, is entitled to the fees of the office of clerk of the district court, which would doubtless amount to several thousand dollars. It cannot be reasonably supposed that such was the intention of the legislature. If the plaintiff is entitled to the fees he claims, then the sheriff and the county clerk are entitled to their fees above named under the same act and by the terms thereof, and by the same course of reasoning adopted by respondent's counsel in this case. The manifest objects of the act and the explicit terms of the act themselves demonstrate the fallacy of the respondent's contention. It is declared in section 11 that the salaries named in the act "shall be in full for all services and all ex-officio services required of the officers herein named." "The officers herein named" include the justice of the peace of township No. 1, and his services in registering voters are ex officio services,—services required of him by virtue of his office of justice of the peace. The terms of the act not only embrace his services as justice of the peace and his ex officio services when acting as coroner, but his ex officio services when acting as registry agent. In 1894, the plaintiff being the justice of the peace of township No. 1, he was one of the officers included in the act, and as such officer he performed the ex officio services of registering the voters of his township, the full compensation for which has been provided by the salary act.

In the foregoing we have been considering the act of 1885, to which the counsel mainly directed his discussion. Gen. St. § 2089 et seq. This act was amended in 1889, 1891,

and 1893. These amendments further show the legislative intent, and that the plaintiff's claim is wholly without merit. The act of 1889 (St. 1889, p. 92) does not change the salary or compensation of the justice of township No. 1, but gives the justice of the peace of township No. 2 a salary of \$480 a year, and it provides that "in addition thereto he shall receive such fees as are now provided by law," but "he shall have no claim against the county for fees in civil or criminal cases." The act of 1891 (St. 1891, p. 129) reduces the salary of the justice of township No. 1 from \$2,000 to \$900, and allows him "such fees in civil cases only as are now allowed by law." This act does not change the salary or compensation of the justice of township No. 2. The act of 1893 (St. 1893, p. 16), which was in force when the plaintiff performed his services as ex officio registry agent, simply re-enacts the provisions of the act of 1891 as to the salary and fees of these two officers, except it declares that the justice of township No. 1 "shall have no claim against the county for fees in civil or criminal cases." It is evident from the very terms of these amendatory acts that the legislature intended to confirm the compensation of the justice of township No. 1 to the salary of \$900 and the fees in civil cases, which fees do not include the fees for the registration of voters; but as to the other justice, with a salary of \$480, it was not intended to so confine him, but to allow him "fees as now provided by law," which include the fees for said registration. Thus it will be seen that the legislature in each of four sections has clearly manifested its intention, which is adverse to the plaintiff's claim.

Counsel argues that the section of the registry act giving compensation to registry agents has not been repealed by any act in express terms; that repeal by implication are not favored; that section 13 only provides that "all acts and parts of acts heretofore passed, so far as they conflict with or are repugnant to the provisions of this act, are hereby repealed"; and that the registry act, wherein the fees for registering voters are provided, does not conflict with and is not repugnant to the provisions of these later acts above named. It is admitted that it was not the intention of the legislature to repeal these provisions of the registry act, but to let them remain in force for the benefit of all registry agents who are not excluded therefrom by the several acts under discussion. But when the registry act provides that justices of the peace shall be ex officio registry agents in their respective townships, and provides their fees for registering voters, and subsequent acts provide that the justice of the peace of a certain township shall receive a certain salary, and "such fees in civil cases only as are now provided by law, in full payment of all services rendered" by him and declare that such salary and such fees "shall be in full for all services and all ex-officio services

required" of him, the imagination is not greatly exercised in discerning a conflict and repugnancy between the former and the subsequent acts. Whether the former act is repealed in express terms or by implication, in so far as it conflicts with or is repugnant to the provisions of the subsequent acts, is immaterial, for by the spirit and terms of these several later acts the plaintiff is denied fees for registering the voters of his township. He has no cause of action in this case. The judgment of the district court is reversed.

BIGELOW, C. J., and BELKNAP, J., concur.

(107 Cal. 632)

MORSE et al. v. DE ADRO et al. (No. 18-440.)¹

(Supreme Court of California. July 2, 1895.)

MINING LIEN.

Code Civ. Proc. § 1183, securing a lien on mining claims for labor performed thereon, does not authorize a lien for labor in working a mine on lands held under an agricultural patent from the United States.

Department 2. Appeal from superior court. Tuolumne county; G. W. Nicol, Judge.

Action by Milton Morse and others against Matthew L. De Adro and others to enforce a mechanic's lien. From a judgment for plaintiffs, defendants appeal. Reversed.

Frank W. Street, for appellants. Frank P. Otis, for respondents.

HENSHAW, J. The action is to foreclose a lien upon defendants' property for labor performed upon a mine situated thereon. Defendant De Adro was the owner, under patent from the United States for agricultural lands, of a farm containing about 160 acres. He had sunk a shaft upon his land and discovered a bed of auriferous gravel. He had then bonded his land to his codefendant Howes, with privilege to Howes of working the gravel deposit and developing the mine. Howes engaged plaintiffs in and about this work, and, having failed to pay them, they seek by this action to enforce a lien upon the land, as a mining claim, under section 1183 of the Code of Civil Procedure.

The single question presented by this appeal is whether land held under agricultural patent may be subjected to a lien for the wages of laborers employed in working a mine upon it. The constitution (article 20, § 15), in securing liens to mechanics and others for the value of their labor, has left to the legislature the duty of providing for the enforcement of these liens. In performance of this duty the legislature has enacted that "every person who performs labor upon any mining claim has a lien upon the same," etc. Code Civ. Proc. § 1183. At the time of the passage of this section, the term "mining claim" had been used in statutes, and had a well-defined meaning which had at-

¹ Rehearing denied.

tached to it, not only by popular acceptance, but by the countenance and authority of judicial decisions. "What, then, is a 'mining claim'?" asks the court in *Mining Co. v. Collison*, 5 Sawy. 439, Fed. Cas. No. 9,886, and, answering its own interrogatory, declares: "A 'mining claim' is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining law." In *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352, work had been done in the stopes and levels of a mine on a mining claim, and a lien was sought to be enforced for the value thereof. This court said: "Section 1183 does not, it is true, provide for liens upon mines, but upon 'mining claims.' The lien, if it exists, extends to the whole claim." In *Williams v. Association*, 66 Cal. 193, 5 Pac. 85, the question came squarely before the court, and it is thus treated: "But, if it be conceded that one who works upon or in a mining claim may secure a lien for the value of his labor on the whole claim, the court below did not find that plaintiff or his assignors 'bestowed labor' upon a mining claim. A 'mining claim,' as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of miners. *Copp*, U. S. Min. Dec. 136, 142; *Weeks*, Min. 118. Independent of acts of congress providing a mode for the acquisition of title to the mineral lands of the United States, the term 'mining claim' has always been applied to a portion of such lands to which the right of exclusive possession and enjoyment, by a private person or persons, has been asserted by actual occupation, or by compliance with local mining laws, or rules, or customs. In the case now here, the court below found that the defendant, the Santa Clara Company, was the owner of two tracts of land, one being a portion of the Rancho Los Capitancillos, and consisting of eleven hundred and nine $\frac{67}{100}$ acres (the title whereto was derived through a patent from the United States), and the other containing three hundred and fourteen $\frac{68}{100}$ acres, being Pueblo Tract No. 2, formerly belonging to the city of San José. The court also found that 'the whole of said land is commonly known as the "Guadalupe Mine";' and then proceeded to declare a lien in favor of plaintiffs upon both tracts, and to decree that the fourteen hundred and twenty-four $\frac{68}{100}$ acres should be sold to satisfy it. The lands directed to be sold were not a 'mining claim,' either in the popular sense of the words, or as the term has been employed in judicial decisions, or as it is used in the Code. The Fremont grant is not a 'mining claim,' although many mines have been opened within its boundaries, and the owners of the grant may claim such mines to be

their own. The right of the defendant, the Santa Clara Company, to a portion of the Rancho Los Capitancillos, or to a portion of the Pueblo lands of San José, and to extract ores therefrom, is no way dependent upon a claim to the possession made in recognition of and in conformity to local rules adopted by miners of a mining district, or in accordance with the usages or customs of a locality. The defendant derived its title, as would seem, from the Mexican or Spanish government, to the larger tract; certainly so as to the Pueblo land. We take notice that no patent, based upon 'mining claims,' could have been issued under any act of congress for the whole or for eleven hundred and nine acres of the Rancho Los Capitancillos. The plaintiff could not acquire the statutory lien upon the lands of the Santa Clara Company, simply because the statute does not authorize it. It may be that the statute is not sufficiently comprehensive; indeed, it would perhaps be difficult to say why one class of 'material men,' or laborers, should have preference over another; why, for instance, the furnisher of seed, or the plowman, should not have a lien on the farm of him to whom the seed is supplied, or for whom the plowing is done. But the legislature has seen fit to limit the benefit of the lien to particular classes, and we are not authorized to extend it to others."

In *Bewick v. Muir*, 83 Cal. 372, 23 Pac. 390, which respondent contends modifies and explains the law declared in *Williams v. Association*, supra, this court was called upon to decide whether the phrase "mining claim" of the lien law included mining claims after the possessory right or claim had matured into a perfect title by the issuance of a mineral patent from the United States; and this was all it was called upon to decide. This court said: "The words 'mining claim,' as used in the law, have no reference to the different stages in the acquisition of the government title. In our opinion, it includes all mines, whether the title is inchoate, as in the case of a mining claim in its strict sense, or perfect, as in the case of a fee-simple title." Reference to the record in this last-named case discloses, not only that the complaint pleaded that all the mining land and ground described therein were mining claims, but that the court in its findings so declared. In the case at bar there is no such finding. It follows, therefore, that the further expressions of the court in *Bewick v. Muir* were not only unnecessary to the decision, but were addressed to a condition neither involved in nor presented by the facts of the case. It is the invariable rule, well understood by the profession, that an opinion of this court becomes authority only upon the point decided, and that obiter dicta are of no binding force or effect. Indeed, such passing declarations have no weight whatever, except such as the cogency of the reasoning may entitle

them to. We must turn, therefore, to *Williams v. Association*, as containing the last authoritative expression of the court upon the question, and we deem its reasoning to be unassailable, and its conclusion determinative of the case at bar. As is there said, the legislature has seen fit to limit the benefit of the lien to particular classes, and we are not at liberty to extend it to others. To do so would not be construction, but judicial legislation. The judgment appealed from is reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

(107 Cal. 549)

JUDSON et al. v. GIANT POWDER CO.
(No. 15,792.)

(Supreme Court of California. June 28, 1895.)

NEGLIGENCE—ESTOPPEL TO CLAIM DAMAGES—
EVIDENCE.

1. The fact that a person sold the land adjoining his own for a dynamite factory will not preclude him from suing for injuries to his own land, and the improvements thereon, caused by an explosion in the factory, resulting from the negligent handling of an explosive necessary for the manufacture of dynamite.

2. A presumption of negligence arises from the fact of an explosion in a dynamite manufactory, where there is evidence that, if dynamite is carefully handled, it will not explode.

3. In an action for damages caused by the explosion of nitro-glycerine in a dynamite manufactory, expert evidence that, if the manufacturing and handling of dynamite is properly carried on, an explosion will not occur, is admissible.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Charles C. Judson, executor, and others, against the Giant Powder Company, for damages caused by an explosion. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Galpin & Zeigler, for appellant.

Page, Eells & Wheeler, for respondents.

GAROUTTE, J. Respondents recovered judgment for the sum of \$41,164.75, as damages for acts of negligence. This appeal is prosecuted from such judgment, and from an order denying a motion for a new trial. The damages to respondents' property were occasioned by an explosion of nitro-glycerine in process of manufacture into dynamite, in appellant's powder factory, situated upon the shore of the Bay of San Francisco. Appellant's factory buildings were arranged around the slope of a hill facing the bay. Nearest to respondents' property was the nitro-glycerine house; next was the washing house; next were the mixing houses; then came the packing houses; and finally the two magazines used for storing dynamite. These various buildings were situated from 50 to 150 feet apart, and a tramway ran in front of them. The explosion occurred in the morning during working hours, and

originated in the nitro-glycerine house. There followed, within a few moments of time, in regular order, the explosion of the other buildings, the two magazines coming last; but, though last, they were not least, for their explosion caused the entire downfall and destruction of respondents' factory, residences, and stock on hand. There is no question but what the cause of this series of explosions following the first is directly traceable, by reason of fire or concussion, to the nitro-glycerine explosion. Of the many employés of appellant engaged in and about the nitro-glycerine factory at the time of the disaster, none were left to tell the tale. Hence any positive testimony as to the direct cause of the explosion is not to be had. The witnesses who saw and knew, like all things else around, save the earth itself, were scattered to the four winds.

1. Respondents sold the premises to appellant for the manufacture of dynamite, and it is claimed that the maxim "*volenti non fit injuria*" applies, and therefore no recovery can be had. We attach but little importance to this contention. The grant of these premises for the purposes of a dynamite factory in no way carried to appellant the right to conduct its factory as against the grantors in any and every way it might see fit. There is no principle of law sustaining such a proposition. Let it be conceded that respondents, by reason of their grant, could not invoke the aid of a court of equity to prevent the appellant from conducting its business; still that concession proves nothing. This action is not based upon the theory that appellant's business is a nuisance per se, but negligence in the manner in which the business was conducted was alleged in the complaint, and is now insisted upon as having been proved at the trial. In making the grant, respondents had a right to assume that due care would be exercised in the conduct of the business, and certainly they have a right to demand that such care be exercised. It is argued that the explosion of all powder works is a mere matter of time; that such explosions are necessarily contemplated by every one who builds beside such works, or who brings dynamite into his dooryard. It is further contended that appellant gave to respondents actual notice of the dangerous character of its business by a previous explosion, which damaged respondents' property, and that respondents, by still continuing in business after such notice, in a degree assumed and ratified the risk, and cannot now be heard to complain. The only element of strength in this line of argument is its originality. The contention that, in the ordinary course of events, all powder factories explode, conceding such to be the fact, presents an element foreign to the case. The doctrine of fatalism is not here involved. In the ordinary course of events the time for this explosion had not arrived, and appellant had no legal right to hasten that event

by its negligent acts. Neither do we think respondents lost any legal rights by continuing to do business in this locality after being served with notice of the danger that surrounded them. While the notice was in the form of an object lesson which came to them in no uncertain tones, yet appellant was not justified in serving it, nor were respondents negligent in disregarding it. Respondents were not bound to abandon their property, though negligence of appellant in the conduct of its factory was ever a menace and danger to their lives and property. Conceding that respondents, by their grant, thereby assumed certain risks and dangers which may be said to always surround the manufacture of dynamite, still they assumed no risks and waived no action for damages which might arise through appellant's negligence. Both reason and authority support this conclusion.

2. It is contended that respondents offered no evidence tending to show that the explosion of the nitro-glycerine factory was occasioned by the negligence of appellant, and this contention brings us to the consideration of a most important principle of law. In addition to the fact of an explosion being established, the respondent offered expert testimony, to the effect that if the factory was properly conducted, and the employees careful during the process of manufacturing, an explosion would not occur. For the present we lay aside the evidence of the experts, and meet squarely and directly the question presented: Does the proof of the explosion draw with it a presumption of negligence sufficient to establish a prima facie case for a recovery? While the cases are not in entire accord in holding that a presumption of negligence arises from the fact of the explosion, still they largely preponderate upon that side, and we think but few well-considered cases can be found looking the other way. All courts agree that, where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence, and makes a prima facie case. This proposition is elementary and uncontradicted. Therefore the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations, and inapplicable to cases where no contractual relations exist. It is intimated in some Indiana case that the presumption arises upon proof of the accident by reason of the carrier's contract to safely deliver the passenger at his destination, but there is no such contract. The carrier is not an insurer of his passengers. If he were, this presumption of negligence arising from the accident, aside from the act of God, would be conclusive and irrefutable; but such is not the fact, for it is only prima facie and always disputable. As was well said by the court in

Rose v. Transportation Co., 11 Fed. 438: "Undoubtedly, the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties." The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care towards this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the relations existing between the party injuring and the party injured. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown. Based upon the foregoing principles, a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in *Shearman and Redfield on Negligence* (section 60): "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care." Tested by this rule, no question of contractual relation could ever form an element in the case. With the same reason it might as well be said that cases of contract were excluded from the effect of the rule, as that cases of pure tort were excluded; but, upon the contrary, it is plainly evident that both classes of actions come equally within its provisions. In speaking to this question, it is said in *Cooley on Torts* (page 799): "The rule applied to carriers of passengers is not a special rule to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose upon one party alone the obligation of special care." The author then cites the case of a householder engaged in repairing his roof. A piece of slate falls therefrom, and injures a traveler upon the street. He then says: "True, the act of God, or some excusable accident, may

have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection."

The important question here involved, and the want of harmony in the decisions of courts bearing upon it, seem to demand a citation somewhat in detail of the many authorities which hold against appellant's views of the law. In England the authorities are in entire accord. Plaintiff was passing along a highway, under a railroad bridge, when a brick used in the construction of the bridge fell and injured him. Negligence in the railroad was presumed. *Kearney v. Railway Co.*, L. R. 5 Q. B. 411. A barrel of flour rolled out of the window of a warehouse, injuring a person passing upon the street. Negligence in the warehouseman was presumed. *Byrne v. Boadle*, 2 Hurl. & C. 722. The same rule was declared upon a similar state of facts in *Scott v. Dock Co.*, 3 Hurl. & C. 596; likewise in *Briggs v. Oliver*, 4 Hurl. & C. 403. The explosion of a boiler of a steamboat is prima facie evidence of negligence. *Posey v. Scoville*, 10 Fed. 140; *Rose v. Transportation Co.*, 11 Fed. 438; *Grimsley v. Hawkins*, 46 Fed. 400. In the *Rose Case* it is said: "In the present case the boiler which exploded was in the control of the employees of the defendant. As boilers do not usually explode when they are in a safe condition and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable." The same general principle is declared in *Cummings v. Furnace Co.*, 60 Wis. 603, 18 N. W. 742, and 20 N. W. 665; *Mulcalrns v. City of Janesville*, 67 Wis. 24, 29 N. W. 565; *Kirst v. Railroad Co.*, 46 Wis. 489, 1 N. W. 89; *Thomas v. Telegraph Co.*, 100 Mass. 156; *Howser v. Railroad Co. (Md.)* 30 Atl. 906. In the case of *Dixon v. Plums*, 98 Cal. 385, 33 Pac. 268 (a case which in its facts is an exact photograph of one of the New York cases hereafter cited), a chisel, used by a workman upon a building, fell upon and injured a girl while passing upon the street below. It was held that a prima facie case of negligence was established, and that the rule as declared in section 60 of *Shearman and Redfield on Negligence* was sound law and controlling.

While there is some discord existing in the New York authorities as to the true doctrine upon this question, still they are largely in line with the cases we have above cited. *Mullen v. St. John*, 57 N. Y. 567, is a leading case upon the question, and, while it has been vigorously assaulted at various times during the past 20 years, it still stands as a declaration of law by the courts of that state, not weakened and mutilated by such assaults, but rather strengthened and unscathed. In *Cahalin v. Cochran*, 1 N. Y. St. Rep. 583, negligence was inferred from the fact of a chisel falling from a building where workmen were engaged, and striking plaintiff when walking upon the street. A case to the same effect is *Goll v. Railway Co. (Super. N. Y.)* 5 N. Y.

Supp. 185. *Mullen v. St. John* is expressly approved, and the doctrine for which we are here contending ratified to its full limits, in the very recent case of *Volkmar v. Railway Co.*, 134 N. Y. 418, 31 N. E. 870.

As supporting a contrary doctrine, one of the leading cases is *Young v. Bransford*, 12 Lea, 232. Yet in the report of that case we find the following language: "At the same time, the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition.'" Another case is *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, a case which relies for support in part upon *Loosee v. Buchanan*, 51 N. Y. 476. Yet in *Mullen v. St. John* the *Loosee Case* was expressly held to be not in point by reason of the presence of other evidence. *Cosulich v. Oil Co.*, 122 N. Y. 118, 25 N. E. 259, is the latest authority to which our attention has been directed holding these views. It cites the *Tennessee* and *Ohio* cases, and also relies, as do other of these cases, upon a general statement, found in *Thompson on Negligence* (page 1-227), namely: "But it is believed that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to the plaintiff, without more, will amount to evidence of negligence on the part of the defendant." The case cited by Mr. Thompson in no way supports this text if the text is to be construed as the *Cosulich Case* seems to construe it, and the learned author's illustrations, which immediately follow, conclusively indicate that, in making the statement quoted, he never contemplated for it any such construction as the New York court seems to give it. This is doubly apparent when we see that upon the same page he indorses the doctrine of *Byrne v. Boadle*, supra. Indeed, the author prefaces his whole discussion of the question of *res ipsa loquitur* by a report in full of the celebrated case of *Kearney v. Railway Co.*, supra, the doctrine of which he fully indorses, and which in no sense was a case of contractual relation. Beyond all this, the *Volkmar Case*, already cited, is a later expression emanating from the New York court, and earlier cases coming from the same source, if opposed to the doctrine there declared, must give way.

There is another class of cases in all essentials fully supporting our views upon this question of negligence. These cases arise in the destruction of property caused by fire escaping from locomotive engines, and, while there is some conflict in the authorities as to the true rule, it is said in *Shearman and Redfield on Negligence* (section 676): "The decid-

ed weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks and cinders (as the case may be) which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in New York, Maryland," etc., citing many other states. While we have not deemed it necessary to verify the correctness of the statement of the authors as to all the states mentioned, we do say there are numberless cases supporting the text. See *Piggot v. Railway Co.*, 3 C. B. 229; *Railroad Co. v. Reese*, 85 Ala. 497, 5 South. 283; *Spaulding v. Railway Co.*, 30 Wis. 110,—citing many cases.

In this state the question has never been directly passed upon as to whether or not negligence will be presumed from the fact of sparks escaping from a locomotive engine, and the destruction of grain fields resulting therefrom. In *Butcher v. Railroad Co.*, 67 Cal. 518, 8 Pac. 174, the doctrine is inferentially favored, although in that case the plaintiff placed an expert witness upon the stand, who testified that "a perfect engine, properly equipped and properly run, will not ordinarily throw out sparks sufficient to start a fire." This line of evidence was also held sufficient to establish a *prima facie* case of negligence in *Hull v. Railroad Co.*, 14 Cal. 387, and *Henry v. Railroad Co.*, 50 Cal. 176. For our purpose it is not necessary to enter into a prolonged investigation to determine why this evidence of the expert strengthened plaintiff's case. But, taking the converse of the proposition, let us assume that defendant's engine was a perfect engine, properly equipped and properly run, and that, notwithstanding such conditions, it would ordinarily when in use throw out sparks of fire, leaving in its wake, as it passed through the country, property destroyed and possibly lives lost. Certainly, this could hardly be tolerated in law. Hence we fail to fully appreciate the importance of this line of evidence. Such conduct upon the part of a railroad company would render it guilty of the commission of a nuisance, and liable in damages for property destroyed. Certainly, it is no answer to such a condition of things to say that the legislative grant to the corporation to do business with the aid of steam locomotives carries with it the right to destroy the property of adjoining owners; but, rather, we must assume that the grant was made only after a prior determination by the same legislative power that a perfect locomotive engine, properly equipped and properly run, will not ordinarily throw out sufficient sparks to destroy adjoining property. It is only upon such a theory that the right to do business by the use of this character of implement was ever granted; and hence we again say that it

may be considered doubtful if this class of evidence strengthens the plaintiff's case; for it is but proving, as a fact, something of which the courts and possibly all the world take full notice.

In the case at bar, following the lines marked out by the cases last cited, respondents placed before the court expert evidence to the effect that, if the correct process of manufacturing and handling dynamite was carefully carried out, an explosion would not occur. This evidence is stronger than in the smokestack cases, for here it declares as a certainty what there is only stated to be the probable or ordinary result; but, be that as it may, if this character of evidence was relevant and material in the smokestack cases, it is equally relevant and material here. If it was sufficient there to complete and perfect a *prima facie* case of negligence, it is ample here to do the same. Again, if appellant had the right, under the laws of the state, to manufacture dynamite (which is conceded), and, if by reason of the existence of such right, courts may assume that, if dynamite is properly handled in the process of manufacture, explosions will not probably occur, then respondents' case is doubly proven, for here we have, not only the presumption of the existence of certain conditions, but the evidence of witnesses as to the existence of them.

In concluding this branch of the case, we can only reiterate that the true rule appears to be found in section 60 of *Shearman and Redfield on Negligence*, which we have already quoted; and, gauging this case by the test there prescribed, a *prima facie* case of negligence was established by respondents' evidence. This case seems to clearly come within the provisions of the rule there declared. There is nothing to distinguish it in principle from the army of cases that have been held to come directly within its provisions. Appellant was engaged in the manufacture of dynamite. In the ordinary course of things, an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur, Ergo, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care. The logic is unassailable, and the principle of law of presumptions of fact erected thereon is as sound as the logic upon which it is based.

3. Questions of negligence in the storage of the gunpowder become unnecessary to consider, owing to our views upon the main question discussed. Neither do we find anything in the record, bearing upon the measure or amount of damages declared and decreed by the court, demanding a new trial of the case.

For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(107 Cal. 602)

RANKIN v. NEWMAN et al. (No. 15,731.)
(Supreme Court of California. June 29, 1895.)

PLEADINGS AS EVIDENCE—APPEAL FROM JUDGMENT—REVIEW OF FINDINGS—ACCOUNTING BETWEEN PARTNERS.

1. A finding that a settlement was made cannot be overcome by mere evidentiary facts improperly injected into an answer which alleges the making of the settlement.

2. On an appeal from a judgment only, a finding cannot be impeached as against evidence.

3. Where a complaint asked for an accounting of the affairs of a partnership, and that a pretended settlement be declared fraudulent and null, and the answer alleges that there has been a valid settlement, and a payment of the amount agreed on, but admits that by an unintentional mistake in figuring the amount paid was less than it should have been by a certain amount, and alleges that this has been tendered to plaintiff, and refused by him, judgment for such sum should be rendered for plaintiff on its being found that the settlement was made as alleged by defendant.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Ira P. Rankin, special administrator of John Levinson, deceased, against William J. Newman and another. Judgment for defendants, and plaintiff appeals. Modified.

Horace W. Philbrook, for appellant. Edward R. Taylor and Reinstein & Eisner, for respondents.

BRITT, C. The parties differ as to the complexion of this action. Plaintiff asserts it to be "a suit in equity by the administrator (with the will annexed) of the estate of John Levinson, deceased, against his surviving copartners, for an accounting and settlement of the affairs of the partnership"; while defendants claim that it is "an action to set aside, on the ground of actual fraud, a partnership settlement made by the executor of a deceased partner with the surviving partners, to have the papers executed in the matter or the settlement adjudged to be void, and to be delivered up for cancellation, and for an accounting and a receiver." Consequences of some moment in the case are supposed to follow according as one or the other of these views of the nature of the action may be adopted. But we think both are right. The complaint resembles somewhat a bill in equity with a double aspect. Its principal object is to obtain an accounting of the affairs of the late firm of Newman & Levinson, a partnership of which the defendants, William J. and Benjamin Newman and said John Levinson, now deceased, were the members, and a distribution of its assets; and to this end it proceeds on the alleged grounds that no such accounting or settlement of the partnership affairs has ever been made; and also that certain fraudulent and collusive dealings, had between a former representative of the said deceased and the defendants, resulted in an ostensible settlement of the partnership af-

airs, and the cession to defendants of the interest of the deceased in its property; and the execution of certain instruments evidencing such ostensible settlement, which instruments plaintiff prays may be canceled. Upon the trial, findings of fact were waived, and defendants had judgment in their favor, from which the plaintiff appeals without bill of exceptions or statement of the evidence; so that the questions made arise on the pleadings.

It is alleged in the complaint, in substance, that Levinson died February 25, 1890, leaving a will, which was admitted to probate in the superior court of the city and county of San Francisco on March 18, 1890, and one S. W. Raveley was appointed executor thereof; that said deceased was at the time of his death, and for a long time previously had been, a member of said firm of Newman & Levinson, which firm was engaged in dealing and trading in sundry classes of merchandise at the city of San Francisco, and that such business was very extensive and profitable, and the assets of the partnership were of large amount and great value; that Levinson's contribution to the capital of the firm was three-tenths thereof; that since Levinson's death the defendants, his surviving partners, have held and managed the property and business of the partnership, and taken all the profits to themselves; that on September 6, 1890, said Raveley, as executor, had certain dealings with defendants (which plaintiff styles a "transaction or proceeding," and which defendants call a "settlement"), whereby he, claiming to act in pursuance of the articles of copartnership between Levinson and defendants, accepted from defendant their promissory notes in the aggregate sum of \$20,790.88, professedly "for the interest of the estate of said Levinson in said partnership"; that the will of Levinson did not authorize a sale or transfer of the interest of his estate "in any partnership," and that the superior court never authorized or confirmed a sale or transfer of such interest "in any partnership." These allegations of the complaint appear to be undenied. The complaint further enters into a statement of the value of the assets and of the amount of the liabilities of the firm, from which the result is deduced that the value of the interest of the estate of the deceased in the business and property of the firm was more than \$120,000. It is also charged that the defendants, knowing such value, and intending to cheat and defraud said estate by various false representations and fraudulent practices described in detail, and the exertion of undue influence on said executor, he being alleged to be their "mere tool," induced him to become party to said "transaction" of September 6, 1890, and to execute certain written instruments evidencing the same. All the allegations of fraud, misrepresentation, and undue influence are denied in the answer; and so of the averments respecting the value of the interest of the estate in the assets of the partnership,

except that defendants, while alleging that the appraised value of such interest was \$20,790.88, yet admit that the actual value was a few hundred dollars in excess of this sum. Plaintiff also avers that "the business of said partnership of John Levinson, William J. Newman, and Benjamin Newman has not, nor have the affairs thereof, been settled or closed"; and that "though demands have been often made upon them to settle the business and affairs of said partnership, and to account to said estate for the interest thereof in said partnership, the defendants have neglected and refused, and still neglect and refuse so to do." These averments are specifically denied in the answer. Defendants also set out at length the steps taken by them and by said Raveley for the adjustment of the mutual affairs of the partnership and the estate of the deceased, claiming that they proceeded as required by the written articles of copartnership under which the firm had been constituted; that, in the manner provided in such articles, they ascertained to be due to the estate of Levinson on account of his interest in the partnership the said sum of \$20,790.88, which sum, they allege, they have fully paid to said executor in discharge of their promissory notes mentioned in the complaint; but they admit a mistake in this amount, to which we shall presently advert. The answer contains many other affirmative allegations not necessary to be stated here. It abounds, indeed, with evidentiary matter which, whatever may have been the requirements of the former chancery practice in such cases, should, under our system, have been omitted.

The statute (Code Civ. Proc. 1583) provides that: "When a partnership exists between a decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. * * * And the executor or administrator may maintain against him any action which the decedent could have maintained." Obviously the important and controlling issue presented by the complaint here—drawn to enforce the duty enjoined on the surviving partners by the law expressed in this section—and the answer of the defendants is whether the Newmans have settled the affairs of the partnership, and have accounted with the executor, and paid over to him such balances as were due in right of the decedent. The plaintiff charges that they have failed and refused to perform these duties, and the defendants deny the charge. On the issue thus made up the judgment was for the defendant, and, the evi-

dence not being before us, the judgment conclusively establishes, for purposes of this appeal (and with the qualification hereafter stated) that defendants have accounted and have paid over as the law directs.

It is the contention of the plaintiff, however, as we understand his argument, that despite the issue made on the ultimate fact of accounting and settlement, and the finding thereon to be implied from the judgment, the allegations of the defendant's answer, showing how the settlement was brought about, the inventory taken, and the mode adopted of valuing the several classes of assets, the estimate of liabilities, the construction placed by the defendants and the executor on the articles of copartnership, and the influence of such construction on the settlement reached, do yet demonstrate that the adjustment made was wholly vicious, and to be treated as null. But assuming, without at all intimating any opinion on the subject, that those averments justify the inference that the executor and the defendants adopted a false basis and pursued a wrong method in their endeavor to "settle the affairs of the partnership," so that the result should be disregarded, it is yet apparent that they are merely matters of evidence, improperly injected into the pleading, upon which the court was not required to find (*Merrill v. Merrill*, 102 Cal. 317, 38 Pac. 675), and which neither add to nor detract from the effect of the denials that the business and affairs of the partnership remain unsettled, and that defendants have failed to account (*Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753, and cases cited). If the court had made the single express finding that "the defendants have accounted to said estate for the interest thereof in said partnership, and have paid over all balances payable to the executor in right of said decedent, and the business of said partnership of John Levinson, William J. Newman, and Benjamin Newman, and the affairs thereof, have been settled and closed," it would have been responsive to the paramount issues made by the pleadings, and, barring the exception below noted, would unquestionably sustain the judgment; it would show that the whole purpose of the action had been already accomplished. But such a finding, being within the issues, and logically necessary to support the judgment, is, there being no express finding, conclusively implied (*Utter v. Eames*, 59 Cal. 5; *Wixson v. Devine*, 80 Cal. 387, 22 Pac. 224; *Blanc v. Mining Co.*, 95 Cal. 525, 30 Pac. 765); and no finding or averment of probative matter—mere items in the sum of the evidence, from which the trial court drew its final conclusion—is of any effect to qualify the ultimate fact thus established. "The rule has long been settled that, when the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the finding of the ultimate fact." *Gill v. Driver*, 90 Cal. 74,

27 Pac. 64; *Smith v. Acker*, 52 Cal. 217. "It has been repeatedly held that a finding of the court cannot be impeached upon the ground that it is contrary to the evidence, otherwise than by a motion for new trial and statement of evidence upon the motion. We can consider, upon appeal from the judgment, only the ultimate facts found by the court, and not the probative facts, which have no proper place in the findings." *Pico v. Cuyas*, 47 Cal. 178. We are informed by the brief for plaintiff here that an appeal has been taken from the order of the court below denying his (plaintiff's) motion for new trial of this action, and that in the record upon that appeal the evidence is shown. To the appeal from the order should be relegated the consideration of the more important questions which appellant has so zealously, even vehemently, urged on the present record.

The defendants state in their answer that, by reason of an unintentional mistake occurring in the preparation of the balance sheet on which the settlement with the executor was founded, the payments made by them to the executor were less than they should have been by the sum of \$593.18. The error, defendants allege, was discovered in the month of April, 1892, and thereupon they tendered such sum, with interest, in all \$662.40, to the plaintiff, but he refused it. They aver their readiness and willingness to pay the same whenever plaintiff will receive it, but made no deposit thereof in court. This matter appearing in the answer is a limitation upon the denial of plaintiff's allegation that the affairs of the partnership remain unsettled. The denial stands with a pro tanto exception of the alleged error. It is a statement of part of the result involved in the final adjustment, which is the ultimate fact in dispute, and is in no respect similar to the evidentiary matter set out in the answer describing the manner in which, and the theory upon which, the adjustment was made. It shows that a substantive part of the plaintiff's cause of action is by the pleadings put beyond controversy.

Respondents argue that plaintiff is not entitled to judgment for the sum admitted to be due, because, they say, he would thus recognize the validity of the settlement he is seeking to overthrow. But to the extent that the settlement is affected by the error of \$593.18 in the balance sheet, it is overthrown by the allegations of the defendants themselves. It is of no moment, as regards the final relief to be granted, that the error to the prejudice of the estate arose from an inadvertent mistake admitted by defendants, and not from the intentional fraud charged by plaintiff. *Belknap v. Sealey*, 2 Duer, 571, cited with approval in *Johnson v. Polhemus*, 99 Cal. 240, 33 Pac. 908. See *Zellerbach v. Allenberg*, 99 Cal. 68, 33 Pac. 786. It is also objected that plaintiff should not recover what he had positively declined to accept. This consideration is of no weight in such a

case. A judgment should be "the simple sentence of the law upon the material ultimate facts admitted by the pleadings or found by the court" (*Gregory v. Nelson*, 41 Cal. 282); and, as the record here contained matter showing that, within the proper scope of the action, the plaintiff was entitled to some further payment in right of the decedent, the appropriate sentence of the law should have emanated from the court, the previous contumacy of the plaintiff notwithstanding. The cause should be remanded, with instructions to the court below to render judgment in favor of plaintiff for the sum of \$662.40.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with instructions to the court below to render judgment in favor of plaintiff for the sum of \$662.40.

(107 Cal. 577)

HELLINGS et al. v. HEYDENFELDT. (No. 15,884.)

(Supreme Court of California. June 29, 1895.)

ELECTION OF REMEDIES—CONTRACT—TENDER OF PERFORMANCE.

1. Where it was agreed that defendant would pay a certain amount to plaintiffs in consideration that plaintiffs would dismiss certain proceedings then pending in the probate court, and defendant afterwards notified plaintiffs that she rescinded and withdrew from the agreement, plaintiffs cannot maintain an action to recover the amount stipulated to be paid, while at the same time continuing to prosecute the proceedings in the probate court.

2. The mere fact that plaintiffs offered to perform will not entitle plaintiffs to recover where the offer was not bona fide, and was not kept good.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Zella O. Hellings and others against Elizabeth A. Heydenfeldt to recover certain moneys alleged to be due on a contract. Defendant had judgment, and plaintiffs appeal. Affirmed.

T. M. Osmont, C. P. Robinson, and H. I. Kowalsky, for appellants. Knight & Hegerty and Pierson & Mitchell, for respondent.

McFARLAND, J. This action was brought by the plaintiffs, who are children and heirs at law of Solomon Heydenfeldt, deceased, against the defendant, who is the surviving wife of said deceased, to recover various amounts of money alleged to be due plaintiffs by defendant upon a certain alleged written contract made by and between said parties. A demurrer, general and special, to the complaint, was overruled; and after answer and trial the court made findings, and rendered judgment in favor of defend-

ant. Plaintiffs appeal from the judgment and from an order denying a new trial.

The main facts are these: The deceased, Solomon Heydenfeldt, left a will, in which, after declaring that he had made provision for his children, he gave nearly all his property to the defendant herein for her life; providing, however, that she might dispose of the personal property during her life, and might by will distribute the real property among the children in such proportions as she might choose. The will was duly probated, and letters issued to the executors named therein. Afterwards the plaintiffs herein filed in the probate court petitions for the revocation of the probate of said will, in which, among other things, they made serious charges against the character of the defendant, alleging that she was not the wife of the said deceased, that her children were not the children of the deceased, and that she was guilty of acts of unchastity and many other heinous offenses, not necessary to be here repeated. Respondent was very much affected and troubled by these charges, and sought Mr. Adolph Sutro, who had been a friend of her deceased husband, and asked him to endeavor to stop these proceedings of the appellants. She gave him her written authority to act in the premises, but on the same day she changed her mind, and revoked said authority. Afterwards, in response to a letter from Sutro, she went to see him, and after a good deal of negotiation Sutro obtained from appellants a written offer of compromise, of which the following is a copy: "We, the undersigned, plaintiffs in the contested will case of Solomon Heydenfeldt, deceased, now pending in department No. 9 of the superior court of the city and county of San Francisco, hereby agree to and do accept in full satisfaction the sum of sixty-five thousand (\$65,000) dollars, to be distributed as follows, to wit: To Zeila O. Hellings the sum of twenty thousand (\$20,000) dollars and the payment of a ten thousand (\$10,000) dollar mortgage on her property; to Thomas O. Heydenfeldt the sum of five thousand (\$5,000) dollars and the payment of a ten thousand (\$10,000) dollar mortgage on his property; to Frederick O. Heydenfeldt the sum of five thousand (\$5,000) dollars; to Ine O. Heydenfeldt the sum of five thousand (\$5,000) dollars; to Solomon Heydenfeldt, Jr., the sum of ten thousand (\$10,000) dollars. Simultaneously with the payment of said sum of sixty-five thousand (\$65,000) dollars within thirty (30) days from this date, we agree to withdraw the said complaint, and each individually agree to sign a release from all claims and demands against said estate and said defendants, each paying its own cost and lawyer's fees. We furthermore agree, upon the execution of the covenants herein contained, to sign a document withdrawing and recalling all charges of a personal character made in our complaint in the above-mentioned case. In case of failure

on our part to faithfully carry out this agreement, we each individually bind ourselves in the sum of ten thousand (\$10,000) dollars, to be paid to the defendants in the above-mentioned case as accrued and forfeited damages. If no acceptance is made by Mrs. E. A. Heydenfeldt, the party defendant in the above-mentioned case, within three days from the date hereof, this instrument to be null and void. San Francisco, November 7, 1891. Zeila O. Hellings, Frederick O. Heydenfeldt, Thos. O. Heydenfeldt, Ine O. Heydenfeldt. By Thos. O. Heydenfeldt, Guardian." To this was attached the following: "I hereby agree to the terms of the above instrument, and bind myself to pay the sum of sixty-five thousand (\$65,000) dollars to the persons named therein within thirty days, provided that all of the conditions imposed upon the plaintiffs in the above-mentioned cause are faithfully carried out; and on my failure to carry out the conditions imposed upon me in the above instrument I agree to pay to the plaintiffs in the said cause the sum of ten thousand (\$10,000) dollars as accrued and forfeited damages. San Francisco, November 7, 1891." To this latter writing the respondent signed her name on the same day—November 7, 1891—in the presence of said Sutro. After signing it, at her request, the following, written by Mr. Sutro, was added: "I sign the confirmation of the above agreement with the understanding that I have already paid in cash twenty-five hundred (\$2,500) dollars for the account of Solomon Heydenfeldt, Jr., and have given my obligation to pay seventy-five hundred (\$7,500) dollars more, which covers the amount of ten thousand (\$10,000) dollars payable under the above agreement to Solomon Heydenfeldt, Jr. San Francisco, November 7, 1891. Mrs. E. A. Heydenfeldt." "Witness: Adolph Sutro." At the time respondent signed as aforesaid she and Mr. Sutro supposed that the property left by her deceased husband was of the value of from \$200,000 to \$300,000, and that, if she failed to comply with the contract, she at most would only be liable in the amount of \$10,000. A few days afterwards she was informed by the executors that she had agreed to pay more than her interest in the property was worth. The whole assessed valuation of the estate of the said deceased was only \$107,548.90, in which she had a life estate, as aforesaid. On November 13, 1891,—six days after the signing of said instrument,—she served a written notice on appellants that she rescinded said instrument, and withdrew her acceptance thereof, and refused to perform or be bound by it, and released and absolved appellants from any compliance therewith. After the service of this notice, appellants did not withdraw their said petitions in probate, or sign any release or document recalling said charges of a personal nature against respondent, nor did they make any attempt to offer to do so until the last of

said 30 days mentioned in said contract; and in the meantime they continued to prosecute in the probate court their said petitions for the revocation of the probate of said will. About 10 o'clock at night on December 7, 1891, the last of said 30 days, two men, who were clerks of the attorneys of some of the appellants, undertook to serve a certain paper on respondent as she was going through the yard of her residence. She was frightened by the men, and ran away from them into her house. The paper was thrown after her, and was found in the yard the next morning. It is contended by appellants that this paper constituted an offer by appellants to perform their covenants contained in said contract of November 7th. This paper was not signed by any one of the appellants, but the paper was prepared and the names of appellants signed to it by persons who were merely the attorneys at law of some of said appellants, and who subscribed the paper as "their attorneys." The court below found that this paper was not on its face an offer to perform the covenants of said instrument of November 7th, that the same was not made in good faith, and that it was not executed by appellants in accordance with the provisions of said instrument of November 7th; and, in our opinion, these findings were correct. Moreover, after this alleged offer, the appellants continued the prosecution of said petitions in the probate court as before. On December 12, 1891, respondent filed a petition for family allowance in said probate court, and the appellant Hellings filed a written opposition thereto, in which she averred, among other things, that respondent was not the wife, and her children not the children, of said Solomon Heydenfeldt, deceased. On January 30, 1892, an amendment was made to appellants' petition, in which the averments of the original petition were adopted and renewed. On January 21, 1892, appellants resisted respondent's motion to dismiss the contest in the probate court, and in various ways appellants prosecuted said contests to and after the commencement of this action. This contest in the probate court was carried on by appellants for more than a year after the commencement of this present action.

The court found that respondent, owing to her mental and physical condition, was not competent to make the said contract; but the record presents some embarrassing questions as to the rulings of the court about the admissibility of evidence on the issue of the competency of respondent, which, under our views of the case, we do not deem it necessary to determine. The court also found that there was no authority for signing the name of the infant Iine O. Heydenfeldt to the said contract, and that the modification of the contract made by the respondent was not accepted by the appellants, and made a number of other findings, each of which, if correct, separately and independently supports

the judgment. But that we will also pass over. The complaint does not go upon the theory that appellants are entitled to the actual damages suffered by respondent's repudiation of the contract,—such damages as are ordinarily recoverable upon the breach of an executory contract. The action, though not technically such, is in the nature of an action for specific performance; that is, appellants sought to compel respondent to pay the full amounts of the exact sums of money specified in the contract, with legal interest from its date. They contend that the contract was "an obligation to pay money only," and that the damage is "the amount due by the terms of the obligation, with interest thereon," as expressed in section 3302 of the Civil Code. No damage is alleged or proven, but judgment is sought for the specific amounts of money mentioned in the contract, just as though the action were upon a promissory note. This is undoubtedly the rule when the consideration has passed to the obligor, and he has given an absolute promise to pay. But when the consideration has not passed, when the contract is executory on both sides, when the promise of the obligor is contingent upon the performance of covenants by the other party, then the amount named to be paid is not by any means the absolute measure of damage for a breach of the contract. In such a case the amount named to be paid is not the measure of damage unless the promisee has done the things required of him to be done, or has made a bona fide and valid offer and tender thereof, so as to pass the consideration to the promisor. If A. promises to deliver to B. within a certain time a certain number of tons of wheat, and B. promises to pay to A. upon such delivery \$10,000, but afterwards notifies A. that he will not comply with his contract, A. may consider the contract broken, and sue B. for the actual damage. If any such he has suffered, and in such case the measure of damage would be the difference between the value of the wheat at certain different dates; or he may elect to consider the wheat as the property of B., and take steps to pass him the title, in which event he may recover the whole amount to be paid. 3 Pars. Cont. p. 223 et seq. But he cannot keep the wheat and also recover the purchase price. In most of the reported cases touching this question the subject-matter of the contract has been property, real or personal; but the same rule obtains when the covenants of one of the parties to the contract is for personal acts or omissions. In the case at bar the appellants, after having received notice from respondent that she repudiated the contract, might have elected to recover of her the actual damage—if any such could be shown—which they suffered by reason of her withdrawing from the contract. But they could not recover the whole of the specific amounts of money stipulated in the original contingent promise of respondent.

ent while retaining the consideration for which that promise was made; that is, while refusing to carry out their covenants for personal acts and omissions provided for in the contract, and continuing to prosecute their said petitions in the probate court and their charges against respondent. That would be like the conduct of a vendor who sought to both keep the goods and recover the price.

Appellants contend that it was enough to offer to perform, and that, if their offer was not good, they were excused from making any offer by respondent's notice that she would not perform. Their complaint, however, rests upon an alleged offer, and not upon an excuse for not making an offer. But it is clear that in this case appellants could not recover from respondent the specific amounts of money named (in principle, the purchase price) without performing their covenants, or making a bona fide offer and tender of performance, and remaining in a position to keep that offer and tender good. This they did not do. They did not perform any of their covenants; and their alleged tender of performance, in addition to defects hereinbefore noticed, was evidently not bona fide, and was not kept good. By continuing to prosecute the proceedings in the probate court, they themselves broke the contract. They put it out of their power to perform their covenants, for they continued to do the things which those covenants restrained them from doing. They were like the vendor of wheat who, while consuming the wheat himself, is suing the vendee for its price. For these considerations, without determining other questions in the case, we think that the judgment should be affirmed. Judgment and order appealed from affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(107 Cal. 665)

CORBIT v. KIMBALL. (No. 19,539.)

(Supreme Court of California. July 3, 1895.)

AGENT—AUTHORITY TO BIND PRINCIPAL.

Where a wife purchased a part of a tract of land as agent for her husband, the husband is bound when the transaction was fair, and there was no misunderstanding between her and the seller, though the husband believed she was buying the whole tract.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by John Corbit against John A. Kimball. Defendant appeals from the judgment against him. Reversed.

F. A. Dorn and Wm. Shipsey, for appellant. Wilcoxon & Bouldin, for respondent.

HENSHAW, J. Plaintiff avers that he gave to defendant \$1,300, with which to buy a certain piece of land, containing about 40 acres, and that defendant purchased the land with the money, taking the deed in his own name. He asks that defendant be de-

clared his trustee, and be compelled to convey. Defendant, for answer, denies these allegations, and avers, with other matters not necessary to this consideration, that he purchased the property from its owner, Goldtree, for himself and his own use, Goldtree agreeing to accept in payment therefor the sum of \$1,300, or a promissory note for that amount. He received his deed upon July 12, 1893. Thereafter one M. B. Corbit, wife of plaintiff, purchased from him, for a consideration of \$1,300, 30 of the 40 acres, defendant reserving ten acres and certain water rights. He further avers that he has made a deed to said M. B. Corbit of the land purchased by her, and, she being dead, expresses his willingness to make any proper additional conveyance to her representatives. The court finds that plaintiff desired to purchase the 40 acres because its water rights would enhance the value of his contiguous land; that plaintiff never employed defendant to negotiate or purchase for him the Goldtree land; that defendant did purchase the land for his own use, as above set forth; that, after said purchase, plaintiff's wife (who had become the owner by gift deed of the community land) contracted and agreed with defendant to buy 30 of the 40 acres, and paid him therefor \$1,300; that defendant paid Goldtree this money for his land; that defendant, during the lifetime of plaintiff's wife, had made her a deed of the land so purchased by her; and that before the commencement of this action, he had tendered to plaintiff "a good and sufficient deed to that portion of said forty acres of land sold to said M. B. Corbit." The court further finds that plaintiff furnished to said M. B. Corbit said sum of \$1,300, paid by her as stated; that in making said purchase from said Kimball, as aforesaid, said M. B. Corbit acted as the agent of plaintiff, and plaintiff understood and believed that said M. B. Corbit was purchasing the whole of said 40 acres of land, and defendant knew, or had reason to know, that the \$1,300 received by him from M. B. Corbit was the money of this plaintiff. Upon these findings the court bases a decree that defendant either pay to plaintiff \$1,300, or make to him a conveyance of the 40 acres. Aside from any question of variance between the allegations and proofs, this decree cannot stand. No doubt is cast by the court upon the fairness of the transaction between defendant and plaintiff's wife. In that transaction Mrs. Corbit, it is found, was acting as agent for her husband. It is elementary that an agent's acts within the scope of his authority bind the principal. There was no misunderstanding between Mrs. Corbit and the defendant. She paid what she agreed to pay, and received what she agreed to buy. That plaintiff believed his wife was purchasing all, when in fact she was purchasing but part, did not affect the situation of the parties. Neither did

the fact that the defendant knew, or had reason to know, that the money paid to him was the husband's money. It is not even found that the defendant knew, or had reason to know, that the husband thought his wife was purchasing the whole tract. The judgment appealed from is reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

(107 Cal. 614)

In re SALMON'S ESTATE. (No. 18,454.)

(Supreme Court of Californiæ July 2, 1895.)

WILLS—OMISSION OF CHILD—PAROL EVIDENCE.

1. Civ. Code, § 1307, provides that when a testator omits to provide in his will for any of his children, or the issue of a deceased child, unless it appears that such omission was intentional, such child must have the same share in the estate as in case of intestacy. *Held*, that parol evidence is not admissible to show that the testator intended to omit a child whom he has not mentioned in his will.

2. The fact that the testator left a small legacy to the wife of a deceased son, but omitted to provide for the issue of said son, does not show an intention to omit such issue.

Department 1. Appeal from superior court San Joaquin county; J. K. Law, Judge.

Certain devisees appeal from an order of the probate court distributing the estate of Cutler Salmon, deceased. Affirmed.

. Nutter & De Vries and Jas. H. & J. E. Budd, for appellants. Nicol & Orr, for respondents.

VAN FLEET, J. Decedent failed to mention or provide in his will for certain grandchildren, the issue of two deceased sons, John and Alexander. He did, however, leave a small legacy to the widow of each of said sons, the mothers of his said grandchildren. On distribution, the omitted grandchildren claimed and were given the share of said estate which they would have taken had the decedent died intestate. Certain of the devisees appeal from the decree.

At the hearing appellants offered evidence to the effect that the testator, in giving directions for the drafting of his will, stated that his son Alexander's estate had cost him \$6,000 and trouble, and that he would not give that family anything, but would give Alexander's widow \$500; that, as for John's family, he would give the widow \$1,000, but the boys must look out for themselves. This evidence was excluded, and its exclusion is assigned as error. The question involved is whether evidence extrinsic of the language of the will itself can be resorted to for the purpose of determining whether the omission of one entitled, in the event of intestacy, to take of the estate, was intentional on the part of the testator, the presumption being that it was not. The question is not a new one in this state. Section 1307 of the Civil Code provides: "When any testator omits to provide in his will for any of his children, or

for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate," etc. This provision was a part of the statute of wills before the adoption of the Codes, and first received a construction at the hands of this court in *Estate of Garraud*, 35 Cal. 336. In that case it was held, after quite an extended review of the authorities and the principles involved, that the statute did not modify the common-law rule upon the subject which limited the investigation for determining the testator's intention to the face of the will; and that parol evidence was not admissible for such purpose. After referring to this and other provisions of the statute, it is there said: "These provisions exhibit the intention of the legislature, not only to adhere to the safeguards which the common law provided as a protection against fraud, but rather to increase and strengthen them by new enactments. With this view, nothing short of an explicit enactment, leaving no room for construction, would lead us to the conclusion that the legislature intended to substitute for the written will, as the exponent of the testator's intentions, the loose and always uncertain evidence of acts and declarations resting in parol, and which are liable to be perverted by the frail memories, obtuse understandings, or fraudulent motives of persons called to testify after the death of the testator." The rule there announced has since remained the law of this state, and is distinctly sustained and reaffirmed in the more recent case of *Estate of Stevens*, 83 Cal. 323, 23 Pac. 379, where the question arose under precisely similar circumstances as in the case at bar. There the testator had left his entire estate to his wife, without mentioning his two children. In the contest for a share of the estate made by one of the latter, the widow offered to show by the declarations of the testator, made contemporaneously with the writing and execution of his will, that his children were intentionally omitted; but the evidence was not admitted. In reviewing the action of the lower court it is said: "The decision of this court in *Garraud's Case* has stood too long without challenge to be overruled without very strong reasons. It is sustained by very powerful reasoning in the able opinion of Justice Crockett. We think it our duty to follow it, and, in accordance with the rule there declared, we must hold that the court below did not err in excluding the offered declarations of the testator."

It is further contended, however, that the fact that the testator mentions the widows of his deceased sons, the mothers of the omitted grandchildren, is sufficient of itself, to show, without resort to extrinsic facts, that the testator had his grandchildren in his mind, and rebuts the presumption that they were forgotten. This position is equally untenable

with the first. While the authorities of other states are far from being uniform or harmonious upon the subject, it is well settled in this state that the mere fact that a testator mentions one closely related by blood, or intimately associated in family relations, with the omitted heir, does not show, as matter of construction, that the omitted one was in his mind, and that the omission was intentional. *Estate of Utz*, 43 Cal. 200; *Bush v. Lindsey*, 44 Cal. 121; *Estate of Stevens*, 83 Cal. 323, 23 Pac. 379. In *Bush v. Lindsey*, supra, the testator devised his property to the child of a deceased son, but did not mention children of the testator then living. It was held that this did not show that he had his children in mind and intended to omit them. In *Estate of Stevens*, supra, the testator failed to mention or provide for his daughter, but left a legacy to her child, the testator's grandson; and it was held that the fact that he mentioned his daughter's child did not necessarily imply that the daughter was in his mind, and she was permitted to take as a pretermitted heir.

We think the court was correct in its ruling upon the offered evidence and upon the construction of the will, and that the decree should be affirmed. It is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.

(5 Cal. Unrep. 780)

FORD v. KENTON et al. (No. 19,436.)
(Supreme Court of California. July 2, 1895.)
ACTION ON NOTE — FORGERY AS A DEFENSE —
AMENDMENT OF PLEADINGS.

1. The fact that nothing was heard of a defense that an indorsement on a note was a forgery until the maker had absconded does not estop the party from asserting it, especially where there was evidence that he did not know that he was held liable until suit was commenced.

2. In an action to hold one liable as an indorser, evidence that defendant was 75 years old, and unable to read or write; that he never authorized the indorsement, but only authorized his name to be written on an undertaking for a small amount,—is sufficient to sustain a verdict that defendant did not indorse the note.

3. The reception of inadmissible evidence over appellant's objection is not reversible error where it was afterwards stricken out on appellant's motion.

4. Granting leave to amend pleadings at the trial will not be reversed except for abuse of discretion.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Joseph A. Ford against Thomas Kenton and another on a note. Defendants had judgment, and plaintiff appeals. Affirmed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Graves & Graves, for respondents.

BELCHER, C. In October, 1892, A. Sittenfeld and O. Mandershiel were partners,

doing business at Paso Robles under the firm name of A. Sittenfeld & Co., and were indebted to numerous merchants in San Francisco in sums aggregating \$8,900. They were in financial trouble, and desired an extension of time to pay their debts. To obtain such extension, they executed a promissory note for the full amount of said indebtedness, payable to the order of A. Sittenfeld, in four equal installments, in 3, 6, 9, and 12 months. The payee indorsed and delivered the note to the representative of the San Francisco creditors, and he delivered it to the plaintiff. Before the note matured, the makers thereof failed and went into insolvency. In due time the plaintiff commenced this action against the defendants, Thomas Kenton and Henry Moody, to recover the amount due on the note, alleging that they were indorsers thereof, and as such liable for its payment. The defendants answered separately, and each denied that he ever indorsed the said note. The case was tried before a jury, and a general verdict was returned in favor of both defendants, and a special verdict to the effect that Kenton did not write the signature purporting to be his on the back of the note. Judgment was thereupon entered that the plaintiff take nothing by his action against the said defendants, from which, and from an order refusing to grant a new trial, the plaintiff appeals.

The grounds relied upon for a reversal are that the verdict was not justified by the evidence, and that certain errors in law were committed by the court in its rulings. As to Kenton's signature, there was positive evidence that it was a forgery. Kenton testified that he never signed, nor authorized any one else to sign, his name on the back of the note, and never saw the paper until it was presented in court; and an expert witness as to penmanship testified that the signature was not Kenton's. No direct testimony to contradict this evidence was introduced by the plaintiff, and the only claim is "that this evidence, in the face of the fact that nothing was heard of such a defense until Sittenfeld, who procured the signature, had absconded, fails." But there was nothing even tending to show an estoppel, and there was proof that Kenton never knew he was held liable on the note until suit was commenced thereon. As to Moody's signature, it was proved that he was 75 years old, and unable to read or write even his own name, and that he never authorized his name to be written on the note, but only authorized it to be written on an undertaking for \$80 or \$90 which Sittenfeld was about to give to obtain an attachment against one Lillenthal. Under these circumstances, the judgment cannot be reversed for want of evidence to justify the verdict.

During the progress of the trial, numerous objections to evidence offered on behalf of defendant Moody were made by plaintiff,

and the objections were overruled and exceptions reserved. Afterwards, however, on motion of plaintiff, the evidence objected to was all stricken out. Conceding, therefore, that the rulings complained of were erroneous, still we fail to see that the plaintiff was in any way prejudiced by them.

At the conclusion of the evidence, counsel for defendant Moody asked leave to amend his answer by inserting the words: "Further answering, defendant avers that he did not sign his name to or indorse his name on the promissory note set out in the complaint." The amendment was allowed, over the objection of plaintiff, and this ruling is assigned as error. It is well settled that applications for leave to amend pleadings are addressed to the sound legal discretion of the trial court. They may be made at any stage of the case, and, whether granted or refused, the action of the court will not be disturbed on appeal unless a clear abuse of discretion appears. We fail to see any abuse of discretion in the action of the court here complained of. The judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(107 Cal. 627)

HARRELSON v. TOMICH et al. (No. 19,514.)
(Supreme Court of California. July 2, 1895.)
PAYMENT OF TAX BY MORTGAGOR — EFFECT ON MORTGAGE.

A contemporaneous parol promise by a mortgagor to pay the tax on the mortgage does not invalidate the stipulation for interest under Const. art. 13, § 5, providing that every contract obligating a debtor to pay the tax on money loaned shall in that respect, and as to any interest specified therein, be void. *Daw v. Niles*, 37 Pac. 876, 104 Cal. 106, followed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by W. H. Harrelson against M. S. G. Tomich and others to foreclose a mortgage. Plaintiff had judgment, and defendants appeal. Affirmed.

W. T. Williams and Reymert & Orfila, for appellants. Albert M. Stephens, for respondent.

BRITT, C. The controlling question here is whether it was competent for defendants to prove an alleged oral agreement entered into by the parties to the mortgage, for the foreclosure of which plaintiff prosecutes this action, and contemporaneously with such mortgage, whereby the mortgagor undertook to pay the taxes which might be assessed or levied upon the mortgage or the debt secured by the same; this for the purpose of defeating plaintiff's claim to interest on the debt.

The court below excluded such evidence, and rendered judgment for plaintiff. Counsel agree that the question presented is substantially the same as that in *Daw v. Niles*, which case was yet pending in this court when the briefs were filed on the present appeal. That case having been since decided (104 Cal. 106, 37 Pac. 876) adversely to the views of defendants here, on its authority the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(107 Cal. 618)

In re CARRIGER'S ESTATE. (No. 15,953.)¹
(Supreme Court of California. July 2, 1895.)
HOMESTEAD IN LANDS HELD IN COMMON—RIGHTS OF WIDOW.

1. A homestead cannot be created by a cotenant in lands held by tenancy in common.

2. A probate court cannot set apart a homestead in lands in which the deceased could not have created a homestead in his lifetime.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Kate Carriger appeals from an order denying her petition for a homestead in the estate of William W. Carriger, deceased. Affirmed.

Ross Campbell and J. T. Campbell, for appellant. Cary Howard and Barclay Henley, for respondent.

PER CURIAM. Kate C. Carriger is the widow of William W. Carriger, deceased, and appeals from an order of the superior court, in probate, denying her petition for a homestead. After the death of the husband Solomon Carriger produced what purported to be the last will and testament of the deceased, in which he was named as executor, but the widow contested the probate thereof, and pending these proceedings said Solomon Carriger was appointed special administrator, and, said contest not having been finally determined, he has ever since been, and still is, such special administrator, and as such, by order of the court, made and returned an inventory of the estate. There was no community property, and the only real estate consisted of an unoccupied and unimproved lot, of the value of \$200, and a one-ninth interest, undivided, in a tract of land containing 904 and 85-100 acres, upon which there is a dwelling house, in which the husband and wife, "during their marriage, had their residence, and made and kept their home, * * * with the knowledge and consent of the cotenants of said William in said land"; and this undivided interest, her petition alleged, does not exceed in value the sum of \$5,000. The foregoing are the facts stated in the peti-

¹ Rehearing denied.

tion, so far as material to be noticed, and upon which she prayed that said undivided interest be set apart to her by the court as a homestead. At the hearing the special administrator appeared by counsel, and admitted all the allegations of the petition to be true; and upon these facts the court made an order denying her petition, and from that order this appeal is taken.

Upon this record two questions are made: (1) Has the probate court jurisdiction to set off a homestead while the estate is in the hands of the special administrator, no general administration having at any time been granted? (2) Can said undivided interest of the deceased in said larger tract be set apart to the widow as a probate homestead? If either of these questions should be decided against appellant, the order appealed from must be affirmed; and, as it is well settled in this state that a homestead cannot be created by a cotenant in lands held by tenancy in common, it is not necessary to consider the first question above stated. In *Wolf v. Fleischacker*, 5 Cal. 244, it was held that a homestead could not be declared by a cotenant in lands held in cotenancy. In *Giblin v. Jordan*, 6 Cal. 416, it was held that land held by a husband, with his wife and child, as tenants in common, is not subject to homestead rights under the laws of this state. In *Kellersberger v. Kopp*, 6 Cal. 564, it was held that a conveyance of a moiety of the homestead by the husband and wife destroyed the homestead. In *Seaton v. Son*, 32 Cal. 481, it was held that a homestead declared by one who supposed he was the sole owner of the land, but who in fact owned seventeen undivided eighteenthths, was invalid. See, also, *Cameto v. Dupuy*, 47 Cal. 79, and *Bank v. Guerra*, 61 Cal. 106. These cases involved homesteads declared under the general homestead laws, and did not arise under the Code of Civil Procedure relating to probate homesteads; but as early as *Kingsley v. Kingsley*, 39 Cal. 665, it was held that a homestead could not be set apart by the probate court in lands in which the deceased could not have declared a homestead in his lifetime. In that case certain lands were owned by co-partners, upon one parcel of which the deceased had resided with his family. After his death the part so occupied was set off to the estate upon partition of the partnership lands, and the probate court ordered the same to be set apart to the widow, upon her petition, as a homestead. The order was reversed upon appeal. There is in the opinion in that case no suggestion that there were partnership debts, but the decision is placed squarely upon the ground that, as the deceased could not have created a homestead in partnership lands during his life, the land in question could not be assigned as a homestead to the widow, though they became the property of the estate by the partition after his death. In *Estate of Noah*, 73 Cal. 590, 15 Pac. 290, the case of *Kingsley v. Kingsley* was cited

and followed. These cases were questioned in the *Walkerly Case*, 81 Cal. 579, 22 Pac. 888; but the question there related solely to the value of a probate homestead, viz. whether a homestead of greater value than \$5,000 could be set apart by the court, and it was held that it could. Appellant contends, however, that the principles decided in the *Walkerly Case*, and followed in *Estate of Smith*, 99 Cal. 449, 34 Pac. 77, which justify the allowance of a more valuable homestead, "because," as was said in the latter case, "there was no other land of the estate out of which a homestead could have been carved, and the premises which the court did set aside were indivisible," would sustain an order granting the prayer of the petitioner in this case. In these cases last above cited there was no question but that the homestead so set apart was capable of complete, full, and perfect enjoyment, unembarrassed by an equal, common right of possession by others, nor any necessity for a partition or other separation of interests in order to its perfect enjoyment. Nor do those cases involve any real conflict with prior decisions, as was explained in the *Walkerly Case*. Upon the question before us, however, the order appealed from cannot be reversed without overruling the numerous decisions which hold that a declaration of homestead cannot be made upon such lands, or, at the least, without overruling those other cases which hold that a probate homestead cannot be set apart in lands in which the deceased could not have created a homestead in his lifetime. Counsel for appellant cite cases from other states which sustain their contention that a homestead may be declared in lands held in tenancy in common. The states that so hold are about equal in number with those that agree with the cases found in our own Reports. So far as the weight of authority elsewhere is concerned, therefore, no satisfactory reason for departing from our prior adjudications appears; and while a hardship may result to the appellant in this case, and may result to others in other cases, from our adherence to former decisions, it is not clear that a departure might not create hardships and inconvenience equally great. It is therefore ordered that the order appealed from be affirmed.

(107 Cal. 644)

SMITH v. BRODERICK, Auditor. (No. 15,833.)

(Supreme Court of California. July 2, 1895.)

CITIES—INDEBTEDNESS IN EXCESS OF REVENUE
—DUTY OF AUDITOR.

1. Under Const. art. 11, § 18, providing that a city shall not incur liabilities in any year in excess of the revenue for that year without the consent of two-thirds of the qualified electors, a levy and assessment for liabilities so incurred is void.

2. Where a levy and assessment for payment of a claim against a city is invalid, one

for payment of a judgment on such claim will also be invalid.

3. Under Consolidation Act, § 87, requiring the auditor to be acquainted with every lawful demand upon it; and section 84, requiring him to determine whether a presented claim is legally due and unpaid, and whether its payment from the city treasury is authorized; and section 88, making him liable for all moneys illegally allowed,—a disallowance by the city auditor of a judgment on a claim which exceeded the revenue for the year in which incurred is proper.

4. An order by the board of supervisors for payment of a judgment against a city out of the general fund is not authorized by St. 1858, p. 235, conferring power on that board to order any final judgment against a city or county paid "out of the surplus fund."

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Application by A. Smith against Broderick, auditor, for writ of mandamus to compel defendant to pay claims against the city. From a judgment for defendant, plaintiff appeals. Affirmed.

Walker L. Graves, for appellant. Mullany, Grant & Cushing, Stanly, Hayes, McEnerney & Bradley, E. H. Heller, and Fox, Kellogg & Gray, for respondent.

HARRISON, J. The plaintiff is the assignee of the claims of sundry individuals for merchandise sold and delivered by them to the city and county of San Francisco, and for labor performed by them for said municipality prior to June 9, 1893; and on that day he commenced an action against the city and county to recover a judgment for the amount of said claims. Prior to the commencement of the action the board of supervisors had adopted a resolution authorizing the city and county attorney to allow judgment to be taken and entered against the city and county in all cases in the litigation of claims against it for supplies, material, and labor "where such claims are or have been examined or corrected by the finance committee of this board, through the expert of said committee," for the amounts approved by said committee. After the plaintiff had commenced his action, the expert of the finance committee reported to that body that he had examined the claims, and that the amount named in the plaintiff's suit was the correct amount due him. Thereupon the finance committee directed the city and county attorney to allow judgment to be taken against the city and county for the amount claimed by the plaintiff. June 16, 1893, after the summons issued upon the complaint in said action had been served upon the city and county, a stipulation entered into between the city and county attorney and the attorney for the plaintiff was filed in said action, in which was recited the foregoing resolution of the supervisors, and allowing judgment to be entered in favor of the plaintiff and against the defendant therein for the amount of his claim; and thereupon judgment was entered in accordance with the stip-

ulation June 19, 1893. July 5, 1893, the plaintiff presented to the board of supervisors his demand for the amount of the judgment, and the same was duly allowed and approved, and an authorization for its payment in the form of a resolution was adopted by the board of supervisors and approved by the mayor July 26th. The authorization is in the following terms: "Resolved, that an expenditure of \$3,548.08 be, and the same is hereby, authorized to be made out of the general fund, in payment to A. Smith, assignee, being for goods furnished and services rendered the city and county of San Francisco, as herein-after stated, as per judgment rendered in the superior court in case No. 41,286, and as certified by the city and county attorney, to wit" (reciting the claims of the different assignors of the plaintiff). Thereupon the plaintiff presented this authorization to the defendant herein, who was and still is the auditor of said city and county, for his approval and allowance. The defendant refused to approve and allow the same, and the plaintiff made application to the superior court for a writ of mandate commanding him to approve and allow the demand. The defendant, in his answer to the application, set forth the foregoing facts, and also alleged that the demands and claims of the plaintiff and of his assignors were for liabilities incurred by the city and county for and during the fiscal year ending June 30, 1893; that only two of the claims of his assignors—amounting to \$117.89—were payable out of the general fund, and that the others were payable out of the street department fund; that on the 8th day of June, 1893, there had been allowed and audited, for the debts and liabilities of the city and county incurred during the fiscal year ending June 30, 1893, demands against the general fund amounting to more than the moneys paid or payable into said fund; that on said 8th day of June, 1893, there was a deficiency in said general fund, which was represented by allowed and registered demands, for the payment of which no money had been provided; that said deficiency still existed, and that there had not been, since the 8th day of June, 1893, was not then, and would not at any time be, any money of the income or revenue of said fiscal year in the treasury applicable to the payment of the two demands payable out of the general fund; that on the 1st day of July, 1893, there was in the treasury, in the street department fund, for the fiscal year ending June 30, 1893, a surplus amounting to \$1,687.08, out of which there had since been paid upon demands for liabilities incurred in said fiscal year the sum of \$535.75, leaving unpaid the sum of \$1,151.33; that there has not been since said 1st day of July, and there never will be, in the street department fund, for the fiscal year ending June 30, 1893, any sum of money applicable to the payment of the claims and demands of plaintiff's assignors which are chargeable against and payable out of the street department fund, any great-

er sum or amount than said sum of \$1,687.08; that the deficiency in the general fund for the fiscal year ending June 30, 1893, amounts to more than the sum of \$100,000, and that there was not at the end of said fiscal year, nor has there been at any time since, nor will there be, nor has there ever been, sufficient money in the treasury of the said city and county to pay the demands incurred in said fiscal year ending June 30, 1893; and there was not on that day, nor has there at any time since been, nor will there ever be, a surplus fund for said fiscal year. The court found that the foregoing matters and facts alleged in the answer of the defendant were true as therein alleged, and further found that on June 26, 1893, the board of supervisors made provision for the payment and satisfaction of the judgment recovered by the plaintiff by levying a tax therefor, and ordering the same to be collected and set apart for the payment and satisfaction of said judgment, and that the money so levied is now in, and a part of, the general fund of said city and county. Upon these facts the court denied the application of the plaintiff, from which he has appealed.

Section 18 of article 11 of the constitution is as follows: "No county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any purpose exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." In *Gas Co. v. Brickwedel*, 62 Cal. 641, it was held by this court that the framers of the constitution meant by this section "that no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such county, city, town, township, board of education, or school district; in other words, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." The same principle was repeated in *Shaw v. Statler*, 74 Cal. 258, 15 Pac. 833, and *Schwartz v. Wilson*, 75 Cal. 504, 17 Pac. 449. See, also, *Mayrhofer v. Board of Ed.*, 89 Cal. 114, 26 Pac. 646. To the argument of the appellant that this construction of the section is injurious to the city and county, and a hardship upon those who in good faith contract with it, we may also quote from the language of the court in the *Brickwedel* Case: "We have neither the right nor the disposition by judicial interpretation to take away the wholesome restriction upon municipalities thus imposed by the constitution. Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if some shall be found to suffer; but it must be remembered that all are presumed to know the law,

and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that that limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss." See, also, *Sutro v. Pettit*, 74 Cal. 337, 16 Pac. 7; *McBean v. City of San Bernardino*, 96 Cal. 187, 31 Pac. 49; *Von Schmidt v. Widber* (Cal.) 38 Pac. 682.

There is ample power under the statutes which constitute the charter of San Francisco to provide for all the contingencies that are suggested in the arguments on behalf of appellant. By the seventy-first section of the consolidation act, as amended in 1866 (St. 1865-66, p. 436), the supervisors are authorized to levy a tax that will raise such an amount of money "as the said board may deem sufficient to provide for the payment of all demands upon the treasury authorized by law to be paid out of the same." The limitation upon this power, viz., \$2.85 on the \$100, is conceded to be far beyond any possible necessities of the municipality. The assessment roll of property subject to taxation is made prior to the levy of this tax, and in determining the amount of the tax to be levied, the supervisors, aided by the experience of the municipality in former years, and by the estimates of the several departments of the city, are enabled to exercise a judicious consideration of the expenditures likely to be incurred during the year, and to make such provision for unforeseen emergencies as ordinary prudence would suggest. As the amount of expenditures cannot, in the nature of things, be determined with accuracy, ordinary prudence would dictate, in view of the foregoing provision of the constitution, that the tax levy should be large enough to meet any unforeseen demand, and to enable the municipality to discharge all of its obligations. If the amount of money so provided is not needed for the expenditures of the year, it can be carried forward into the next fiscal year; whereas, if the revenue thus provided is not sufficient to meet the expenditures, there is no provision for meeting the deficiency, except by the "assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

The right of the appellant to the relief he seeks is not affected by reason of his demand having been reduced to a judgment. The foregoing provision of the constitution cannot be evaded by a consent on the part of the officers of the municipality that a judgment may be entered against the municipality upon an open demand which constitutes no liability against the city. The effect of the judgment was only to make definite and of record a claim which previously was open to controversy, and rested in parol, and to convert a disputed into an audited claim. *Sharp v.*

Contra Costa Co., 34 Cal. 291. While a judgment is sometimes said to be the highest evidence of an obligation, it does not, for that reason, in all cases, foreclose an investigation of the nature of the obligation as well as the liability which it imposes. In *Clark v. Rowling*, 3 N. Y. 216, it was held by the court of appeals of that state that in an action to enforce a judgment it was competent for the defendant to go behind the judgment, and show that it was rendered upon a cause of action from which he had been discharged in bankruptcy, although the discharge was not rendered until after the rendition of the judgment, and a suit upon the obligation was pending when the petition in bankruptcy was filed; that the judgment, instead of being a new debt which did not exist at the time the petition was filed, was merely the old debt in a new form; and that, for the purpose of protecting the defendant, the court would look behind the judgment, and see upon what it was founded. The same rule was afterwards laid down in this state in *Imlay v. Carpentier*, 14 Cal. 173, where the judgment debtor sought in equity to set aside a judgment that had been rendered against him under similar circumstances. In *Betts v. Bagley*, 12 Pick. 530, where the same question was under discussion by the supreme court of Massachusetts, Chief Justice Shaw said: "Although a judgment to some purposes is considered as a merger of the former promise, and as constituting a new cause of action, yet, when essential rights of parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the nature of such original cause of action was." See, also, *Wyman v. Mitchell*, 1 Cow. 316; *Owens v. Spigg's Garnishees*, 2 Md. 457; *McDonald v. Davis*, 105 N. Y. 513, 12 N. E. 40; *Commissioners v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327; *Morley v. Railway Co.* 146 U. S. 169, 13 Sup. Ct. 54. In *U. S. v. County of Macon*, 99 U. S. 582, a judgment had been rendered in favor of the relator against the county for the amount of certain coupons upon bonds that had been issued by the county. In a proceeding to compel the county to levy a tax for the purpose of paying this judgment, it was shown that the statute under which the subscription to the bonds was made contained a limitation upon the amount of tax that might be levied by the county to pay the same, and it was held by the court that, although a judgment had been rendered upon the coupons, the judgment creditor was not entitled to a writ of mandate directing the levy of a tax for the payment of the judgment, saying: "We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand, and of the amount that is due, but it gives him no new rights in respect to the

means of payment." The same principle was again asserted in *Ralls County Court v. U. S.*, 105 U. S. 733, although it was held inapplicable in that case, as it was in *U. S. v. New Orleans*, 98 U. S. 381, for the reason that at the time when the bonds upon whose coupons the judgment had been rendered were issued there was no limitation upon the power of taxation, and that the payment of the bonds as they matured, or of a judgment obtained thereon, could not be avoided by any subsequent legislation, inasmuch as such legislation would be in contravention of that provision of the constitution forbidding the impairing of the obligation of a contract. This distinction is referred to in *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211. In that case the relators had recovered a judgment against the city of New Orleans for damage done to their property by a mob in the year 1873. By a statute of the state which was in force when the damage was done, the city was rendered liable therefor, and at the time when the judgment was rendered, as well as when the damage was done, the city was authorized to levy taxes to an amount which would be sufficient to satisfy the judgment. Subsequently, in the year 1879, a provision was made in the constitution of the state restricting the power of the city in levying taxes, by which the relators were prevented from collecting their judgments, as the funds authorized to be levied were exhausted by the current expenses of the city. Thereupon they applied for a mandamus to compel a levy by the city of taxes to meet their judgments at a rate which was permitted when the damage was done for which the judgments were rendered. The supreme court of the United States held that they were not entitled to the writ; that the judgments held by the relators did not rest upon contract in any respect; and that the obligation of the city had no further element of contract in it because merged in the judgment than it had previously possessed, and that the limitation in the constitution upon the extent to which the city could exercise the power of taxation did not infringe the provision forbidding the impairment of the obligation of a contract. Commenting upon the inapplicability of this provision of the constitution, the court said: "The cases in which we have held that the taxing power of a municipality continues notwithstanding a legislative act of limitation or repeal are founded upon contracts, and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts existing when they were made have been by such legislation impaired. The usual mode in which municipal bodies meet their pecuniary contracts is by taxation, and when, upon the faith that such taxation will be levied, contracts have been made, the constitutional

inhibition has been held to restrain the state from repealing or diminishing the power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy." In *U. S. v. County of Macon*, supra, the court said: "Thus, while the debt was authorized, the power of taxation for its payment was limited by the act itself, and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated and the debt incurred. The difficulty lies in the want of original power." Upon these principles the same provision of the constitution has no application here. The contracts forming the basis of the plaintiff's judgment were not entered into upon the faith that any tax would be levied with which to meet them, but with full knowledge that the municipality was prevented from paying them out of any fund other than the revenue that had already been provided for the fiscal year ending June 30, 1893. None of the remedies which then existed for the enforcement of these contracts have been in any respect impaired. If at the time of entering into the obligation there is a limitation upon the extent to which a municipality may enter into such obligation, or upon the extent of taxation for the payment of its liability, or upon the mode in which such payment is to be made, there is no violation of any provision of the constitution, or of any obligation of the municipality, in insisting that the person dealing with it shall be bound by the terms of the law as they existed when he entered into his dealings with the municipality. The same reasons which would justify the refusal of a writ of mandate to enforce the collection of a judgment by the levy of a tax which is forbidden by law require the refusal of the writ when sought to enforce a judgment by applying thereto, in contravention of an express provision in the constitution, moneys that have been already collected and are in the treasury.

The act of 1858 (St. 1858, p. 235), invoked on behalf of the appellant, is not available to him in the present case. That act conferred power upon the board of supervisors to "order paid any final judgment against said city and county, out of the surplus fund," whereas the authorization in the present case is that the judgment be paid out of the general fund. The surplus fund is provided for in section 76 of the consolidation act, and "consists of any moneys belonging to the general fund, remaining in the treasury after the satisfaction of all demands due and payable, which are specified in the first fourteen subdivisions in section ninety-five."

The collection in the subsequent fiscal year of a tax levied by the board of supervisors for the express purpose of paying this judgment did not give to the plaintiff any additional right to the payment of his claim, or any right to the money thus collected. The provision of the constitution limiting the power of the municipality in incurring a liability to the income and revenue "provided for it for such year," means that only the income and revenue that had been provided for the expenditures of the year prior to incurring the liability can be appropriated for the payment of such expenditures. To hold that any deficiency in the revenues of one year can be met from taxes collected in a subsequent year, under the guise that they had been collected for the express purpose of meeting such deficiency, would sweep away the entire restriction which the constitution intended to place upon municipal extravagance.

Unless it was the duty of the auditor to allow the claim of the appellant, the writ of mandate cannot be allowed. *Von Schmidt v. Widber*, supra. By section 87 of the consolidation act that officer is required "to be constantly acquainted with the exact condition of the treasury and every lawful demand upon it." By section 84 of the same act, whenever a claim against the treasury is presented to him for auditing, he must "satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury of the city and county is authorized by law, and out of what fund." Section 88 declares that, if he allow any demand on the treasury not authorized by the act, he shall be liable to the city and county individually, and on his official bond, for the amount so illegally allowed. Inasmuch, therefore, as it appeared from the facts found by the court that the claim of the appellant was not a legal demand upon the treasury, which he had the right to have paid out of funds therein at the time he presented the same to the auditor, the auditor was justified in refusing its allowance. The judgment is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HENSHAW, J.; TEMPLE, J.

(108 Cal. 115)

In re SMITH'S ESTATE. (No. 15,754.)
(Supreme Court of California. July 12, 1895.)
ELECTION BY WIDOW—CLAIMS AGAINST EXECUTOR'S ESTATE—DEDUCTION ON DISTRIBUTION.

1. A finding declared by the court to be drawn from facts previously stated must fail if they do not support it.

2. The will of a husband devising community estate gave the wife a life estate therein, and stated that it was "made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife." The widow declared that she wished the will to stand, and afterwards conveyed "all her interest in said property mentioned in said

will as vesting a life estate therein upon said widow." *Hdd*, not to show an election to take under the will, so as to create an estoppel, unless the widow had full knowledge of the facts concerning the properties and of her right to elect.

3. Where J., an executor and legatee who received moneys of the estate, died, and W., surviving executor, presented no claim against his estate for the same, the court cannot, on the death of W. after the time for presenting claims against the estate of J. had expired, deduct upon distribution the amount collected by J. out of the share due his estate.

In bank. Appeal from superior court, San Benito county; James N. Breen, Judge.

Petition by Robert Cardiff, administrator with the will annexed of Robert Smith, for a settlement and distribution of decedent's estate. From an order settling the administrator's final account, and from a decree of distribution the administrator and the widow appeal. Order settling the amount affirmed, and decree of distribution reversed.

N. C. Briggs and John C. Hudner, for appellants. Montgomery & Jefferson, for respondent.

HENSHAW, J. Appeals by the administrator with the will annexed and by the widow from the order settling the administrator's final account, and from the decree of distribution. Robert Smith died in April, 1891, and by his last will bequeathed one dollar to each of his four grandchildren, and the residue of his personal property among certain of his children,—to his son, William R., four-tenths thereof; to his son, John A., three-tenths thereof; to his daughter, Jessie, three-tenths thereof. Said will provided as follows: "Thirdly. I give and bequeath to my daughter, Mrs. Mary Cardiff, now of San Benito county, California, a life estate in my home ranch, in San Benito county, California, the same being described as follows, to wit, being the southwest quarter of section 6, Tp. 15 S., range 7 E., M. D. M.; also all livestock, farming utensils, household furniture, and, in fact, all personal property that may be on said ranch, excepting money on hand, securities and other evidences of money due me,—to have and hold and use during her natural life as her own, and at her death to pass in fee to her sons, Robert Cardiff and Geo. H. Cardiff, and to their heirs in fee simple. But in the event I survive my said daughter, Mary Cardiff, then at my death said property to pass directly to her said sons, Robert and George Cardiff. This bequest, however, is not to take effect during the lifetime of my wife, Mary Smith, who is now residing with me on the above-described property; and, in the event she survives me, she is to have full and free use and absolute control of said real property and personal herein referred to, and after her death to pass as above provided. This is made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife." The sons, John A. and Wil-

liam R., were named as executors. Both qualified, and both, after service, died before settlements of their accounts. In July, 1893, the Robert Cardiff above named was appointed administrator with the will annexed, and in December of the same year filed, with his final account, a petition praying for its settlement and the distribution of the estate. In January next the widow of the testator filed her written claim and notice that all of the property of her husband was community property, and that she claimed one-half thereof as being beyond his power of testamentary disposition. Thereupon, the widow of the son, John A., as executrix of her husband's estate and as one of his heirs, filed her written objections to the account and to the claim of Mary Smith, alleging that Mary Smith had previously elected to take under the will.

The court found that all of the property of the estate was community property; that Mary Cardiff had died since the death of testator, leaving her two sons, above named, her sole heirs; "that, since the death of said Robert Smith, said Mary Smith, his widow, conveyed all her interest in said property, mentioned in said will as vesting a life estate therein upon said widow, to said Robert and George Cardiff;" and, finally, "that said Mary Smith, said widow of Robert Smith, after the death of her said husband, and prior to January, 1894, said to her grandson, Robert Cardiff, 'that she wished the will to stand.' She has remained in possession of said real property, and said personal property upon and about said real property, being the property described in the will as bequeathed to her for a life estate, until in the year 1893, when she conveyed all her interest therein as hereinbefore stated." As a conclusion of law, separately stated, the court held: "From the foregoing facts the court concludes that said Mary Smith, widow of said Robert Smith, deceased, had elected to take under the said will, and is not entitled to a share of the moneys, securities, or notes referred to in said will."

The will of Robert Smith was one whose terms forced an election upon the widow. While courts will presume that a testator meant to deal with that property only over which he had power of testamentary disposition, this presumption cannot prevail against the unequivocal intention expressed in the will. That intention, when it can be deduced from the instrument, governs its construction. *Morrison v. Bowman*, 29 Cal. 347. Of two permissible constructions that which favors the conclusion that the testator was disposing only of his own moiety of the community property will be adopted. This is the scope of the doctrine in the cases of *Silvey's Estate*, 42 Cal. 210, *In re Gwin's Estate*, 77 Cal. 313, 19 Pac. 527, and *Estate of Gilmore*, 81 Cal. 240, 22 Pac. 655. Here, however, the testator undertakes in terms to dispose of all the property of the community. Any attempt to give effect to the clear pro-

visions of the instrument would work an invasion of the widow's rights as the surviving member of the community. And this is done, so the instrument declares, with full knowledge of those rights, and with the knowledge and consent of the wife. The declaration that the disposition is made with the knowledge and consent of the wife does not, of course, bind her; but it aids in showing the intent of the testator, which intent, read into the terms of the will, was sufficient to put the widow to her election. *Etcheborne v. Auzeais*, 45 Cal. 121; *Estate of Stewart*, 74 Cal. 103, 15 Pac. 445. That election, declared upon distribution, was good and sufficient, unless, by her former acts in dealing with the property, she was estopped from making it. The previous election, which John's widow pleaded had been made by her mother-in-law, is therefore to be tested by the rules of estoppel. *Bigelow, Estop.* 562. The court in probate seems to have so viewed the matter, since it found the acts of the widow, and concluded from them that she had elected to take under the will. The result reached was properly placed among the conclusions of law, and will not be disturbed. *Hayne, New Trial*, § 242; *Society v. Burnett* (Cal.; No. 14,553) 39 Pac. 922. But in this case it matters little whether it be treated as a conclusion or a finding. For, if regarded as a finding, it is declared by the court to be drawn from the facts previously stated, and, if they do not support it, under the rule in *People v. Reed*, 81 Cal. 70, 22 Pac. 474, it must fall.

Before the widow can be denied her right to elect upon distribution it must be found that, with the knowledge of her rights, by unequivocal acts evincing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid these acts and disclaim her intent. Professor Pomeroy, in language adopted by this court in *Burroughs v. De Counts*, 70 Cal. 371, 11 Pac. 734, thus enunciates the principle: "To raise an inference of election from the party's conduct merely, it must appear that he knew of his right to elect, and not merely of the instrument giving such right, and that he had full knowledge of all the facts concerning the properties. As an election is necessarily a definite choice by the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must evince an intention to elect, and must show such an intention. The intention, however, may be inferred from a series of unequivocal acts. * * * Where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, when done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an

election by her to take under the will and to reject her dower." *Pom. Eq. Jur.* § 515; *Bigelow, Estop.* p. 568. The acts of the widow, as found by the court, do not establish this implied election or election by estoppel. An examination of the cases which find that an election has been exercised by reason of a deed discloses the fact that the deed is of property to which, except for the will, the grantor would have no title, and thus the deed becomes strong evidence of intent to take by the will, and for obvious equitable considerations the grantor will not be allowed to deny it. Such is not the present case. It is not found that she recognized by her deed the life estate in the land devised to her. She conveyed "all her interest in said property mentioned in said will as vesting a life estate therein upon said widow." The language leaves something of lucidity to be desired, but, however, interpreted, upon the death of her husband she was the owner of an undivided one-half of all of that real estate, and her deed was sufficient to convey that title, and for aught that appears was meant to do so. She remained in possession of the property, but it was the home of the family, and for a limited time at least she was entitled to remain in possession, and it is not found that she continued that possession under claim of the estate devised to her by will. She said to her grandson "that she wished the will to stand," but this is without weight or value unless it be further shown that she had full knowledge of the facts concerning the properties, and of her right to elect at the time she made the statement.

The court found that, during the executorship of John A. Smith, he received \$264.65, moneys of the estate, and disbursed the sum of \$17.50, leaving in his hands at the time of his death \$247.15 belonging to the estate of deceased, which was never paid over. When John A. died his estate went into probate. His brother William continued as executor of the father's estate, but presented no claim against the estate of the brother. When William in turn died the time for presenting claims against the estate of John A. had expired. The court distributed to the estate of John A. the three-tenths of the residue of the personal property devised to him, and did not deduct the \$247.15 from his distributive share. John A. held the estate's money as trustee, and upon his death, being indebted to his beneficiary, the estate, its position became no better than that of any other creditor unless it was able to pursue the precise trust fund. *Lathrop v. Bampton*, 31 Cal. 23; *Roach v. Caraffa*, 85 Cal. 444, 25 Pac. 22. It was the duty of William, as surviving executor, to have presented a claim against his brother's estate, or to have compelled an accounting of his brother's trust in equity. *Allgier's Case*, 65 Cal. 230, 3 Pac. 849; *Chaquette v. Ortet*, 60 Cal. 594. The court had no power to deduct the amount from the share of the estate

of John A. upon distribution. Assets cannot be collected upon distribution (Estate of Cook, 77 Cal. 232, 233, 17 Pac. 923, and 19 Pac. 431), and the \$247.15 was not an advance to the devisee, so that this case would come within the principle of Estate of Moore, 96 Cal. 522, 31 Pac. 584.

The order settling the administrator's account is affirmed, and decree of distribution is reversed.

We concur: TEMPLE, J.; GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.

(107 Cal. 518)

MALONE v. ROY. (No. 15,684.)

(Supreme Court of California. June 27, 1895.)

MORTGAGEES—INTEREST AFTER MATURITY—MORTGAGEE IN POSSESSION—IMPROVEMENTS—TRESPASS—DAMAGES.

1. Where the interest on a mortgage loan is computed to the time it will be due at a greater than the statutory rate, and added to the principal, the loan, after maturity, will bear only the legal rate.

2. A mortgagee cannot justify his possession of the mortgaged premises, so as to recover for improvements erected thereon, by asserting that he held possession from the mortgagor, where it appeared that, as security for a prior indebtedness, the land was leased to another and the rent paid to the mortgagee, but the mortgagor, in attempting to resume possession at the termination of said lease, and after the satisfaction of the prior indebtedness, was ousted by the mortgagee.

3. The fact that the mortgagee did not make improvements until after he obtained judgment in the lower court quieting his title will not entitle him to recover for their value, where the mortgagor appealed and the judgment was reversed.

4. The measure of damages in an action against a mortgagee for being wrongfully in possession is the fair value of the rents and profits, with interest on each year's income, irrespective of what the mortgagor might have realized had he been in possession.

5. A mortgagee in possession will not be allowed for improvements, further than is necessary to keep the premises in repair.

6. Where a deed absolute in form was in fact a mortgage, and the mortgagee held possession of the premises without the mortgagor's consent, he cannot recover for improvements because he was of opinion that his possession was lawful.

7. The measure of damages for trespass in cutting timber is the amount that was received for it, or if that was less than its value, then the value, with interest from date of sale.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by John Malone against George G. Roy to foreclose a mortgage. Plaintiff had judgment, and defendant appeals. Reversed.

A. J. Bledsoe, for appellant. R. W. Miller, for respondent.

HAYNES, C. This action was brought by Malone against Roy to foreclose a mortgage. The plaintiff had judgment, and defendant appealed therefrom and from an order denying a new trial. On January 4, 1888, the de-

fendant was the owner of 360 acres of land, under a contract of purchase, upon which he owed \$6,550, and on that day he obtained that sum from the plaintiff, applied it to the payment of the balance due upon the land, obtained a conveyance to himself, and, to secure the plaintiff for the moneys so obtained, executed to the plaintiff a deed, absolute in form, for the expressed consideration of \$7,532.50, and the plaintiff at the same time executed and delivered to the defendant his agreement to reconvey the premises to the defendant upon payment of said sum of \$7,532.50 on January 4, 1889. In March or April, 1889, Malone, claiming said deed to be an absolute conveyance and not a mortgage, brought an action against Roy to quiet his title to said land, and on appeal this court held that the transaction constituted a mortgage. *Malone v. Roy*, 94 Cal. 341, 29 Pac. 712. Malone thereupon brought this action to foreclose said mortgage. Nearly all the findings are attacked, and numerous errors of law occurring on the trial are specified.

The case involves three principal questions, which are covered by the specifications, and the findings affecting these questions are in substance as follows: That the sum secured by the mortgage is \$6,550, and interest thereon from January 4, 1888, at the rate of 15 per centum per annum; that Malone entered into possession of said premises under the deed from Roy, with his consent, on or about January 4, 1888, with the understanding that, if Roy should fail to purchase the property within the time limited in the paper executed by Malone, his title would become indefeasible; that Malone, being in possession, in good faith, after January 4, 1889, made valuable repairs and improvements to the amount of \$2,232; that the rents and profits for the year 1888 were received by defendant; that the rents and profits since January 4, 1889, to the date of the findings and judgment, May 31, 1893, received by the plaintiff, were \$2,650, and that plaintiff also received \$500 for timber sold, and after charging the plaintiff with the value of the rents and profits, and timber sold, and crediting him with the amount of repairs and improvements, found there was due from the defendant \$10,954, and a decree was entered accordingly. Other facts will be noticed as we proceed.

1. The court erred in its allowance of interest. The deed and defeasance constituted a mortgage to secure the payment of \$7,532.50, due January 4, 1889. That sum was made up of \$6,550, the money loaned, and interest thereon for one year at 15 per cent.; but there was no agreement as to the rate of interest beyond the date at which the money became due, and therefore the statutory rate of 7 per centum per annum is all that can be recovered after that date. If Malone had lent the same amount, and taken Roy's note for \$7,532.50, payable one year after date, without interest, thus including the interest at the rate of 15 per cent., and made no pro-

vision as to the rate after maturity, no one would contend that more than 7 per centum per annum could be collected after maturity. Appellant insists, however, that Roy did not promise in writing to pay any rate of interest, and therefore the principal sum upon which to compute interest is the \$6,550 loaned, and that interest at the rate of 7 per cent. is chargeable from the date of the loan upon that sum, and not upon the amount stated in the defeasance. But the defendant could not well insist that the instrument he received from Malone was effective to convert the deed into a mortgage, and then deny that it fixed the amount to be paid on January 4, 1889, to satisfy the mortgage.

2. As to the allowance made to the plaintiff for repairs and improvements, the findings do not show the amount expended for each separately. Respondent concedes that if his possession were wrongful he would not be entitled to be reimbursed for improvements, but relies upon the finding of the court, that he was put in possession by appellant, to sustain his claim that he was rightfully in possession. The facts upon which that finding seems to be based were that, prior to the transactions here involved, the defendant used the land in question as a dairy farm, having thereon about 70 cows and other personal property, and was indebted to the plaintiff in the sum of about \$2,000, and to secure that indebtedness had given the plaintiff a bill of sale or pledge of the cows and other personal property, and by an arrangement between plaintiff and defendant, and for the better security of the plaintiff as to the pledged property, the ranch, cows, and other personal property so pledged were leased to one Giacomini, the lease being executed by the plaintiff, and the rent being paid to him and credited to defendant upon said prior indebtedness. The lease was made January 20, 1888, and expired November 1st the same year. A subsequent arrangement was made by which the tenant remained until March 4, 1889. In February, 1889, the plaintiff took possession by one of his sons without the consent of defendant, who went upon the ranch March 4th for the purpose of taking possession, but his goods were removed from the house by plaintiff, and a proceeding was commenced against him for forcible detainer. Plaintiff then commenced an action against the defendant to quiet title, and in the lower court obtained judgment, and the defendant appealed to this court and the judgment was reversed, as already stated. It is clear from the testimony that whatever possession the plaintiff had was in connection with the lease for the better security of the plaintiff as to another and wholly distinct liability from that here in question, and which was fully satisfied by the rent paid by Giacomini and a sale of some of the cows under the pledge, and that no possession was at any time given under the mortgage. The entry of defendant as soon as the tenant vacated

the premises, his answer to the action brought to quiet title that the deed was given as security and was in fact a mortgage, and his successful appeal to this court in that case, negative any consent on his part to the possession of the premises by the plaintiff. In this action, brought to foreclose a mortgage, the plaintiff is estopped from saying that the mortgage he seeks to foreclose gave him any right to the possession, and, as he was not in possession under the deed by the consent of the plaintiff, his possession was without right, and therefore wrongful.

It is said, on behalf of respondent, that he made no improvements until after he obtained judgment in the superior court quieting his title; but that does not aid him. He was informed by the proceedings in that case that the defendant denied his ownership, and insisted that the deed was given as security only, and if he proceeded to make improvements as though he were owner, in the face of defendant's appeal, he can only reflect upon his own rashness. That defendant saw him make these improvements does not estop him from contesting his liability for them, as by his refusal to acquiesce in the judgment against him, and by his appeal therefrom, he constantly denied the right of possession and ownership of the plaintiff, and is unaffected by the erroneous judgment against him. "The ordinary rule in respect to improvements is that the mortgagee will not be allowed for them further than is proper to keep the premises in necessary repair. Unreasonable improvements may be of benefit to the estate; but, unless made with the consent and approbation of the mortgagor, no allowance can be made for them. The mortgagee has no right to impose them upon the owner, and thereby increase the burden of redeeming." Jones, *Mortg.* (5th Ed.) § 1127. The case of *Mahoney v. Bostwick*, 96 Cal. 53, 30 Pac. 1020, is directly in point. That was a case where a deed was given as security, and the grantee ousted the grantor and held possession. The court said: "The court did not err in refusing to credit defendant with the value of the checks, ditching, and fencing placed by him upon the premises while he was wrongfully in possession and holding adversely to the plaintiff." At common law a mortgage conveyed the fee, subject to be defeated by the performance of the conditions expressed in it; but if the conditions were not performed the mortgagee had a right of entry, and when he entered for "conditions broken" his entry and possession were lawful, and the general doctrine in regard to the rights of a mortgagee in possession grew up under that system. But under our statute, as well as that of many other states, a mortgage does not convey the title, but makes it a mere chattel, a lien; the fee and right of possession remaining in the mortgagor, both before and after condition broken. As was said by the supreme court of Minnesota: "The only logical rule is that, to

constitute 'a mortgagee in possession,' the mortgagee must be in possession by reason of the agreement, or assent of the mortgagor or his assigns that he have the possession under the mortgage, and because of it." *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765. Or, as was said by the supreme court of Michigan, by Campbell, J.: "If the mortgagee in possession can insist on retaining it, his right must depend on his contract, and, as already suggested, should be capable of enforcement. There can be no interest in lands which cannot be enforced somewhere." *Newton v. McKay*, 30 Mich. 380, 383. As the plaintiff was not in possession as mortgagee, he cannot be allowed either for repairs or improvements; for, if he were not in as mortgagee, he must have been in either as tenant or disselector. If in as tenant, he could only make repairs after notice to the owner, and the failure of the owner to make them; and there is no claim made on that ground. *Raynor v. Drew*, 72 Cal. 307-312, 13 Pac. 866.

3. Appellant contends that the value of the rents and profits found by the court is much less than the evidence justified. The evidence on this point is conflicting, and need not be discussed in this connection, as the judgment must be reversed on the other grounds above mentioned. The court found the value of the rents and profits from January 4, 1889, to the date of the judgment, May 31, 1893, to be \$2,650. This would be at the rate of \$600 per annum. This sum (\$2,650), less \$2,232 found to have been expended for improvements and repairs, was credited to defendant as of the date of the judgment, without any allowance of interest. As the difference was not large, the effect on the result is not great. Interest on defendant's debt should be computed from January 4, 1889, down to the date of the judgment at 7 per centum per annum, without rests, and the plaintiff should be charged interest at the same rate upon the annual value of the rents and profits for each year from the expiration of the year for which it is allowed to the date of the judgment, and upon the \$500 received for timber sold from the date of the sale. That, in a court of equity, interest should be charged upon the rents and profits under the circumstances here existing, see *Pujol v. McKinlay*, 42 Cal. 559.

We cannot consider each of the assignments of errors of law, nor is it necessary. A few general observations upon questions that will necessarily arise upon a new trial is all that is required. The rate of interest to be charged the defendant, and the principal sum upon which it is to be computed, is conclusively fixed by the defeasance and the statute. The question as to how or when the plaintiff obtained possession of the land, the fact of his possession being admitted in his complaint, is irrelevant, except as to the question of repairs and improvements; and what has been said on that subject sufficiently indicates the character of the evi-

dence which is relevant and competent upon that point. The opinion of the plaintiff that he was the owner of the fee, or had a right to the possession, is irrelevant. He could not be in possession rightfully under a deed which conveyed no title, otherwise than by the consent of the defendant for some purpose connected with the mortgage security. If he were put in possession, either impliedly or expressly, for the purpose of perfecting his security under the pledge of the personal property for another and distinct indebtedness, and the defendant did not afterwards consent to plaintiff's possession for some purpose connected with the mortgage here sought to be foreclosed, his possession is wrongful, and his claims for repairs, as well as improvements, must be disallowed. Upon the question of rents and profits, what the plaintiff did or did not realize from the use of the land, or what the defendant thinks he could or might have realized if he had personally occupied the land, is immaterial. The question is, what is its fair rental value annually, during the time it has been occupied by the plaintiff, for the purpose for which it was occupied at the time plaintiff took possession? As to the timber sold from the ranch, the plaintiff is liable for what he received for it, and if the value of the timber at the time of the sale was more than he received, then for such value, with interest from the date of sale.

The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

(107 Cal. 656)

LABS v. COOPER. (No. 18,345.)
(Supreme Court of California. July 3, 1895.)

PUBLIC IMPROVEMENTS—DIAGRAM.

1. A recorded diagram, in a proceeding for assessments for street work, in which there was nothing to indicate the points of the compass, whereby an owner could determine, from an inspection of the diagram and assessment, where upon the map his land was plotted, is insufficient.

2. The fact that the lot may be identified by reference to the city's official map will not cure the defect, where there was nothing in the record of assessment referring to said map, and because the court will not take judicial notice of such map, nor is the property owner chargeable with knowledge of it.

Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by B. Labs against John F. Cooper to foreclose the lien of an assessment for street work. Defendant had judgment, and plaintiff appeals. Affirmed.

Clinton L. White, for appellant. Armstrong, Bruner & Platnauer, for respondent.

HENSHAW, J. Appeal from the judgment rendered in favor of defendant in an action to foreclose the lien of an assessment for street work. The court found in favor of the plaintiff upon all his averments, excepting that of the recordation of the diagram. The diagram, as recorded, omitted the arrow and the initial letters N., E., S., and W., indicating the points of the compass. The court concluded that there was no sufficient description of the property contained in the recorded assessment and diagram, and passed judgment accordingly. The arguments here urged in support of the sufficiency of the diagram were, with few exceptions, before this court in *San Francisco v. Quackenbush*, 53 Cal. 52, and *Norton v. Courtney*, Id. 691, and there held insufficient. The purpose of the recordation being to carry notice, by an inspection of the record, to the owner and all others having dealings with the property, that it is subject to a lien, it follows that any variance between the original and recorded instruments which defeats this purpose is material. Per contra, if the diagram and assessment as recorded do contain a sufficient description, then, in this regard, any departure from the original form will be held trifling and immaterial. In the diagram as recorded, in the above cases, the relative locations of the streets to each other were shown, as were also the relative locations, frontages, and dimensions in feet of the lots assessed, and the lots bore appropriate assessment numbers. No difficulty would have been experienced by any one in fixing with mathematical accuracy the precise position of any piece of land sought to be charged, if only the points of the compass had been indicated. But without this indicator an owner could not determine from an inspection of the diagram and assessment where upon the map his land was plotted, nor whether, in fact, it was delineated at all. It is true he could determine these matters by a resort to outside aids, but the rule, "*Id certum est, quod certum reddi potest*," has no application to descriptions under proceedings in invitum. In such cases the description must be sufficient to enable the owner to determine from an inspection of it whether his land is sought to be subjected to the lien. The doctrine of these cases has been apparently modified in the later cases of *Whiting v. Quackenbush*, 54, Cal. 306; *Williams v. McDonald*, 58 Cal. 527; *Brady v. Page*, 59 Cal. 52; *Williams v. Savings & Loan Soc.*, 97 Cal. 122, 31 Pac. 908,—but the modification is based upon the view of the court, expressed in each case, that the diagram is sufficient, because the court must take judicial notice of the streets of San Francisco, their relative locations, and the directions in which they extend. St. 1858, pp. 52, 56. But in the case at bar the description cannot be held sufficient even upon this ground. In the assessment the land is

described as "all lot 6, block D and E—16 and 17," and upon the diagram a lot is numbered 6. This, appellant contends, is sufficient, because it contains the number of the lot according to the official map of the city of Sacramento. There is, however, nothing in the record to show this; the assessment does not refer to any official map; we cannot take judicial notice that there is such a map; and, what is of still more consequence, the property owner is not chargeable with knowledge of it. We conclude, then, that the recorded diagram and assessment contain no sufficient description of the land to be charged, and that the omission of the indicating arrow forms a material variance between the original and recorded diagram. The judgment is affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

(108 Cal. 31)

In re HOWARD. (Cr. 37.)

(Supreme Court of California. July 8, 1895.)

CRIMINAL LAW—PROVING EXCEPTION.

Where the commissioner's report in a proceeding under Pen. Code, § 1174, to prove an exception, presents a conflict of testimony as to whether the language complained of was in fact used by the prosecuting attorney, the action of the trial court in striking it from the bill of exceptions must be sustained.

In bank. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

John E. Howard was convicted of murder, and moves to prove an exception. Application denied.

Chas. G. Lamberson and H. C. Lillie, for appellant. Atty. Gen. Fitzgerald, for respondent.

GAROUTTE, J. This is an original proceeding, brought under section 1174 of the Penal Code, for the purpose of proving an exception. According to the petition, the defendant, Howard, was on trial, charged with murder, and during the closing argument the assistant district attorney used certain language to the jury, which, it is claimed, was unjustified by the evidence, and seriously objectionable to defendant's rights, and to which objection was made at the time, and an exception noted. This alleged language, objection thereto, and exception, were incorporated into defendant's proposed bill of exceptions to be used upon appeal, and the bill so presented to the judge for settlement. But the judge refused to settle the same, as presented, and struck therefrom the purported language of the prosecuting officer, and the exception thereto, upon the ground that no such language was used by the attorney during the argument, and thereupon settled the bill. Upon the filing of the present petition this court ordered a reference to a commissioner to take evidence as to the truth of the allega-

tions of the petition bearing upon the language claimed to have been used. The commissioner took the evidence, and has reported the same in full to this court, without conclusions as to the ultimate fact. Upon examination of the evidence placed before us, there appears to be a square and irreconcilable conflict as to whether or not the language set out in the petition was used by the prosecuting officer in his address to the jury. Under such circumstances the action of the trial court in settling the bill of exceptions as it was settled must be sustained. For the foregoing reasons, petitioner's application is denied.

We concur: McFARLAND, J.; HARRISON, J.; HENSHAW, J.

(107 Cal. 610)

HULFORD et al. v. NEALE. (No. 15,808.)
(Supreme Court of California. June 29, 1895.)

WAREHOUSEMEN—CHARGES.

Plaintiffs were warehousemen, and stored wheat according to a custom whereby they charged more for the first month it was in storage than the succeeding months, the difference being for "carting" the wheat. Plaintiffs sold out to defendant, and the latter agreed to collect, without charge, plaintiffs' claims for storage. Held that, in determining the amount due, the extra charge for the first month belonged to plaintiffs, and should not be distributed pro rata over the entire time the wheat was stored.

Department 2. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by E. W. Hulford and another against A. S. Neale to recover moneys collected for plaintiffs. Plaintiffs had judgment, and defendant appeals. Affirmed.

John H. Dickinson, for appellant. T. C. Coogan, for respondents.

McFARLAND, J. This action was brought to recover certain moneys alleged to have been collected and received by defendant from divers persons for and on account of plaintiffs. Judgment was rendered for plaintiffs in the sum of \$2,038.65. Defendant appeals from the judgment and from an order denying a motion for a new trial.

The plaintiffs were conducting a warehouse business, and in February, 1893, they agreed to sell the business, including the good will, leases for warehouses, office furniture, and certain other personal property used in the business, to the defendant. The transaction was completed and possession given to defendant on March 1, 1893. At that time there were large quantities of grain and general merchandise stored in the warehouses, upon which money was due to plaintiffs for storage. This grain and merchandise had been taken by plaintiffs under the system called "season storage"; that is, a certain sum per ton was charged for the first month's storage, and a smaller sum for succeeding months,

until a certain amount agreed upon had accrued, after which there was no further charge until the end of the "season," which was the 1st day of the following June, and the owner of the property stored had the right to allow it to remain in the warehouse until said 1st of June. For instance, if the owner was to pay 50 cents per ton for the first month, and 25 cents for the succeeding months, until the whole should amount to \$1.50 per ton, then, after the expiration of five months, he could have his property remain in the warehouse until June 1st following, without further charge. At the time defendant took possession,—on March 1st,—the storage on the property which had been stored with plaintiffs was due, and they had a lien upon it for said storage; and in the written contract between the parties it was agreed as follows: "Said party of the second part [defendant] does also hereby agree that he will collect, without making any charge therefor, all claims and liens that the said parties of the first part [plaintiffs] have or hold against any property now stored at said warehouses, and deliver the amount so collected to them from time to time, promptly, upon the collection thereof, said claims and liens in all cases to be collected before the delivery of said property to the owners thereof." The court found that of these claims and liens defendant did collect the sum of \$4,053.74, and that he had paid plaintiffs \$1,588.90, and no more; and these findings are clearly supported by the evidence. Under these findings the plaintiffs would have been entitled to judgment for \$2,464.84; but the court also found that said grain and merchandise remained for a time, and "occupied certain space in said warehouses, and was taken care of by defendant, and he performed work in delivering the same," and for this defendant was allowed \$428.19, which reduced the amount of the judgment to \$2,038.65. The correctness of this last finding need not be inquired into, as it was to defendant's advantage.

The main contention of appellant is directed to the point that certain charges for "cartage" were erroneously allowed respondents. It seems that under the season storage system the larger charge is made for the first month on account of the cartage, or expense of hauling the goods to the warehouse. Upon this subject there was some testimony, which was not very clear, and calculations somewhat difficult to follow; but it appears that the cartage was merely represented in the charge for storage for the first month, and that no separate charge was made for it. Therefore, no matter how it be considered,—whether charged as cartage or as storage,—it was part of the "claims and liens" which respondents had against the stored goods, and which appellant had agreed "to collect without making any charge therefor," and to pay over promptly to respondents. The contract clearly contemplates that the goods were to

remain in the warehouses at least for a reasonable time, and that appellant was to collect the amounts due respondents "before the delivery of said property to the owners thereof." Having collected moneys which included the cartage, there is no reason why he should not have paid them to respondents. We are unable to see any error in the record; at least, as against appellant. The judgment and order appealed from are affirmed.

I concur: HENSHAW, J.

TEMPLE, J. (concurring). I concur in the judgment, but I do not understand the controversy exactly as it is stated by Mr. Justice McFARLAND. The court practically divided the storage money between the parties in proportion to the time the goods remained in storage before or after the assignment, without reference to the amount earned, computed by the warehouse custom. For instance, if the goods had been stored five months when the assignment was made, and therefore the full amount for storage had accrued, still if, after the assignment, they had remained two months longer, and no further charge could be made for such additional time, the court gave to plaintiffs only five-sevenths of the amount and to the defendant two-sevenths, after deducting cost of cartage, which is included in the charge for the first month. Defendant contends that he would be entitled, in the supposed case, to two-sevenths of the whole amount, since all is charged as storage. I think in this view the court properly deducted the charge for cartage before computing defendant's pro rata charge. I therefore concur in the judgment.

(107 Cal. 659)

RAMISH v. KIRSCHBRAUN et al. (No. 19,481.)

(Supreme Court of California. July 8, 1895.)

SALE—DELIVERY—BREACH OF CONTRACT—FAILURE TO DELIVER CONSIGNMENT PROMPTLY—HARMLESS ERROR—INSTRUCTIONS.

1. Where a bill of lading was sent to a bank to be delivered to the consignee on payment of the purchase price of the goods consigned, there was no transfer of title until the bill was received by the bank for delivery.

2. In an action by the consignee against the consignor for failure to deliver a consignment of eggs, whereby plaintiff was damaged by a decline in the market, it was proper to submit to the jury the question of defendant's negligence in failing to promptly forward a bill of lading, where it appeared that it was detained by defendant, and though, if promptly forwarded, it could have reached plaintiff at the same time as the consignment, it did not.

3. The fact that the consignee, by agreement with the carrier, the latter being protected by a bond, was allowed to take freight in advance of presentation of the bill of lading, did not make it incumbent on him to obtain possession of a consignment, where the agreement with the consignor was that the bill should be delivered on payment of the purchase price, and the consignor negligently detained the bill.

4. Error in admitting evidence of market value on a day not in issue is not prejudicial

where it was the same as the day in controversy.

5. In an action for failure to promptly deliver a consignment, plaintiff admitted that the goods were ready for delivery to him on a certain date, though he did not take possession of them until later. Evidence of the market value after the goods were ready for delivery was excluded. *Held*, that a charge that plaintiff should recover the difference in price on the day they should have been delivered and on the day they were "actually delivered" could not have misled the jury on the computation of damages.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by A. Ramish against Kirschbraun & Sons for breach of contract. Judgment for plaintiff, and defendants appeal. Affirmed.

Will D. Gould, for appellants. Finlayson & Finlayson, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. The facts of the case will be found stated in the opinions of this court rendered upon former appeals. 90 Cal. 581, 27 Pac. 433, and 98 Cal. 676, 33 Pac. 780.

The evidence warranted the jury in believing, as from the verdict it will be presumed it did believe, that the car load of eggs was sold by defendants to plaintiff, to be delivered to the latter in Los Angeles in due course of freight transportation from either Omaha, Neb., or some point of shipment in Iowa. By agreement, also the bill of lading made to defendants as consignees, and by them indorsed to plaintiff, was to be sent with a sight draft to the Southern California National Bank at Los Angeles, by which it was to be delivered to plaintiff upon his payment there of the price of the eggs. Under these circumstances, there was no transfer of the title to the eggs before the bill of lading was received at the bank for delivery. *Reynolds v. Scott* (Cal.) 4 Pac. 346; *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513; *Kelsea v. Manufacturing Co.* (N. J. Err. & App.) 26 Atl. 907, 22 L. R. A. 415, and notes; *Dows v. Bank*, 91 U. S. 618; *Brandt v. Bowlby*, 2 Barn. & Adol. 932; *Newcomb v. Railroad Corp.*, 115 Mass. 230. The eggs arrived at 7 p. m. of July 9th, and would then have been delivered to plaintiff upon presentation of the bill of lading, though, in ordinary course of business, delivery would have been made the following day; but the bill of lading had not arrived. There had been negligent delay by defendants in mailing it from Omaha. Forwarded from the shipping point in Iowa it reached them in Omaha upon July 3d, but too late to be remailed on that day with the sight draft, which defendants first discounted at a local bank. It could have been mailed at that time with an order for payment merely. The following day was a holiday. Upon the next the matter was neglected, and upon July 6th the bill, with the draft, was forwarded. Defendants contend that, despite their failure to forward the bill as expeditiously as they might; nevertheless they put it in the post

office upon July 6th, when, in the ordinary course of the mail (four days between Omaha and Los Angeles), it should have reached the bank, and, constructively, plaintiff, upon July 10th, the day when the car was ready for delivery, and that therefore they had used due diligence. But, considering the nature of the goods shipped, the market conditions, the original delay of defendants, the fact that defendants' agent,—the bank,—if it received the bill upon July 12th, yet, seemingly through dereliction, did not have it ready for delivery until the 14th, sufficient was shown to warrant the submission of the question of negligence to the jury under proper instructions. And the jury was properly instructed. The instructions, the refusal to give which is complained of, were one and all embraced in those actually given, in so far as they were proper to give at all. The fact that, under agreement with the railroad, the plaintiff, who was a truckman, was allowed to take freight of consignees in advance of presentation of the way bill,—the railroad being protected by a bond,—did not make it incumbent on him so to obtain possession of the eggs. He was under no obligation to put himself or his bondsmen in jeopardy in the matter, and it was his right to stand upon the terms of his contract. By those terms, delivery of the waybill was to be made to him through the bank upon his payment of the price, and it was the understanding of the parties that the delivery of the eggs should be had in the manner indicated.

Of the exceptions to the instructions given, one only merits special consideration. The court instructed the jury: "In estimating the damages, you will first ascertain what day the eggs should have been delivered, according to the terms of the contract, and the value of the eggs upon that day; and you will then ascertain what day the eggs were actually delivered to and received by the plaintiff, and the value of the eggs upon that day. If the value of the eggs upon the day last mentioned was the same as or greater than upon the day when they should have been delivered according to the contract, then the plaintiff has sustained no damage, and your verdict should be accordingly. If, however, you find the value of the eggs upon the last-mentioned day, namely, the day when they were actually delivered and received, was less than the value of eggs upon the day when they should have been delivered according to the terms of the contract, then the measure of damages will be the difference. By 'value of eggs' is meant the market value of eggs." The evidence showed that plaintiff took the waybill and manual possession of the eggs upon July 18th, but no evidence was admitted as to the market price of eggs upon that date. The evidence was confined to the days between the 9th and 14th of July, both included. Nor, if it be conceded that

evidence of the value upon July 9th was inadmissible under the proof that in the ordinary course of business delivery would have been made on the 10th, still no prejudicial error can be predicated thereon, since all of the witnesses agree that the value remained the same on the 9th and 10th. The delivery claimed by defendants upon July 12th, and that pleaded by plaintiffs upon July 14th, both rest upon the proposition of law that the moment when defendant's agent—the bank—had the waybill ready to be turned over to plaintiff, then, so far as defendants were concerned, delivery by them had been made, and for any further delay they were not responsible. This proposition is sound, and it was more than once declared to the jury by instructions. The contention of defendants, supported by the bank's evidence, is that the bank received and held the waybill for delivery on July 12th, and it is therefore claimed that this date limits defendants' liability. Upon the part of plaintiff it is claimed, and the evidence is not disputed, that the bank, upon the 12th and 13th of July, in response to demand, declared that it did not have the bill, and that upon the 14th only was plaintiff notified of their readiness to deliver it. The determination of the time under these circumstances was left, and properly left, to the jury. The error of the instruction, and the injury worked by it, defendants claim, consist in this, that it uses the phrase "actual delivery," as contradistinguished from the constructive delivery of the 12th or 14th, and founds damage upon such actual delivery, and that the jury was therefore misled into adopting the lower market price obtaining upon July 18th, instead of the higher price of July 12th or 14th, as the basis of their computation of damages. But plaintiff pleaded delivery to himself upon July 14th; admitted the delivery on that date by telegram to defendants to that effect; the court fully and repeatedly instructed the jury that defendants' liability for further damage ceased immediately when the waybill was ready for transfer; it is admitted by plaintiff that this was upon the 14th; the pleadings have not been amended, and it has become the law of the case that evidence of damage should not go to a date later than July 14th; and, finally, as has been said, testimony of the varying market values was not admitted as to any date subsequent to the 14th. Under these circumstances, it cannot be held that the jury could have been misled by taking into their computation the value of eggs at a date upon which no evidence was given of that value. Moreover, the verdict rendered was not for an amount in excess of what the evidence reasonably supported. The judgment and order are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

LOWE et al. v. WOODS et al. (No. 19,494.)
(Supreme Court of California. July 3, 1895.)

Commissioners' decision. Department 2.
Appeal from superior court, San Luis Obispo
county; V. A. Gregg, Judge.

Action by Dawson Lowe and others against
E. L. Woods and others to enforce a livery
stable keeper's lien. Defendants had judg-
ment, and plaintiffs appeal. Affirmed.

Wilcoxon & Bouldin, for appellants. F.
Adams and F. A. Dorn, for respondents.

SEARLS, C. This action is brought by liv-
ery and feed stable keepers to enforce a lien
upon a horse for the feeding of the animal.
The plaintiffs were consulted at the trial,
and appeal from the judgment rendered there-
on. The case was here once before upon an
appeal from a judgment in favor of the plain-
tiffs, and a reversal was had. The decision
in that case stated the facts and the law ap-
plicable to the case. The bill of exceptions
upon which this appeal is based does not
vary in any important particular from the
showing on such former appeal. The evi-
dence of James Guthrie, one of the plaintiffs
on the last trial, was in part as follows:
"Woods told me, at the time he left the horse
with us, that he belonged to Miss Adams,
and the conditions under which he held the
horse under the contract with Edith Adams.
I never spoke to Miss Adams, nor wrote her
a letter." The evidence at the last trial being
substantially in accord with the findings re-
sulting from the former trial, no practical
good can result from a restatement of the
facts which it tended to prove, or the law ap-
plicable thereto. The judgment appealed
from should be affirmed upon the facts and
law laid down on such former appeal, report-
ed in 100 Cal. 408, 34 Pac. 959.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in
the foregoing opinion, the judgment appealed
from is affirmed upon the facts and law laid
down on such former appeal, reported in 100
Cal. 408, 34 Pac. 959.

(107 Cal. 629)

KNOWLES v. SANDERCOCK et al. (No.
15,790.)¹

(Supreme Court of California. July 2, 1895.)
CORPORATE STOCKHOLDERS—INDIVIDUAL LIABILITY
—EVIDENCE—STOCK AND TRANSFER BOOK—
ULTRA VIRES ACTS.

1. A stock-certificate book of a corporation,
with entries of the number of certificates, num-
ber of shares, dates of issue, and names of
holders, designed for the stock and transfer
book, and apparently corresponding with the re-
quirements of Code, § 378, requiring corpora-
tions to "keep a book to be known as the 'Stock
and Transfer Book,'" though not so named, is
competent to show the amount of stock out-
standing.

¹ Rehearing denied.

2. The stock-certificate book, stock ledger,
and stock journal, coupled with the testimony
of the secretary of a corporation that they con-
tained the names of all the stockholders, are suf-
ficient, in an action by strangers against the
stockholders, to show who the stock subscribers
are, it not appearing that the corporation had
any other book showing who subscribed.

3. In an action by creditors against stock-
holders of a corporation to enforce their liabil-
ities as such, a complaint which sets out the orig-
inal indebtedness, and also avers the execution
of a note by the corporation for the same, is a
correct pleading, under the Code.

4. Money paid by stockholders to the presi-
dent of a corporation to discharge their propor-
tionate liability for the entire indebtedness, if ap-
plied to the payment of a corporate debt to the
extent of the proportionate shares of such stock-
holders, does not relieve other stockholders of
their shares of the indebtedness.

5. When interest is added to a claim against
a corporation, and a note given for the amount,
it becomes a debt of the stockholders, though
there was no agreement in writing to pay the
interest.

6. A creditor of a corporation may recover
against the stockholders their proportionate
share of his claim, though the creditor is also a
stockholder.

7. As the liability of a stockholder in a cor-
poration is primary, in the sense that he is not
a surety, he cannot defend an action against him
by a creditor of the corporation on the ground
that the corporation had given a mortgage to se-
cure the debt, and that this is unrecorded.

8. Under Const. art. 12, § 9, which forbids
a corporation to engage in any business other
than that which is expressly authorized in its
charter, a subscription, by a corporation formed
to manufacture and deal in furniture, for stock
in a hotel company, is ultra vires.

Department 2. Appeal from superior court
of the city and county of San Francisco;
Charles W. Slack, Judge.

Action by J. N. Knowles against William
Sandercock and others. From a judgment
for plaintiff, defendants appeal. Reversed as
to the defendant the California Furniture
Manufacturing Company, and affirmed as to
other defendants.

Edward P. Cole and Ernest Graves, for ap-
pellants. Smith & Pomeroy and Carter P.
Pomeroy, for respondent.

TEMPLE, J. This action was brought by
the assignee of numerous creditors of the
California Southern Hotel Company, a corpo-
ration, against certain stockholders, to en-
force their liability, as stockholders, for the
debts of the corporation. The complaint con-
tained 34 separate causes of action. Prior to
the trial, one appellant, the California Furni-
ture Manufacturing Company, paid its pro-
portion of the indebtedness contained in the
first 30 causes of action, and went to trial
on the last 4. The other appellants—Nathan
Goldtree, Morris Goldtree, Isaac Goldtree,
and J. H. Hollister—contested all causes of
action. Judgment went for plaintiff on all
contested issues. All the appellants moved
for a new trial, which being denied, each ap-
peals from the whole of the several judg-
ment against him, though all the points made
by them on this appeal have reference to the
last four causes of action. In each separate

cause of action it is alleged that 690 shares of the capital stock of the California Southern Hotel Company, and no more, had been continuously subscribed for during all the times mentioned in the complaint, and that the appellants Goldtree had continuously been the owners of 100 shares; Hollister, of 20 shares; and the California Furniture Manufacturing Company, of 20 shares. The court found that 753 shares had been continuously subscribed for, and that appellants had during such time been the owners of the number of shares charged.

Appellants Goldtree and Hollister attack the finding as to the number of shares subscribed. It was incumbent upon the plaintiff to prove the whole amount of stock outstanding, to enable the court to determine the liability. For that purpose, plaintiff offered in evidence the stock-certificate book, to which the defendants objected on the ground that it was immaterial, irrelevant, and incompetent, and because it was not properly kept, and was not one of the books provided for by the Civil Code. The objection being overruled, defendants reserved an exception, and the book was received. The entries were in form as follows: "Certificate No. 1. No. of shares, 10. Issued September 25, 1888, to William Sandercock. Not canceled." The stock ledger and stock journal were also put in evidence, and the secretary of the corporation testified that they contained the names of all the stockholders; also that no other persons appear on the books of the company as having owned stock during any of the times mentioned in the complaint. It is contended that this evidence is not only incompetent, but that, admitting its competency, it is insufficient. It is claimed that it is incompetent because the books are not corporation books required to be kept by the provisions of sections 377 and 378 of the Civil Code, and are not quasi public records, which by any rule of law are made binding on the stockholders. The evidence, it is said, is not sufficient because there may be other subscribers for stock besides those whose names appear in these books, and the liability of stockholders is made to depend upon the number of shares subscribed for. The burden, it is said, was on the plaintiff, not only to show that there were certain stockholders, which, at the most, is all the books introduced show, but also to prove that no more shares had been subscribed for. Section 377 of the Civil Code requires all corporations for profit to keep a journal of all meetings of the directors, members, or stockholders. Section 378 prescribes that, in addition, such corporations shall "keep a book to be known as the 'Stock and Transfer Book,' in which must be kept a record of all stock; the names of the stockholders or members, alphabetically arranged; installments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale or transfer of stock made,

the date thereof, and by and to whom; and all such other records as the by-laws prescribe." The book introduced seems to have been designed for the stock and transfer book. It is true that its contents are not shown here, further than is above stated. So far as its contents are set out, it corresponds with what is required by the Code. The fact that the book is not named as the Code requires is not material. The Code does not require that there shall be a subscription book, nor direct how subscriptions shall be made. It does not appear that this corporation had any other book showing who the subscribers were. The suit is by strangers to the corporation against its stockholders. I think these books, together with the testimony, sufficient. *Evans v. Baily*, 66 Cal. 112, 4 Pac. 1089.

The thirty-first cause of action is alleged to be "that on the 19th day of November, 1888, Ignatz Steinhart, at the special instance and request of said California Southern Hotel Company, loaned to the said California Southern Hotel Company the sum of \$25,000, which sum the California Southern Hotel Company then and there promised to pay to said Ignatz Steinhart two years after the said 19th day of November, 1888, with interest on same at the rate of seven per cent. per annum until paid." The complaint then proceeds to state that, to secure the same, the corporation gave its promissory note, which it set out. It is also averred that Steinhart assigned the same to plaintiff. The objections urged to the judgment on this cause of action are (1) that the suit is brought on the note, and not on the contract of loan, which, it is said, is the primary indebtedness, for which only the stockholders are liable; (2) that the original indebtedness has not been assigned to plaintiff; and (3) that the debt had been paid.

1. The complaint, as appears from the above, sets out the original indebtedness, and also avers the execution of the note of the corporation. I think this is correct pleading, under the Code, and, if the allegations in regard to the note are surplusage, they do not harm. The complaint is not objectionable on the ground that it does not show when the debt accrued. Perhaps some confusion has arisen on this subject by expressions to the effect that the stockholder's liability is not that of a surety, but that of an original debtor. These expressions, from the point of view from which they were made, correctly state the law. Nevertheless, the statute expressly makes the stockholder liable for the debts of the corporation, and it would not be good pleading to aver that the stockholder borrowed the money or bought the goods for which the indebtedness arose. The debt to be alleged is the debt of the corporation, and I see no reason why it may not be pleaded in the usual mode. The original contract here, upon which the indebtedness arose, was the note, and the allegation of it is a sufficient

allegation of the debt of the corporation. Whether the presumption would be that the indebtedness was incurred at the time the note was given need not now be decided, for the further fact is alleged, showing when the debt was incurred. The stockholder is, perhaps, not strictly liable on the contract, but on the statute. Still, if the debt of the corporation is created by a written contract, the debt of the corporation must be pleaded in the usual mode. The liability of the stockholder in this case is no more based on a supposed original implied contract than on the note. The proper averment of a debt is against the corporation, not against the stockholder, and the showing that it was incurred while defendant was a stockholder fixes his statutory liability. Suppose, for instance, the note called for interest at 2 per cent. per month. It cannot be doubted that the stockholder would be liable for his proportion of all this interest until the statute of limitation would run in his favor. The debt of a corporation, which is a condition precedent to the liability of the stockholder, must be shown by proper averment.

2. The evidence fully sustains the finding that the note and the original debt, if there is a distinction, passed by assignment to plaintiff.

3. It is contended that the indebtedness to Steinhart had been paid by the corporation. This contention is based on the following facts: When Howard became president of the hotel corporation, he found it very much in debt. The stockholders were unwilling to pay assessments, or to make voluntary contributions. Thereupon he was advised to have the debts assigned, and bring a suit to enforce the individual liability of the stockholders. He issued a circular to the stockholders, stating the condition. Thereupon some stockholders voluntarily paid him the amount of their supposed proportionate liability and took receipts in the following form: "San Francisco, November 17, 1890. Received of [name of stockholder] ——— dollars, the sum being his assumed proportion of the indebtedness of the California Southern Hotel Company, which indebtedness is considered equal to \$100 per share on the issued shares of said hotel company. John L. Howard, President." Howard, when on the stand as a witness, said, "The amounts paid in by the stockholders were for the benefit of the creditors of the stockholders, as against their proportion of the entire indebtedness." There was no assessment or call in pursuance of which this money was paid, and it is manifest that the stockholders who paid intended that the payment should protect them from their liability in the proposed litigation. But as their liability was not joint, and as each stockholder owed a share of each debt, the conditions under which the money was paid to Howard did not authorize him to pay it out in satisfaction of any one debt which would constitute an inconsiderable proportion of the

entire indebtedness. Nor did Howard pretend to pay the note for the corporation. He says he borrowed the money and took the note up for the West Coast Land Company, intending when he did so to assign it to plaintiff for the purpose of causing suit to be brought on it. Therefore, it was not intended as a payment of the note, and it was not a transaction of the hotel company. The money was not paid to the corporation, and was not in its possession. It was not intended to be used to pay the debts of the corporation, but to discharge the proportionate liability of the stockholders who paid it. It was held as the money of the stockholders who paid it, and was not the money of the corporation. If applied to the payment of the debt, to the extent of the proportionate shares of the stockholders who paid, that would not help appellants, for their shares of the indebtedness would be unaffected by such an application of it.

The thirty-second cause of action is for \$33,069.81, due to Goodall, Perkins & Co., for which the corporation gave its note. The allegations of the complaint in regard to it are similar to those in regard to the cause of action set out in the thirty-first cause of action, and the objections to the pleading, so far as they are the same, need not be further noticed.

It is said that the claim evidenced by the note contains some charges for interest which cannot be recovered from the defendants, because the agreement to pay is not in writing. If so, when the interest became a legal debt against the corporation, by its note, it became a debt of the stockholders. The assignment of the note carried with it the original debt.

The objection is made that suit cannot be maintained upon this claim because it was a debt due to Goodall, who was also a stockholder, and it is claimed that the statute was not intended for the benefit of a stockholder who is also a creditor. The objection is founded upon certain decisions made by the courts of New York in cases growing out of statutes which made the stockholders liable jointly and severally for all the debts of the corporation. It was held that this put the corporators on the footing of partners, and, as a partner cannot sue at law for a debt due him from the partnership, they could not, under such a law, bring suit against a stockholder. Our law is entirely different, and the absurd consequences indicated cannot result. If each stockholder is liable only for his proportionate share of each debt, and if, having paid it, he becomes a creditor of the corporation, still he can recover nothing from a stockholder who has already paid his share of the debt.

The thirty-third cause of action is for the balance of an account of \$3,575.09 for moneys lent, and for moneys paid, laid out, and expended, for the use of the hotel corporation, by Goodall, Perkins & Co. The only serious

question in regard to this count is that it includes \$225, interest which had accrued on the money lent, paid out, and expended by Goodall, Perkins & Co., and there is no mention of interest in the complaint. The count, as before stated, is for the balance of an account, and ought to have specified the nature of the items composing it. This cannot, however, be a very serious matter. It is only by force of precedents and established practice that such pleading is construed to state a cause of action at all. It can hardly be said that such a complaint states the facts constituting a cause of action. Defendant can demand a bill of particulars, and only by so doing can he really learn the facts. But all the items indicated bear interest by virtue of the statute. The complaint does show an indebtedness on the part of the corporation for the interest, and also that defendants, as stockholders, are liable for their proportion thereof.

The thirty-fourth cause of action is for \$5,668.17, balance of an account for moneys lent, and for moneys paid, laid out, and expended, by the First National Bank of San Luis Obispo for the hotel corporation. It is contended that this debt had been paid by the corporation, or at least had been secured by a mortgage which the creditor still holds, and which is unenclosed. The hotel corporation executed to the bank a mortgage for the sum of \$15,000, which the witnesses testified was intended as collateral security for what the corporation then owed the bank, and for further advances. The bank, however, gave the corporation credit on its books for \$15,000, and deducting the debt showed a balance of \$9,529.09 cash on deposit to the credit of the hotel corporation. It is claimed that this amounted to payment. There was no agreement that it should be considered payment, but, had there been, it would have made no difference. The debt was not paid, but, at most, renewed, and no doubt the stockholder can be made to pay his proportion of it. The note was due, but the mortgage had not been foreclosed. This fact constitutes no defense for defendants. They are not affected by the fact that because of the mortgage only an action to foreclose could be brought against the corporation. The mortgage only affects the remedy against the mortgagor,—the corporation. The liability of the stockholder, as has already been said, is primary, in the sense that he is not a surety. He is not injured, nor is he benefited, by the fact that the corporation has given security. *Bank v. Hill*, 50 Cal. 107.

It is contended by the California Furniture Manufacturing Company that the subscription of that corporation for 20 shares of the stock of the hotel corporation was ultra vires, in the absolute sense, and is void. It was admitted that on the 26th day of October, 1888, the hotel corporation issued to the appellant corporation 20 shares of stock, and received \$2,000 therefor, and that the stock is still retained by appellant. The articles of the hotel

corporation declare "that the purposes for which it is formed are the building, owning, and operating an hotel in the city of San Luis Obispo." The articles of the defendant corporation declare that the "objects for which this corporation is formed are to manufacture, import, buy and sell, furniture and upholstery, and to carry on said business in all its branches, including the dealing in all materials appertaining to said business." It will be seen that the defendant corporation is not authorized to deal in stocks, or to become a stockholder in other corporations. The general rule is, undoubtedly, that a corporation cannot own corporate stock, unless expressly authorized. Indeed, it has been said that statutes in regard to the formation of corporations do not authorize any but natural persons to become corporators. *Mor. Priv. Corp.* § 433. "A private corporation has no implied authority to invest in shares of another private corporation. If this were so, it might, by an easy process, transfer its resources to another." *Spell. Corp.* § 172. See, also, *Tayl. Corp.* § 267; *Brice, Ultra Vires*, 133; *Pearson v. Railroad Corp.*, 62 N. H. 537; *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 18 N. E. 486; *Central R. Co. of New Jersey v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Hotel Co. v. Schram*, 6 Wash. 134, 32 Pac. 1002; *Hazlehurst v. Railroad Co.*, 43 Ga. 57; *People v. Chicago Gas-Trust Co.*, 130 Ill. 268, 22 N. E. 798; *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43. In this state a corporation is forbidden to engage in any business other than is expressly authorized in its charter, or the law under which it is organized. *Const. art. 12, § 9*. To own stock in another corporation is to become interested in the business of such corporation. A stockholder is engaged in the business of the corporation, within the meaning of this section of the constitution. He has a voice in the management; may, in fact, control such business; and is, of course, liable for the debts incurred while he is a stockholder. The above provision makes all acts which are wholly without the business of the corporation unlawful. The only reply made by respondent to this point is that the subscription is sustained by *Kennedy v. Bank*, 101 Cal. 495, 35 Pac. 1039. In this, I think, counsel is mistaken. It was there held that the bank rightfully invested its funds in the shares of other corporations. It has been held that banks and other corporations whose business it is to loan money may take stock in other corporations, as collateral, and, in the process of realizing their securities, may become the owners of them. Also, in some cases, such institutions may invest temporarily surplus funds in such securities. It has, however, been held, as to such corporations, that they cannot permanently invest in the stock of other corporations, unless authorized by their articles. The corporation defendant has no funds to invest. Its capital is for the purpose of carrying on its business, no part of

which consists in getting interest on money, or making a profit in outside investments. Its sole purpose is to earn a profit for its stockholders through the business to be conducted by itself as specified in its articles. Its subscription, therefore, was ultra vires, and void. The judgment and order are affirmed, as to all the appellants except the California Furniture Manufacturing Company, and as to it the judgment and order are reversed.

We concur: MCFARLAND, J.; HENSHAW, J.

(108 Cal. 54)

PEOPLE v. DENBY. (Cr. 18.)

(Supreme Court of California. July 11, 1895.)

VAGRANCY—RESISTING ARREST—CRIMINATING EVIDENCE—CROSS-EXAMINATION.

1. One who asked assistance on a single occasion is not guilty of vagrancy within Pen. Code, § 647, providing that a healthy person soliciting alms as a business is guilty of vagrancy.

2. One innocent of an offense is justified in resisting arrest by a private citizen acting under authority of Pen. Code, § 837, allowing a private person to arrest another for a public offense committed or attempted in his presence.

3. On a prosecution for vagrancy, the defendant cannot be required to testify as to whether he had at another time and place passed under an assumed name.

4. A witness cannot be required to testify on cross-examination as to circumstances which have no connection with those to which he testified in chief.

Department 2. Appeal from superior court, Orange county; J. W. Towner, Judge.

William Denby was convicted of assault with a deadly weapon. From the judgment, and an order denying a new trial, defendant appeals. Reversed.

F. O. Daniel, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. Defendant was convicted of an assault with a deadly weapon, and appeals from the judgment, and from an order refusing a new trial.

The prosecuting witness testified that he saw defendant soliciting alms from the passengers on the cars. Witness saw him through the windows, but did not hear what he said. He, however, asked witness for some money; when witness arrested him, and took him to the depot, as he says, "quite a length back south from where I arrested him. I started up town with him to go to jail. I got out across the track, and he turned on me, and struck me in the face with his fist. I knocked him down. He fell on his knees, and I followed him up till he saw he had enough of it, and then he promised he would go along with me. But when we got near the jail he turned on me with a knife, and made a desperate thrust at me with the knife, which I avoided by jumping away from him, and next by throwing up my hand and striking his arm. Then I

knocked him down. * * * At that time he made a desperate effort to get away from me and said, 'I am going to cut you.' The witness held the defendant by the collar and sleeve. Witness was a special agent for the California Southern Railway Company, and had no other authority. It does not appear that he had ever seen the defendant before, nor was there any evidence tending to show that defendant had solicited alms at any other time, or that he had been guilty of any other offense.

The defendant was a witness in his own behalf, and gave a very different statement of the affair. He says he had the knife in his hand when he was arrested. He was paring his nails. He kept the knife all the way along. That he thought at first the prosecuting witness was an officer, and on the way discovered that he was not. He then declined to go with him, and was knocked down and beaten. He denies any attempt to strike the prosecuting witness with the knife, and says he did not intend to cut him with it. In his own behalf, the witness only testified to the circumstances of the arrest and the alleged assault. On cross-examination he was asked whether he was in Los Angeles in 1893. The question was objected to as not proper cross-examination, but the objection was overruled, defendant excepting. He was then asked, "Under what name did you go there?" The question was excepted to as not proper cross-examination, and as incompetent, irrelevant, and immaterial. The objection was overruled, and defendant excepted. The defendant then declined to answer on the ground that the answer would tend to degrade his character. The court nevertheless required him to answer, saying that a person may have a justifiable reason for passing under another name when no reason for so doing appeared. An exception was taken to the ruling, and the defendant answered "Thomas Swift." These rulings were manifestly erroneous, but the attorney general claims that the evidence was harmless. I do not think so. If it be conceded that one may have good reason for passing under another name, it nevertheless tends to cast suspicion upon one who does so. The district attorney evidently thought so, or he would not have insisted upon the testimony. It had no place in the case, and if it were relevant testimony it would have been improper to educe it from the defendant under the circumstances. It had no connection with the matters concerning which he had testified in chief.

The court refused to give the following instruction asked for by the defendant: "The witness Strait, not being a peace officer, had no right to arrest or attempt to arrest the defendant for begging; and the defendant was justified in resisting such arrest, or attempting to free himself from the hold of said witness, after he had arrested him, upon ascertaining that the person so arresting

him was not an officer authorized to make arrest." Upon this subject the court, against the exception of defendant, instructed the jury as follows: "Now the question arises, was this defendant committing an offense for which a private person might arrest him on the occasion of this transaction which has been detailed to you? Section 647 of the Penal Code of the state defines who are vagrants, and, as I understand the testimony given in this case, it is for the offense of vagrancy in some one or other of its forms that this arrest was made, and made by a private person, and made for the public offense of vagrancy." Section 837, Pen. Code, provides: "A private person may arrest another: (1) For the public offense committed or attempted in his presence." Vagrancy is defined in section 647, Pen. Code. In that section various classes of persons are pronounced vagrants, made such by their practices, habits, and mode of life, and dependent sometimes partially upon physical condition. There is nothing in the testimony showing or tending to show that the defendant committed or attempted to commit the public offense of vagrancy in the presence of the prosecuting witness. The statute makes it an offense for a healthy beggar to solicit alms as a business. For one to ask assistance on one occasion does not make him a vagrant. As an employé of the railroad company, the prosecutor had a right to remove the defendant from the cars, and to protect passengers from annoyance by him, using no unnecessary force to that end; but he had no right to arrest him, and defendant was justified in resisting such unlawful detention. I think the instruction ought to have been given as asked.

It would serve no useful purpose to consider other alleged errors. The judgment and order are reversed.

We concur: McFARLAND, J.; HENSHAW, J.

(108 Cal. 46)

SAN DIEGO COUNTY v. SOUTHERN PAC.
R. CO. (No. 18,365.)

(Supreme Court of California. July 11, 1895.)

COLLECTION OF RAILROAD TAXES.

Act April 23, 1880 (St. 1880, p. 136), providing that any county may sue in its own name for delinquent taxes, in so far as it applies to railroads operated in more than one county, is repealed by St. 1883, p. 65, providing that such suits shall be in the name of the people of the state, and otherwise changing the former procedure.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by San Diego County against the Southern Pacific Railroad Company to recover certain taxes. From a judgment for defendant, plaintiff appeals. Affirmed.

Attorney General Fitzgerald, for appellant.
A. B. Hotchkiss, for respondent.

VAN FLEET, J. Action to recover the amount apportioned to the county of San Diego of the taxes assessed by the state board of equalization for the fiscal year ending June 30, 1888, against the franchise, roadway, roadbed, rails, and rolling stock of defendant's railway,—a railroad operated in more than one county. The lower court sustained the demurrer to the complaint, and, plaintiff declining to amend, final judgment was entered against it, from which it appeals.

One of the grounds of demurrer, and the only one that need be noticed, is that plaintiff is not authorized to maintain the action. The action is brought under the supposed authority of an act authorizing the bringing of suits for the collection of delinquent taxes, and prescribing a form of complaint therein, passed April 23, 1880 (St. 1880, p. 136), which provides "that any county, or city and county, where such taxes are delinquent, may sue in its own name for the recovery of delinquent taxes, whether the same be for county, or city and county, and state purposes, or taxes, or either of them." In 1883, however, the legislature passed an act (St. 1883, p. 65) whereby it amended certain sections of the Political Code, and added new sections thereto, wherein it provided a complete and comprehensive scheme or system for the assessment and collection of taxes on the franchise, roadbed, rails, and rolling stock of railroads operated in more than one county of the state, and repealed all acts or parts of acts in conflict with the provisions thus enacted. The provisions thus enacted place railroads of the kind mentioned in a class by themselves, and prescribe a method of assessment and collection of the taxes thereon, quite distinct and apart from that applicable to other taxable property. Section 3670,—one of the new sections there enacted,—provides that: "After the first Monday of February of each year the controller must begin an action in the proper county, in the name of the people of the state of California, to collect the delinquent taxes upon the property assessed by the state board of equalization; such suit must be for the taxes due the state, and all the counties, and cities and counties, upon property assessed by the board of equalization, and appearing delinquent upon the 'duplicate record of apportionment of railway assessments.' The demands for state and county, and city and county, taxes may be united in one action." It is apparent, as contended by respondent, that by this act the legislature intended to revise the whole system for the collection of taxes on property of this kind, and to substitute the new system for the old. The remedy therein provided by suit is specific, and must be held to be exclusive of all others. Being wholly inconsistent with the provisions of the act of April 23, 1880, which authorizes suit in the name of the county, its effect was to supersede or repeal the latter act, in so far as it affects

actions to recover taxes of the character in suit. It follows that the demurrer was properly sustained. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(107 Cal. 667)

GREENBERG v. CALIFORNIA BITUMINOUS ROCK CO. (JOHNSON, Intervener). (No. 19,581.)

(Supreme Court of California. July 3, 1895.)

VENDOR AND PURCHASER—CONTRACT—DEFAULT.

1. Where land was conveyed to a corporation, to be paid for in stock, and no day was fixed for the delivery of the stock, the corporation cannot be put in default until demand for the stock is made.

2. Where plaintiff conveyed property to a corporation, and agreed to accept in payment therefor all the stock of the "corporation of the approximate value of said real estate," he cannot afterwards refuse to accept the stock, and demand, instead, a vendor's lien, on the ground that the stock had no value.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Meyer Greenberg against the California Bituminous Rock Company to foreclose a vendor's lien. C. B. Johnson intervened. Plaintiff dismissed his action. There was judgment that defendant issue to intervener 300 shares of its stock, and intervener appeals. Affirmed.

Van Ness & Redman, for appellant. Graves & Graves, Louis Lamy, and E. P. Cole, for respondent.

HAYNES, C. The plaintiff, and the intervener, and one L. M. Warden purchased certain lands, the title to which was conveyed to plaintiff, who executed a declaration of trust admitting that Johnson owned an undivided one-fourth thereof. These parties sold said lands to the California Bituminous Rock Company, a corporation, and, as alleged by appellant, agreed to accept in payment therefor 1,250 shares of the stock of said corporation, of the approximate value of said real property, which value was alleged to have been, at the time of the sale, \$25,000. Said 1,250 shares was the entire capital stock of the corporation, and was to be issued and delivered in the following proportions: To Warden, Johnson, Greenberg, and Underhill, each 300 shares,—the latter taking one-half of Warden's interest,—and to one Ernest Graves 50 shares. Although the whole legal title was in Greenberg, Warden and Johnson joined in the conveyance to the corporation, and this sale and conveyance was made July 24, 1888. Said stock not having been issued and delivered, Greenberg in January, 1891, commenced an action against the corporation to foreclose an alleged vendor's lien, alleging a sale for the sum of \$25,000, payable on demand, and that no part of the purchase money had been paid. The corporation an-

swered January 29, 1891, the answer consisting of a general denial. Johnson, the appellant here, filed a complaint in intervention, denying that the sale was made for money, and alleging the sale for stock, and the interest of the several persons as hereinbefore stated, and further alleged as follows: "That neither said shares of stock of the approximate value of said lands, nor of any value whatever, nor any shares at all, were ever issued and delivered as agreed, or at all, and said corporation has never paid any consideration whatever to this intervener, nor to the said Greenberg, his said trustee, for said property; nor has any security, note, or other obligation ever been given therefor by said corporation." And his prayer was that, if the terms of sale were as alleged in the complaint, the plaintiff should have the relief prayed for by him in his complaint, but that in case it should be found that the consideration of the sale was as alleged by him, said intervener, then that the decree of foreclosure be rendered in favor of the plaintiff in accordance with the facts alleged by said intervener, and, in either case, that his interest be established and protected. The plaintiff and defendant each answered the complaint in intervention, and, after a general denial, further answered, in effect stating the terms of sale to have been as alleged by the intervener, but further alleging that at the time of sale it was understood and agreed by all the parties thereto that said stock should not be issued and delivered until a certain note for the sum of \$2,937.50, executed by said Greenberg, Warden, and Johnson to one Jack—and which appears to have been given by said parties as part of the original purchase price of said property—should be paid; that said intervener had never paid or offered to pay his proportion of said note, or requested the issuance of the stock to which he was entitled; and further alleging that the corporation defendant was and always had been ready and willing to issue and deliver to the intervener the number of shares of said stock agreed to be issued to him. The court found the terms of the sale to the corporation to have been for stock, as alleged by the intervener; that the stock was not to be issued until said note was paid; that the intervener had never paid or offered to pay his part of said note, but that said note was paid by Greenberg on October 31, 1888, amounting, with interest, to \$3,191.12; that the title and ownership of said lands, ever since said conveyance, has been and still is in said corporation; that said corporation is and always had been ready and willing to issue to the intervener the number of shares to which he is entitled, but that said intervener had never demanded or requested that said stock should be issued or delivered to him,—and upon these findings entered judgment that said corporation, defendant in the action, issue to the intervener 300 shares of said capital stock. No judgment was rendered

in favor of the plaintiff, he having dismissed his action. Said intervener, C. B. Johnson, appeals from said judgment requiring said corporation to issue to him said stock, and from an order denying his motion for a new trial.

Appellant's first specification is that the third finding is not justified by the evidence, because the evidence does not show an agreement that the stock should not be delivered until said note should be paid; but, on the contrary, it is claimed that the evidence shows that the corporation assumed its payment. There was direct oral evidence of the agreement, as stated in the finding; and, as against that statement, there was put in evidence a resolution passed by the corporation, after the conveyance was made, by which it was resolved that the corporation assume the payment of said note as part of the consideration to be paid for the land. The resolution, which was adopted after the agreement of sale and conveyance was made, did not affect the correctness of the finding. If it had any effect upon any issue in the case, the additional fact should have been found that the payment of the note was afterwards assumed by the corporation. The only bearing the agreement concerning the payment of said note has in this case relates to the time at which the stock of the corporation should be issued and delivered to the intervener. If, as the court found, the stock was not to be delivered until the note was paid by the grantors, who were also the makers of the note, the time of delivery was dependent upon their act, and not upon any act of the corporation; and in such case the corporation could not be put in default for the nondelivery of the stock until payment of the note, and a demand for the delivery of the stock, accompanied by notice of such payment, had been made; while if the contention of appellant is sound, viz. that the agreement was that the note should be paid by the corporation, no day was fixed for the delivery of the stock, and in such case a demand for its delivery was necessary. Upon this point the rule is stated in *Parsons on Contracts* (volume 2, 8th Ed. p. *681) as follows: "If the contract specifies no time, the law implies that it shall be performed within a reasonable time, and will not permit this implication to be rebutted by extrinsic testimony going to fix a definite term, because this varies the contract. What is a reasonable time is a question of law. And if the contract specify a place in which articles shall be delivered, but not a time, this means that they are deliverable on demand." Since, therefore, a demand was necessary in either case, if the finding assailed was not justified by the evidence, appellant is not prejudiced, because the effect upon him would have been the same if the fact had been found according to his contention.

I have considered this question at greater

length than would appear to be necessary, because of its bearing upon another point made by appellant, which is involved in his exception to the seventh finding, and also in his specifications of errors of law, and which may be broadly stated thus, viz. that the vendors were to receive from the corporation its capital stock, being 1,250 shares, of the value, approximately, of the land, which value is alleged to have been, at the time of the sale, \$25,000. Upon the trial appellant was permitted to show without objection that at the time of the trial, and for about three years theretofore, the stock of the corporation had no value; that the judgment, therefore, gives him nothing (that is, it gives him 300 shares which have no value, while he was entitled to 300 shares of the approximate value of his interest in the land at the time of the sale); and, as it was not in the power of the corporation to give him stock of that value, that he should have had judgment foreclosing his lien for \$8,250 upon an undivided one-fourth of the land conveyed to the corporation. This contention cannot be sustained. By agreeing to accept a definite number of the shares of stock in payment for the land conveyed, the vendors assented that the stock so agreed to be received was, approximately, of the value of the land. The 1,250 shares, which constituted the entire capital stock of the corporation, assuming that the corporation had no other property or assets than the land so conveyed to it, was of the same value as the land, since it represented it. If the corporation then owned other property or assets, the value of the stock exceeded the value of the land so conveyed. If the stock had then been issued and tendered, the vendors could not have questioned its value; and they are in no better situation now. Nor is there any evidence that the stock had depreciated at the time said note was paid, which was about three months after the conveyance. If appellant's contention that the corporation assumed the payment of said note be sound, he had a right to demand and receive his stock at once; since the requirement that the vendors should pay their note given for part of the purchase money of the land before the stock should be delivered could only have been intended to secure the corporation against a vendor's lien. Appellant did not allege in his complaint that he ever demanded his stock, or that the corporation ever refused to deliver it; while the corporation alleged in its answer, and the court found, that no demand for the stock was made by appellant, and that the corporation was at all times ready and willing to issue and deliver it to him. The corporation did not guaranty that the stock should always have a value equal to the then actual or estimated value of the land, or that, if the stock should decline in value, they should be paid in money, or have a vendor's lien as for a money consideration. It certainly could not have been the intention that these

parties should sell their land to the corporation for a definite number of shares of its capital stock, and that they might leave their stock unissued in the hands of the corporation, so that if the corporation was prosperous, and its stock valuable, they would then take it, but if the corporation became involved they might possibly escape liability as stockholders by refusing to take it upon the ground that the stock was not of the value they contracted for, but hold the land as security for its alleged value by a proceeding to foreclose a vendor's lien. What appellant's remedy would have been if he had demanded the stock, and the corporation had refused to issue it, need not be considered, as that question is not involved.

This, however, is a second appeal, and appellant insists that the law of the case, as declared on the former appeal, required the judgment to be for the foreclosure of his vendor's lien, as hereinbefore stated. The issues as well as the evidence were different upon the first trial. The plaintiff, Greenberg, filed an answer consisting of a general denial, and the corporation made default. The judgment there was that the corporation issue to the intervenor 300 shares of its capital stock upon payment by the intervenor of his proportion of said note. As there was no issue upon said note, nor any mention of it in the pleadings, it was held that the intervenor was entitled to judgment against the defendant upon its default as prayed for. See 33 Pac. 192, not reported in California Reports. The judgment having been reversed upon the first appeal, with leave to the intervenor and plaintiff to amend their pleadings, said intervenor amended his complaint, and the defendant then came in and answered, alleging, among other things, that it had always been ready and willing to issue and deliver the stock, but that appellant had never requested it to be issued; and these issues were found in favor of defendant. It is therefore obvious that the former decision could not be the law of the case upon the second trial. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(108 Cal. 92)

BACIGALUPO v. SUPERIOR COURT OF
CITY AND COUNTY OF SAN FRANCISCO,
DEPARTMENT NO.

10. (S. F. 71.)

(Supreme Court of California. July 11, 1895.)

PROBATE OF WILL—REVOCATION—CITATION TO
EXECUTORS.

Code Civ. Proc. § 1328, provides that upon filing a petition for the revocation of probate of a will "a citation shall be issued to the executors," etc. *Held*, that such citation can-

not be issued after the petition has been filed for over a year, though a prior citation had been issued, but was quashed for irregularity.

In bank.

Application by Paola Bacigalupo, as executor, for a writ of review of a certain order of the superior court of the city and county of San Francisco, department, No. 10. Order annulled.

Jos. F. Cavagnaro and Wm. J. McGee, for petitioner. Dunne & McPike, for respondent.

GAROUTTE, J. This is an original proceeding in the nature of an application for a writ of review. One Bacigalupo, the petitioner, was appointed executor of the estate of Bacigalupo, deceased. Some months thereafter, certain of the heirs of the deceased filed a petition in the court where such estate was undergoing administration, praying for a revocation of the probate of the will of said deceased, and a citation was issued thereupon to all parties interested to show cause at a certain time why the prayer of the petition should not be granted. No appearance was ever made in answer to the citation, but upon August 17, 1893, the court of its own motion vacated, set aside, and discharged said citation. Thereafter, and more than one year subsequent to the filing of said petition, said petition was dismissed upon motion of this petitioner. Thereafter, upon affidavit showing cause, the court set aside the order dismissing the petition for revocation, and, after reciting wherein the original citation was defective, ordered an amended citation to issue to all parties interested, ordering them to appear and show cause why the revocation of the probate of said will should not be had; and such citation was thereafter issued as ordered by the court.

The citation involved in this proceeding was issued too late. The contest has lapsed, and the petition and citation based thereon should be dismissed. Section 1328 of the Code of Civil Procedure provides: "Upon filing the petition a citation must be issued to the executors of the will," etc. This section clearly contemplates that such citation should in no degree be used as an instrument for the purpose of delaying the administration of estates, but, rather, that it should issue forthwith upon the filing of the petition for revocation. Again, section 1713 of the said Code provides: "Except as otherwise provided in this title, the provisions of part 2 of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." A citation in its general character is a summons, and under this provision of the Code, giving section 1328 the widest latitude of construction possible, the power to issue a citation would, beyond all question, cease one year after the petition for revocation was filed. Whether it would cease in less than a year we need not here decide. The fact that one citation was taken out within the year is immaterial, for that

citation was quashed and set aside and discharged, and thereafter the case stood exactly as though no citation had ever been issued. After its dismissal it possessed no life. It was a quashed summons, and served no further useful purpose in the proceeding. The citation here under discussion was in no sense an amended citation, but rather a second or alias citation, and it came too late. At that time the court had no power to make the order upon which it issued. The order of the court for the issuance of citation, and the citation issued thereon, are annulled, vacated, and set aside.

We concur: HARRISON, J.; VAN FLEET, J.; HENSHAW, J.; MCFARLAND, J.

(108 Cal. 45)

LACEY v. LACEY. (No. 19,526.)
(Supreme Court of California. July 9, 1895.)
DIVORCE—ALLOWANCE OF COUNSEL FEES.

Under Civ. Code, § 137, providing that the court may, while an action for divorce is pending, require the husband to pay, as alimony, money necessary to enable the wife to prosecute or defend the action, an allowance of counsel fees incurred during the trial cannot be made on final judgment.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Isabella Lacey against William Lacey for divorce. There was a judgment granting the divorce and allowing plaintiff attorney's fees, from the latter portion of which defendant appeals. Modified.

Graves, O'Melveny & Shankland, for appellant. Graff & Latham, for respondent.

PER CURIAM. Action for divorce, and judgment for plaintiff. Defendant appeals from that part of the judgment which decrees to plaintiff \$3,500, and interest, for her counsel fees.

During the pendency of the action, respondent applied for counsel fees, and the court allowed her \$500, which was paid, with "leave to apply for a further allowance." In addition to this, appellant paid respondent, prior to and during the pendency of the action, \$200 per month. No further allowance for counsel fees was made until the final judgment, by which respondent was awarded a large amount of real and personal property, of the value of nearly \$100,000, and being about one-half of the community property. In this final judgment respondent was allowed \$2,500 as additional counsel fees. The allowance was for past services, and under the circumstances was clearly not "necessary to enable the wife * * * to prosecute * * * the action;"¹ and upon the authority of *Loveren v. Loveren*, 100 Cal. 493, 85 Pac. 87, and *Mudd v. Mudd*, 98 Cal. 322, 33 Pac. 114, it is erroneous. The cause is remanded, with

¹ Civ. Code, § 137.

directions to the superior court to modify the judgment by striking therefrom that part which awards her counsel fees. In all other respects the judgment is affirmed.

(108 Cal. 16)

SIMONS et al. v. WEBSTER et al. (No. 19,520.)

(Supreme Court of California. July 6, 1895.)
REVIEW ON APPEAL—MECHANIC'S LIEN—FILING BY FIRM.

1. A finding of the trial court on conflicting testimony will not be disturbed.

2. Where the right to file a mechanic's lien existed in a firm composed of three members, the sale to two of them of his general interest in the partnership by the third does not destroy the right of the remaining partners to file it.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Ed. Simons and another against G. G. Green and others. From a judgment for plaintiffs, defendant Green appeals. Affirmed.

A. R. Metcalfe and Anderson & Anderson, for appellant. Chapman & Hendrick, for respondents.

MCFARLAND, J. Action to enforce a lien for brick, lime, and sand furnished by plaintiffs as subcontractors. The defendant Webster who was the original owner of the building for which the materials were furnished, and defendant Haver, the original contractor, made default. The defendant Green, who was a subsequent mortgagee of Webster, and who now owns the premises in controversy through a foreclosure of his mortgage answered; and, judgment having been rendered for plaintiffs, Green appeals from the judgment and from an order denying his motion for a new trial.

Appellant relies entirely upon the second, third, fifth, sixth, and seventh assignments of errors, and all these assignments are simply specifications of "the particulars in which the evidence is insufficient to justify the findings." In the briefs on both sides the case is very fully, closely, and skillfully argued. The evidence is carefully analyzed, and its separate parts compared, contrasted, or harmonized in accordance with the different views and contentions of respective counsel. But, after a thorough consideration of the arguments presented by counsel and the evidence presented by the record, we are satisfied that the case is merely one of those instances of fairly and substantially conflicting evidence where the determination of issues of fact by the trial court is final. Counsel for appellant endeavors to take the case out of the rule respecting conflicting evidence by contending that a consideration of the assignments "does not involve so much an inquiry as to whether a fact found is sustained by the testimony as it does the construction

of the admitted and undisputed facts of the case, and the application of the law thereto." There are cases, no doubt, to which that contention would apply, but the case at bar is not one of them. The ultimate question here was whether or not the money claimed by respondents as secured by their lien had been paid; and that was simply a question of fact, to be solved upon the evidence. The case does not materially differ from ordinary cases where findings of fact are to be arrived at by weighing evidence that is conflicting. To say anything further with respect to the case generally would be to state here all the evidence, which would be a tedious and valueless task. Perhaps the third assignment should be specially noticed. The plaintiffs did business as a partnership under the firm name of the City Brick Company, and at the time the contract for the materials was made the firm was composed of the respondents Ed. Simons, A. A. Hubbard, and one Thomas Goss. It appears that at some time between the making of the contract and the filing of the lien Goss sold all his interest in the firm to the plaintiffs, who continued the business under the same firm name, and filed the lien. The said third assignment attacks the correctness of a finding of the court that the contract was completed after Goss sold, appellant claiming that the evidence shows that Goss did not sell until after the completion of the contract. While we think that there was evidence to support the finding, we do not think that the question involved is material. Appellant contends that, if Goss did not sell until after the completion of the contract, then a new partnership was created, and, as the new firm filed a lien for a claim held by the old firm, the case is within the rule that a right to create a lien cannot be assigned, as stated in *Mills v. Land Co.*, 97 Cal. 254, 32 Pac. 169. But the rule in the *Mills Case* does not apply here. In that case the persons who had furnished the materials undertook to assign their "right of lien" to an entire stranger to the transaction. In the case at bar the right to create the lien existed in respondents as partners, and in each of them, before the sale to them of Goss' interest in the firm; and that right was not destroyed by the extinguishment of Goss' general interest in the partnership. The judgment and order are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(107 Cal. 675)

CRAIG et al. v. HESPERIA LAND & WATER CO. (No. 19,445.)

(Supreme Court of California. July 3, 1895.)

REVIEW ON APPEAL—FAILURE TO EXCEPT.

An order granting a nonsuit will not be reviewed unless the record shows that an exception was taken to the order, and such exception appeared in the stating or substantive part of the bill of exceptions.

v.40p.no.15—67

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by John W. Craig and others against the Hesperia Land & Water Company to set aside an assessment of stock made by defendant, and restrain a sale of the stock by virtue thereof. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Willis & Cole and H. A. Barclay, for appellants. Graves, O'Melveny & Shankland, for respondent.

McFARLAND, J. The court below granted a nonsuit, and judgment for defendant followed. Plaintiffs appeal, or have undertaken to appeal, from the judgment and from an order denying a new trial. Respondent has submitted a motion to dismiss the appeal on several grounds, but, under our views of the case, it is unnecessary to pass upon that motion. The main attack of appellants is upon the order granting the nonsuit. The only specification under the head of "Errors of law occurring at the trial and excepted to by the appellants" is that "the court erred in granting defendant's motion for a nonsuit." But the record shows no exception taken to the order granting the motion for a nonsuit, and therefore that order cannot be here reviewed. The ruling of a trial court upon a motion for a nonsuit presents a question of law, and, as such, must be both excepted to and specified. *Malone v. Beardsley*, 92 Cal. 150, 28 Pac. 218; *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737; *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. 1063; *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243; *Cravens v. Dewey*, 13 Cal. 43. And the exception must appear in the stating or substantive part of the bill of exceptions or statement. It is not sufficient that it be referred to in the assignment of the errors relied on, which counsel for appellants annex to bills of exception after the trial. The bill must show that the ruling thus assigned as error actually took place at the trial, and was excepted to. *Braverman v. Irrigation Co.*, 101 Cal. 644, 36 Pac. 386; *People v. Faulke*, 96 Cal. 17, 30 Pac. 837. We think that the demurrer to the answer was properly overruled, and there are no other points to be discussed. Judgment and order affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(108 Cal. 33)

BUCKMAN v. FERGUSON. (No. 15,845.)
(Supreme Court of California. July 2, 1895.)

PUBLIC IMPROVEMENTS—CONTRACTS.

1. Under St. 1885, p. 151, § 6, providing that the superintendent of streets shall fix the time for the commencement, which shall not be more than 15 days from the date of the contract, and for the completion, of the work, under all contracts entered into by him, the superintendent may perform this duty on January 4th, by indorsing, on a contract executed December 23d

prior, "the work to be commenced fourteen days * * * from the date of the contract."

2. Where the term of office of the superintendent of streets expired before the 15 days from the date of a contract entered into by him, his successor may fix the time for the commencement of work within the time required by St. 1885, p. 151, § 6.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by A. E. Buckman against Oscar H. Ferguson to foreclose a street assessment. From a judgment for defendant, plaintiff appeals. Reversed.

Wm. H. Chapman and Edwin G. Knapp, for appellant. Grant & Cushing, for respondent.

HARRISON, J. Action to foreclose a street assessment in San Francisco. The validity of the assessment is contested upon the ground that the contract for doing the work was invalid by reason of the failure on the part of the superintendent of streets to fix the time for the commencement and the completion of the work. Judgment was rendered in favor of the defendant, from which, and from an order denying his motion for a new trial, the plaintiff has appealed.

The contract in question was awarded to W. H. Maxwell, and notice of the award having been posted and published December 11, 1890, the contract was entered into by Maxwell and Thomas Ashworth, as superintendent of streets, December 23, 1890. The body of the contract was written, dated, and signed on one page, which was numbered "Page 1," and provided, among other things, that Maxwell would do and perform all the work required to be performed, under the direction and to the satisfaction of said superintendent, "according to the specifications hereunto annexed, and made part of this contract." Upon the upper part of another sheet of paper, which was attached to the contract, marked "Page 2," was pasted a copy of the specifications which had been included with the notice inviting proposals for doing the work; and beneath this copy of the specifications were the following words: "The work to be commenced *fourteen* (14) days, and completed within *one hundred and twenty* (120) days from the date of the contract." These words, except those in italics, were printed upon the page, with blank spaces in which to insert the respective periods of time, and the words in italics were written therein. At the bottom of this page, several lines below any other writing or printing, is the signature, "James Gilleran, Superintendent of Public Streets, Highways, and Squares." Ashworth's term of office as superintendent of streets expired January 4, 1891, and Gilleran succeeded him and qualified as such superintendent January 5, 1891. The court finds "that said contract was signed and executed by said Ashworth, as such superin-

tendent, and by said Maxwell, on the 23d day of December, 1890"; and, also, "that on the 5th day of January, 1891, said James Gilleran, as such superintendent, did in form fix the time for the commencement of the work to be performed on said contract at fourteen days from and after the date of said contract, and for the completion thereof at one hundred and twenty days from the date of said contract, by indorsing upon said contract the words and figures following, to wit: 'The work to be commenced within fourteen and completed within one hundred and twenty days from the date of the contract.'"

Section 6 of the act under which these proceedings were had (St. 1885, p. 151) requires that the superintendent of streets "shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him." This provision is mandatory, and an omission to comply therewith renders the contract void. *Libbey v. Ellsworth*, 97 Cal. 316, 32 Pac. 228. The fixing of these times is not a matter of agreement between the superintendent and the contractor, nor is the signature of the contractor essential; but it is a duty imposed by law upon the superintendent (*Fletcher v. Prather*, 102 Cal. 425, 36 Pac. 658), and, like any other official act, must be authenticated by his signature (*Dougherty v. Hitchcock*, 35 Cal. 512). This requirement is found in a separate clause of section 6, and applies to "all contracts entered into by him," including not only those which have been awarded by the city council to bidders under the notice for proposals authorized by section 5, but also those which may be awarded by the superintendent himself under the provisions of section 13. The times thus to be fixed by the superintendent may be indorsed upon the contract after it has been entered into, or they may be incorporated into the body of the contract. The only limitation upon the time within which the superintendent is to perform this duty is found in the provision that the time to be fixed for the commencement of the work "shall not be more than fifteen days from the date of the contract." The provision in section 5 of the act that, if the original bidder to whom the contract is awarded "neglects, fails or refuses, for fifteen days after the first posting and publication of the notice of award, to enter into the contract," proposals shall be again invited for doing the work, shows that the "date of the contract" must be prior to the expiration of this 15 days. The superintendent may, therefore, perform this duty at any time after the date of the contract which will allow him to designate a period of not more than 15 days from such date for the commencement of the work. Inasmuch as the fixing of these times is essential to the validity of the contract, the contract, even though entered into by the contractor, is to be deemed inchoate on the

part of the superintendent until he has fixed the times. Its execution by the contractor being with the understanding and agreement on his part that the superintendent may thereafter fix the times (*Fletcher v. Prather*, supra), the contract is not fully executed by that officer until the times have been fixed. The first publication and posting of the notice of award was made on the 11th of December, and Maxwell entered into the contract on the 23d of December. The execution of the contract was then complete on his part; but, although it was then signed on the part of the superintendent, it was inchoate until the times for the commencement and completion of the work should have been indorsed thereon. The clause fixing these times having been indorsed upon the contract before the expiration of 15 days from its date rendered its execution complete, and made the contract valid.

The provision in the contract that the work shall be done "according to the specifications hereunto annexed and made a part of this contract" does not extend to the clause by which the time for the commencement and the completion of the work is fixed. The "specifications" thus referred to are those which by section 3 of the act aforesaid (St. 1889, p. 159) are to be furnished by the city engineer, and which by section 5 of the act (St. 1889, p. 160) are to be stated with the notice inviting proposals for doing the work. As the contract was equally valid whether the superintendent indorsed thereon the clause fixing the times for the commencement and completion of the work on the same day that he signed the contract, or upon any day within 15 days from its date, it follows that, if his term of office expired before the expiration of the 15 days, this act could be performed by his successor. The act of fixing these times is the act of the officer, and not of the individual, and can be performed by the individual who at the time of performing it is the incumbent of the office. The execution of the contract being inchoate on his part until this act is performed, it is immaterial that one of the steps in the completion of its execution is performed by the outgoing officer, and the other by his successor. They are each official acts, and are entitled to the same consideration, whether performed by the same or different officers. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(133 Cal. 19)

GARD v. GARD et al. (No. 18,389.)

(Supreme Court of California. July 6, 1895.)

VENDOR'S LIEN—WAIVER.

Plaintiff conveyed all his property to his son, the consideration named being \$950. It was agreed that the deed should not be operative

until the manner and time of payment should be agreed on. Plaintiff remained in possession until it was rendered to the son under an agreement to pay plaintiff during life a certain sum per month if the son occupied the premises personally, or received rents from them. *Held* that, if plaintiff had a vendor's lien at the time of the last agreement, he then and thereby lost it.

Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by Jacob Gard, Sr., against Jacob Gard, Jr., and another. From a judgment for defendant, plaintiff appeals. Affirmed.

W. H. Carlin, for appellant. J. H. Craddock, for respondents.

HENSHAW, J. Appeal from the judgment rendered after demurrer sustained and plaintiff's refusal to amend. The action is to have declared and enforced a vendor's lien upon land conveyed by plaintiff under the following state of facts, disclosed by the complaint: In 1890, plaintiff, an old man, executed and delivered a deed of the land—all the property he owned—to his son, for the named consideration of \$950. It was agreed that, as between themselves, the deed should not be operative until the mode, manner, and time of payment should at some indefinite future date be agreed upon. Plaintiff remained in possession of the land, and exercised full dominion over it, after the making of the deed, until 1893, when the defendant took possession and control of the land under the following agreement: "For value received from Jacob Gard, Sr., I, Jacob Gard, Jr., hereby covenant, promise, and agree to pay to said Jacob Gard, Sr., monthly during his natural life, three-fourths of all sums by me received for rent of the premises known as the 'Seven-Mile House,' situate on the public highway leading from Marysville to Brown's Valley, in Yuba county, state of California, and designated and described in a certain indenture of deed bearing date May 6, 1890, made and delivered by said Jacob Gard, Sr., as grantor, to myself, as grantee, and recorded in volume 39 of Deeds, Records of Yuba County, at pages 153 and following, which said premises are now under lease to one George J. Crossley at the monthly rental of twenty dollars. And in case I should occupy said premises myself, instead of renting the same, then, and in such case, I covenant to pay the said Jacob Gard, Sr., the sum of fifteen dollars monthly during his natural life. Said sums to be paid monthly on the fifteenth day of each and every month at the Northern California Bank of Savings, Marysville, California, to the credit of said Jacob Gard, Sr. [Signed] Jacob Gard, Jr." A short time after the date of this agreement, defendant entered into the personal occupancy of the premises, and has ever since continued in such occupancy. He has failed, after demand, to comply with his agreement, and has refused to pay to plaintiff the monthly

sum of \$15, or any other sum. His wife, with knowledge of all the facts, has placed a homestead upon the property. The defendant son has no property except that so acquired from the father, and the father, 80 years old, feeble and decrepit, has no means of subsistence unless the sum of \$15 a month can be made a charge upon the property.

Such is the tale told by the complaint, and in this consideration it must be taken as true. It is the tragedy of Lear in a country setting, with the "Seven Mile House" for the revenues of a kingdom, and a country pauper for the distracted king. The case is one which appeals strongly to that sense of "natural equity" upon which it is sometimes said a vendor's lien rests; but at the same time a court of equity, no more than a court of law, can, because of individual hardship, reject from its consideration the well-considered and firmly-established principles and rules upon which the right to the relief asked has always been based. The enforcement of purely moral obligations is not within the domain of equity or law. An outlawed debt still holds the debtor under moral obligation, but no court can compel its payment. "The grantor's lien, wherever recognized, is only permitted as a security for the unpaid purchase, and not for any other indebtedness or liability. There must be a certain, ascertained, absolute debt owing for the purchase price. The lien does not exist in behalf of any uncertain, contingent, or unliquidated demand." 3 Pom. Eq. Jur. § 1251. This rule, as deduced by Prof. Pomeroy, has an overwhelming weight of authority in its support. See note to Mackreth v. Symmons, 15 Ves. 329, in 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 468; Peters v. Tunell, 43 Minn. 473, 45 N. W. 867; Perry, Trusts (4th Ed.) § 235; 2 Jones, Liens, § 1071. Conceding, without deciding, that plaintiff had a vendor's lien upon the property for the sum of \$950 down to the time of his entering into the agreement as above set forth in 1893, he then and thereby lost his right to such lien. And this is so whether the last-named agreement be considered as a substitute by novation for the original indebtedness, or merely as a consummation, within the contemplation of its terms, of the original contract of sale. If the last agreement be treated as in novation of the original indebtedness, the lien is at once extinguished (3 Pom. Eq. Jur. § 1252); while, if considered as but the completion of the unconsummated original agreement, it is open to all objections of uncertainty and contingency as to time, amount, and mode of payment. The learned judge of the trial court, in an able opinion sustaining the demurrer, makes this clear and forcible presentation of the matter, which we adopt: "But it is claimed by counsel for plaintiff that this agreement amounts simply to a written acknowledg-

ment of defendant's indebtedness to plaintiff for the amount of the purchase price, \$950, and his promise to pay it. I do not see how it is possible to sustain that contention. The agreement is not that defendant shall pay the purchase price of the granted premises, which is \$950, or any other or definite or fixed sum. His agreement to pay anything was wholly contingent, and dependent upon the uncertainty of a human life. If plaintiff had died the next moment after receiving the agreement, the obligation to pay would have died with him, and nothing would have been paid under it. But it was even possible under the agreement that nothing should be paid plaintiff even though he should live a term of years, for the promise is only to pay provided the defendant Gard occupied the premises personally, or received rents from them. He might never occupy them himself, and he might not receive any rents. The premises might remain vacant, or the tenant might fail to pay rent. Again, it might be possible that under the agreement the defendant would be compelled to pay a sum largely in excess of the alleged purchase price. It might be double that amount, or even more, depending upon the uncertain contingency of the length of plaintiff's life, the rental and receiving of rents, or the occupancy by the defendant. I cannot see how it is possible to conclude that this agreement was, in effect or in the intention of the parties, an acknowledgment of an indebtedness for the purchase price of the granted premises, and a promise to pay it. On the contrary, it seems clear that it was an independent and collateral contract or covenant, speculative in its character, and designed, if the original debt still existed, to cancel and extinguish it. It was speculative, because under it the plaintiff might receive a sum largely in excess of the purchase price of the land in the form of an annuity, while, on the other hand, the defendant might satisfy his \$950 indebtedness by the payment of little or nothing. It seems to me that no argument is required to show that such an agreement, by no interpretation whatever, can be made the basis of a lien of a vendor. Under the agreement the defendant became personally bound only and subject to an action for damages for breach of his contract, the only remedy open to plaintiff. The case is analogous to that of Payne v. Avery, 21 Mich. 524, where the court held that while the grantor, upon the facts, might be able to maintain a remedy at law for damages caused by the grantee's failure to comply with his contract, such damages were too uncertain in their character to form the subject of a vendor's lien." The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(108 Cal. 14)

In re PHILBROOK. (No. 21,188.)

(Supreme Court of California. July 5, 1895.)

NEW TRIAL—ORIGINAL PROCEEDING IN SUPREME COURT.

Motion for a new trial is not the proper remedy to obtain a reconsideration of an original proceeding in the supreme court, especially after a motion for rehearing has been argued and denied.

On rehearing. For original opinion, see 38 Pac. 511, 884.

PER CURIAM. After the decision made in this case on the 5th of January, 1895, the respondent filed a petition to vacate the decision and judgment and for a rehearing. Upon this an elaborate argument was made, and the petition was denied. It is insisted that respondent has still pending and undisposed of a motion for a new trial. No notice of a motion for a new trial was given, other than in the petition referred to, in which it is said: "So far as this is a motion for a new trial, it is submitted upon the minutes of the court." Respondent cites two cases, decided under the former constitution of this state, in which it was held that the proper course to obtain a reconsideration of an original proceeding in this court is to move for a new trial. *People v. Coon*, 25 Cal. 635; *People v. Holloway*, 41 Cal. 409. Also, *Bank v. Steinmiltz*, 65 Cal. 219, 3 Pac. 808, which decision was made after the present constitution took effect. But since those cases the question has been fully considered here, and the conclusion reached that a motion for a new trial is not the proper remedy in such a case. In re *Tyler*, 71 Cal. 374, 12 Pac. 289, and 13 Pac. 169; *Granger's Bank v. Superior Court of City and County of San Francisco*, 101 Cal. 198, 35 Pac. 642. In the case of *People v. Coon* it is said that "the party aggrieved must pursue the course prescribed in the practice act in like cases arising in the district courts." Respondent has not pursued that mode. He did not give the notice of intention prescribed by the Code, nor did he prepare a statement or bill of exceptions. And in this he was right. These things are not required here, for the record to be reviewed is the record of this court, and, therefore, a motion for a new trial and an application for a rehearing would present the same questions for consideration. And since, as said in *Granger's Bank v. Superior Court of City and County of San Francisco*, the constitution requires that a judgment in department shall be final unless ordered into banc or a rehearing is granted within 30 days, and since the constitution does not distinguish between a judgment in an original hearing and in an appealed case, it would seem to follow that a motion for a new trial, which might cause a delay beyond the 30 days, is not an appropriate remedy. As it would serve no useful purpose, it would seem to follow either that

the application for a rehearing could not be heard, or a motion for a new trial would not lie. It would be preposterous to expect that a motion for a new trial would prevail, after an application for a rehearing has been denied, upon a consideration of the same points which are presented by the motion for a new trial. The motion is denied.

HARRISON, J., not participating.

(108 Cal. 88)

EMIGRANT DITCH CO. v. WEBBER. (No. 18,453.)

(Supreme Court of California. July 11, 1895.)

CORPORATIONS—RIGHT TO SUE—FILING ARTICLES OF INCORPORATION.

1. Civ. Code, § 299, providing that any corporation holding property in a county shall not maintain an action in relation to such property without filing a copy of its articles of incorporation with the clerk of the county in which such property is situated, does not apply to corporations seeking to acquire property by condemnation.

2. Where a ditch company incorporated in T. county seeks to condemn defendant's land in F. county, and pleads its ownership of ditches, canals, and water in F. county, which ownership defendant's pleadings deny, the issue involves the determination of the ownership of property claimed by plaintiff, and the action cannot be maintained until a copy of its articles of incorporation is filed in F. county, as required by Civ. Code, § 299.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Condemnation proceedings by the Emigrant Ditch Company against A. A. Webber. From a judgment for defendant, plaintiff appeals. Affirmed.

Stanton L. Carter and E. D. Edwards, for appellant. L. L. Cory and N. C. Coldwell, for respondent.

HENSHAW, J. Appeal from the judgment under a plea in bar. Plaintiff averred its incorporation under the laws of the state for the purposes of building, owning, holding, obtaining, and selling ditches, canals, flumes, rights of way, water and water rights, reservoirs, headgates, etc., and to operate the same. It then averred its acquirement of certain valuable water rights in Tulare county; its construction and ownership of canals, ditches, etc., by which it conveyed water from Cole slough, in Tulare county, through that county, and into Fresno county. It is alleged that the purposes of diversion are for the distribution and selling and renting of the water to the inhabitants of the two counties, and for supplying farming neighborhoods therein with the water for farming, irrigation, domestic and other useful purposes; and it is further averred that the water is used for these purposes. Being unable to acquire by purchase the necessary rights for extending its ditches, etc., over the land of defendant, plaintiff begins these proceedings to condemn the same. Const. art.

14, § 1; Code Civ. Proc. § 1238. Defendant traversed all the material allegations of the complaint, and then, in bar, pleaded a non-compliance by plaintiff with section 299 of the Civil Code. This plea was first heard and determined by the court upon consent of the parties, and, judgment thereon passing in favor of defendant, plaintiff prosecutes its appeal.

Plaintiff was incorporated in the county of Tulare, and had not filed a certified copy of the copy of its articles of incorporation in the county of Fresno. Yet, as appears by its complaint, it did at the time of the commencement of the action, and had for many years prior thereto, owned ditches, canals, water, etc., in that county; and it is to enable it to extend its operations of distribution, rental, and sale of the water that the action is prosecuted. The contentions in support of the judgment are two: First. That plaintiff cannot maintain this action to acquire and hold the rights sought to be condemned, unless, as to that property, it has filed a copy of its articles of incorporation before the commencement of the action. Second. That the action, from its nature, and under the averments of the complaint, necessarily involves the determination of the ownership of and title to other property situated in the county of Fresno, and claimed by plaintiff as its own. To this extent, therefore, the action is "in relation to" that property, and cannot be maintained.

To the first contention we cannot accede. The statute provides, in effect, that any corporation holding any property in a county shall not maintain or defend any action or proceeding in relation to such property, its rents, issues, or profits, until such certified copy of the copy of its articles of incorporation shall be filed as required by law. The commencement of an action is a part of its maintenance. *Byers v. Bourret*, 64 Cal. 73, 28 Pac. 61. But the holding of property is radically different from the attempt to acquire a holding. Plaintiff does not even claim to have or hold any rights in defendant's property. It concedes full and complete ownership in defendant, but asks the court to decree it a holding after proof of its right of eminent domain, and after payment by it of just compensation to the owner. Section 299 of the Civil Code does not forbid corporations failing to comply with its provisions from acquiring property either by purchase or by condemnation, but does inhibit the maintenance or defense by them of any action in relation to the property which they have acquired.

The questions involved in the consideration of the second contention are essentially dissimilar. Plaintiff, to acquire by condemnation the desired rights over defendant's land, found it necessary to plead its ownership of ditches, canals, and water in Fresno county, and the uses made, and to be made, not only of its acquired prop-

erty, but of that sought to be acquired. By defendant's answer, plaintiff's title to the property which it claims to own is put in issue. Nor is the issue an immaterial one. If defendant, even while conceding that plaintiff may invoke the right of eminent domain, can show that the right should not be exercised upon his property, plaintiff must fail. And this might be established, under the issues joined, by proof that plaintiff had acquired no property or rights in Fresno county which made condemnation of his land necessary or expedient. So that if no weight whatever be given to the suggestion that the acquirement of the new right has relation to the water already owned, and that, therefore, the action is in relation to property held by the corporation, nevertheless it manifestly appears that the decision upon the question of the holding of property claimed by plaintiff as its own may be determinative of the controversy. It must be, therefore, that this action is in relation to property held by plaintiff, and cannot, under the circumstances, be maintained.

Nothing herein said is to be construed as determining the sufficiency or insufficiency of the complaint. The demurrer upon the ground that it failed to state a cause of action was overruled, and the appellant here is not the aggrieved party under that order. It is preferable, under every consideration, that the question, if it reach this court, should, so far as this action is concerned, be considered as *res integra*. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(12 Wash. 251)

FREMONT MILLING CO. v. DENNY et al.
(Supreme Court of Washington. July 10, 1895.)

REVIEW ON APPEAL—EXCEPTIONS TO FINDINGS.

Where the only findings of fact made were certain general ones in the decree, and there was no motion for specific findings or objections except as follows: "To all of which findings defendant B. excepted, which is allowed,"—the exception taken is insufficient to raise any question as to the evidence.

Appeal from superior court, King county; R. Osborn, Judge.

Action by the Fremont Milling Company against David T. Denny and others for the purpose of foreclosing the interest of defendant Brown in certain premises, and quieting the title to the same. From a judgment for plaintiff, defendant Brown appeals. Affirmed.

Bruce, Brown & Cleveland, for appellant.
Frank P. Lewis, for respondent.

SCOTT, J. In May, 1891, one Wood and wife, who were the owners of certain real estate in the city of Seattle, entered into an agreement with M. N. Knuppenberg and L. B. Levy to convey said real estate to them on

condition that they would place improvements thereon to the value of \$4,000. This agreement was duly performed by all parties. In constructing said improvements said Knuppenberg and Levy became indebted to various parties for material and labor, and said parties thereafter filed liens against the property, and brought foreclosure actions. After the filing of the liens and the institution of said suits, with the exception of one of them, appellant Brown obtained a judgment against said Levy, and filed a transcript thereof with the auditor of King county. Judgment was rendered in favor of the lien claimants, but Brown was not a party to said suits, and this action was subsequently brought for the purpose, among others, of foreclosing his interest in the premises. Judgment was rendered in favor of the plaintiff, and this appeal was taken therefrom. The only findings of fact made by the court are certain general ones, contained in the decree. It is conceded that there was no motion or request by either party to have other or specific findings, or to set aside the decree on the ground that the findings were irregularly made, nor was there any objection to the findings other than that the appellant excepted as follows: "To all of which findings and decree defendant Brown excepted, which is allowed." We have repeatedly held that, in order to raise any question as to the evidence, there must be exceptions to the findings of fact, otherwise the only question relating to the facts that can be presented upon appeal is whether the decree rendered is repugnant to the findings or the facts admitted by the pleadings. The exception taken in this case was insufficient. No specific exception was taken, and no ground was stated. While it may not be necessary in all cases to state the ground of an exception to a finding of fact, it must nevertheless appear from the case that the point urged upon appeal was fairly presented to the lower court, as we have repeatedly held that we will not review questions raised here for the first time.

It was insisted by appellant upon the argument of the cause that he was entitled to a reversal upon the facts admitted by the pleadings, and that it appeared thereby that his claim was a prior and paramount one. Appellant's brief evidently was not prepared upon such a theory of the case, and it is questionable at least whether it is sufficient, or presents enough to allow him to urge the particular point. However, without considering this matter of the sufficiency of the brief further, we are of the opinion that the contention aforesaid as to the pleadings is not well founded. Not enough appears therefrom to show the superiority of appellant's claim, or to entitle him to any relief here; and the lower court, as one of the facts, expressly found appellant's claim to be subordinate to the claims of the parties to whom relief was awarded. This finding was not repugnant to any of the facts admitted by

the pleadings. It follows that the judgment must be affirmed.

DUNBAR, ANDERS, and GORDON, JJ., concur. HOYT, C. J., not sitting.

(12 Wash. 279)

BLACKINTON et al. v. RUMPF et al.

(Supreme Court of Washington. July 13, 1895.)

MOTION TO VACATE ATTACHMENT—SUFFICIENCY OF COMPLAINT—AFFIDAVIT—EVIDENCE OF FRAUD.

1. A complaint which alleges that defendants entered into a secret agreement to carry on business in the name of one of them, and that the proceeds of the business should be divided between them, and conspired to defraud and cheat all persons from whom they should purchase goods; that, in pursuance of the fraudulent scheme, they purchased goods from plaintiff in a certain amount, which were never paid for; and that the open partner disposed of his property to the other defendant,—states a cause of action in which an attachment could be issued, under Code Proc. §§ 288, 289, allowing an attachment when defendant is assigning, secreting, or disposing of his property, or is about to do so, with intent to defraud or delay his creditors, or where the debt was fraudulently contracted.

2. An affidavit for an attachment under Code Proc. §§ 288, 289, which states that "defendant has assigned his property with intent to delay and defraud his creditors; that defendant is about to assign his property with intent to defraud his creditors,"—does not contain inconsistent allegations.

3. In an action for goods sold, the complaint alleged a fraudulent secret partnership between defendants M. and R.; and it appeared that the defendants had been engaged in business as partners, and that, after the dissolution of the firm, R. opened a place of business across the street from the old place. The new business was carried on in his name, and he and M. continued in intimate relations. On the night that R. sold out the new business, M. and his two brothers were seen carrying goods away from R.'s house; and a draft for goods sold by R. on that night was on the next morning deposited to the credit of M., who stated that he had advanced R. the money on the draft the night before. The amount of the draft was \$5,000, and M. stated that he sent the amount in cash to R. by a messenger. For 16 days before the cashing of the draft, defendant M. claimed to be hard pressed for money, and allowed an overdraft to be charged up against him. On the night of the sale for which the draft was given, R. absconded. *Held* sufficient, on a motion to vacate an attachment, to warrant a finding that both defendants were interested in the business carried on in the name of R.

Appeal from superior court, King county; R. Osborn, Judge.

Action by W. Blackinton and another against Simon Rumpf and another for goods sold. An attachment was levied on the property of defendant Mayer, who moved that the same be discharged, and from an order refusing his motion he appeals. Affirmed.

Burke, Shepard & Woods and Sapp & Lyons, for appellant. Arthur E. Griffin and Stratton, Lewis & Gilman, for respondents.

DUNBAR, J. Simultaneously with the service of the summons in this case, a writ of attachment issued against the property of

the defendant was levied upon the merchandise of the defendant Joseph Mayer, the defendant Simon Rumpf having disposed of all his property, and having fled the country. Defendant Mayer procured the release of his goods by giving a statutory bond for that purpose. Shortly after, Mayer moved the court for an order discharging the writ of attachment as against his property. Sundry affidavits were filed by him and by others on his behalf. The motion was resisted by counter affidavits, and by transcripts of testimony provisionally taken in other causes, and received under stipulation as equivalent to affidavits. Upon said hearing, the motion to discharge the attachment was denied, and from the order of the court refusing to discharge the attachment this appeal was taken. The complaint in the action alleges, in substance, that the said defendant Mayer and defendant Simon Rumpf entered into a secret arrangement under which they should engage in the jewelry business in the city of Seattle, and should purchase and receive on consignment, in the name only of defendant Rumpf, wares and merchandise, namely, jewelry, and that the interests of said defendant Joseph Mayer in said enterprise should be kept secret, and that the proceeds of said business were to be halved and divided among said defendants; and that they conspired and colluded and conceived the scheme of defrauding and cheating all persons from whom they should purchase goods; and that, in pursuance of said fraudulent scheme, they did begin the business aforesaid in the name of defendant Simon Rumpf; and that thereafter they purchased goods of the plaintiffs to the amount set forth in the complaint; and that afterwards, to carry out said scheme, Rumpf disposed of his portion of the property, and fraudulently conveyed to defendant Mayer certain real estate in King county; and that they fraudulently sold all the stock of jewelry, fixtures, and furniture then located in his store. There were also other allegations of fraud and collusion on the part of the defendants.

The first contention of appellant is that either the action sounds in tort, and the provisional remedy of attachment is therefore not available, or else, if the action sounds in contract, the alleged fraudulent incurring of the debt, having been waived by the plaintiff's suing on an implied contract, cannot be alleged as a ground for the attachment. The case of *Finlay v. Bryson*, 84 Mo. 664, is cited in support of that contention. An examination of this case convinces us that it does not sustain the contention of the appellant. In that case the principal portion of the money sued for consisted of the proceeds from two pairs of mules sold by the defendant as property of the plaintiff, and applied to his own use. The court, in passing upon the attachment in this action, was construing a provision of the Missouri attachment law which gives the right to the attachment

where the debt sued for was fraudulently contracted on the part of the debtor; and this was all, as we gather from the reported case, that was set forth in the affidavits to sustain the attachment. It was conceded that the remedy was separately provided for in the attachment laws of Missouri if the action sounded in tort, and the court held that the testimony showed a wrongful conversion of the proceeds of the sale, and would not sustain an attachment for an alleged fraudulent contract. "The wrongful conversion of property," said the court, "which results in damages, is one thing; the fraudulent inducement of a debt is another thing. Both are well known, and the subdivision we are construing [namely, the subdivision above quoted, where the debt sued for was fraudulently contracted for on the part of the debtor] refers to the latter, and not to the former." It is true, the court, in another portion of the opinion, uses the language quoted in appellant's brief,—that, by electing to sue for the money for which the property was sold, the plaintiff affirmed the act of the wrongdoer, claiming the proceeds thereof, and was thereafter estopped from treating the transaction as a wrong, and that he would not therefore be permitted to waive the tort, and to prosecute the defendant for it in the same suit. But it will be seen that what the court intended to say was that a plaintiff would not be allowed to make contradictory statements in his pleadings; that he would not be allowed to get benefits or profits flowing from a contract which he himself asserted was fraudulently made, and whether or not the court in that case reached a logical or correct conclusion it is not necessary to determine, for there are no elements of this kind in the case at bar. This action, so far as the action itself is concerned, is for a simple debt,—the purchase price of the jewelry in question; and the complaint is consistent with itself, and also with the affidavits in support of the attachment.

The citation of cases where it does not appear that the statutes are similar so far as attachment law is concerned are of little benefit. This is recognized by Mr. Wade in his work on Attachment (section 10), where he says: "That the decisions of the courts in the different states of the Union are inharmonious upon the question of the nature of the demand that will support the proceeding by attachment can certainly be no occasion for surprise, in view of the fact that these decisions are rendered in construing statutes as various in their provisions as could well be imagined. They vary from the most definite restriction to such demands as arise on contracts, and are for the direct payment of money only, to the widest latitude that embraces actions for damages, liquidated or unliquidated, arising either *ex contractu* or *ex delicto*." And the author sets forth the substantial requirements of

the affidavits for attachment in most of the states of the Union. In most of the states, however, the plaintiff is given his election to sue upon the contract or in tort; and, where a contract is sued upon, the fact that the breach upon which the writ is claimed is also a tort does not defeat the right. In *Railroad Co. v. Peoples*, 31 Ohio St. 537, the court said: "The plaintiff had her election to set out the promise, its consideration and breach, and ask judgment, or to set out facts which gave rise to a liability in tort, and pray judgment thereon." That was a case where a railroad company agreed for a consideration to carry a passenger over its road, and it was alleged that by its negligence an injury resulted to the passenger. Many cases were cited by the court in this case to sustain the doctrine announced. An examination of our statute will discover the fact that there are no restrictions whatever. The statute provides that the plaintiff, at the time of commencing the action, or at any time afterwards, before judgment, may have the property of the defendant attached when he shall make an affidavit showing that the defendant is indebted to him, and that one of several different conditions of things exists; among others, that the defendant is assigning, secreting, or disposing of, or is about to assign, secrete, or dispose of, any of his property with intent to delay or defraud his creditors; or that the defendant has been guilty of a fraud in contracting a debt, and in incurring the obligation for which the action was brought.¹ These are the two grounds upon which the attachment is asked in this case.

The affidavit in this case sets forth that the defendants are justly indebted to the plaintiff, stating the amount, alleging the other grounds that we have just mentioned; and we think it is amply sufficient. Another proposition of appellant is that the affidavit for attachment is bad in form in its allegations as to fraudulent disposition of property, the allegations being (a) that the defendant has assigned, etc., his property, with intent to delay and defraud his creditors; (b) that the defendant is about to assign, etc., his property, with intent to delay or defraud his creditors. These, it is claimed, are inconsistent allegations. This is the language of the statute. It provides that an attachment shall issue if the affidavit is made that the defendant has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, etc. If the affidavit were in the disjunctive, of course the allegations would be meaningless, because it could not be told from the language whether the charge was that the defendant had disposed of, or was about to dispose of, his property; but here it is stated in the conjunctive, and under the disjunctive provisions of the statute either one of the allegations would be a suf-

ficient basis for attachment. If the defendant has assigned, secreted, etc., that is sufficient to warrant the issuance of the writ; or if he has not done this, but is about to assign, secrete, etc., that is sufficient basis for the issuance of the writ. Neither is there anything inconsistent with the idea that he may have done both. He may have assigned or disposed of a portion of his property prior to the making of the affidavit, and he may also be about to assign or dispose of any portion or of all of the remaining portion at the time of the making of the affidavit. Some cases are cited to sustain this contention, but we think the reasoning is strained, and that a common-sense construction of the statute will sustain the affidavit in this respect.

This brings us to the discussion of the main proposition in the case; namely, the contention on the part of appellant that the proofs in support of the attachment fail to show the alleged partnership between the defendants, which is the main ground of appellant's alleged liability. Conceding that this question can be raised upon a motion to dissolve the attachment, which is a doubtful proposition, and considering this proposition with the other one made by appellant, that the proofs in support of the attachment fail to support any grounds alleged for it in the affidavit, we are of the opinion that the testimony shows a state of facts which warranted the court in refusing to dissolve the attachment. The testimony is conflicting, and it is true that many of the allegations of the appellant and of the affidavits are flatly denied by defendant Mayer. Collusion and fraud are always hard to prove; and, while this fact will not warrant the court in reaching the conclusion that fraud has been committed, the court must closely scan the circumstances surrounding the case, and look into the motives which naturally actuate men under the circumstances existing. The testimony shows conclusively—in fact, it is not denied—that these two defendants had been engaged in the business of pawnbrokers and dealers in jewelry, and that, after their alleged dissolution, Rumpf proceeded to carry on the same business immediately across the street from the business house of the old firm; that they were on intimate relations with each other; that they were seen together under exceedingly suspicious circumstances, if the testimony of the witness Harris is to be believed (and the court was warranted in believing it); that, upon the night of the sale, Rumpf and Mayer and his two brothers were seen carrying goods away from the house in a clandestine manner; that the draft which was alleged to have been given to Rumpf for the goods sold to Basye was presented next morning at the bank by Mayer; that the proceeds of the draft were placed to his credit, and used by him in paying his personal debts. He un-

¹ Code Proc. §§ 288, 289.

dertakes to explain this by stating that he had advanced Rumpf the money on this draft the night before as a matter of personal accommodation to Rumpf, although he introduces testimony to show that his relations with Rumpf were not cordial, and the most suspicious circumstance is that, instead of paying this money and taking up this draft from Rumpf personally, he saw fit to employ a person who could easily be made a witness of the transaction, namely, one George W. Hoffman; and this witness placed himself in a very poor light before the court by admitting that he had made statements contradicting the statements that he made in court to Emmons and Battle; and this man, if the testimony of Mayer is true, was intrusted with \$5,000 in ready money by Mayer to be carried to Rumpf the night before his departure. Another circumstance throwing suspicion upon the transaction is the fact that Mayer, while claiming to be hard pressed for money, and allowing an overdraft to be charged up to him at the bank, appears to have had this large amount of money about his person for sixteen days prior to its payment to Rumpf, on the 28th of August, the night before Rumpf absconded. The whole transaction is inconsistent with the actions of honest business men. The carrying away of the goods in a clandestine manner the night of Rumpf's departure, which business was participated in by Mayer, the payment of this amount of ready money in the nighttime, and especially its payment in the manner related by Mayer,—namely, by intrusting it to a third person, who seems not to have had any very close relations with Mayer,—the decding of all of Rumpf's real estate to Mayer, impress us with the belief that at least the jury would be warranted in coming to the conclusion that Rumpf and Mayer were equally interested in the purchase and disposition of these goods, and that the allegations of the complaint were true; and we think that justice demands that this attachment should be maintained until the question of fraud and collusion alleged in the complaint is passed upon by the proper tribunal. The judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(6 Colo. App. 120)

BEAVER BROOK RESERVOIR & CANAL CO. et al. v. ST. VRAIN RESERVOIR & FISH CO.¹

(Court of Appeals of Colorado. April 8, 1895.)

APPROPRIATION OF WATER—ABANDONMENT OF RIGHT.

1. Where a party appropriated water, and by failure to apply it to beneficial use within a reasonable time forfeited his rights, he may aft-

erwards re-enter if intervening rights have not attached.

2. The burden of proof is on the party claiming an abandonment of a water right.

3. The owner of land has no right to construct a reservoir for the storage of water to be disposed of for irrigation purposes unless he appropriates the water in accordance with the provisions of the constitution and the statutes.

Appeal from district court, Boulder county.

Application for a writ of injunction by the St. Vrain Reservoir & Fish Company against Charles F. Fifer and another. From a decree of perpetual injunction, defendants appeal. Affirmed.

This was a suit in equity by appellee against appellants, and a controversy over the right to the possession of land in the mountains as a reservoir site for the storage of water to be used for irrigating agricultural lands some distance below; Beaver Brook, the source of water supply for the reservoir, being a tributary of the St. Vrain river. Until the year 1889 all the land in controversy was public domain, the property of the United States. Some time in the year 1882, Beach Bros. commenced the construction of a dam to make the reservoir. When partly constructed, in the same year (1882), Starbird, Bond & Culver organized under the name of the Tip Top Reservoir Company, purchased from the Beach Brothers, who were to complete the dam the ensuing year, for \$10,000, which was paid, the dam was completed, and the Tip Top Company succeeded to the rights of Beach Bros. and took possession. The main dam was 400 feet long, 20 feet high, from 50 to 60 feet wide on the bottom, and 20 feet wide on top. There was also another small dam, about 150 feet long and 10 feet high. Some time in the latter part of 1883 or in 1884, the Tip Top Reservoir Company sold the reservoir to the Supply Ditch Company. During the fall and winter of 1884 the reservoir was filled with water. At that time the entire cost was about \$13,000. In the year 1884 the Supply Ditch Company and the Highland Reservoir were the joint owners. In June, 1885, a portion of the dam, about 70 feet in length, was carried away by high water. Many parties below were injured by the flood resulting from the breaking of the dam. Several suits were brought for the damages, and a large amount in the aggregate was paid by the owners. By reason of the litigation and want of money, no work of construction or repair was undertaken. Engineering work was done, and plans submitted preparatory to rebuilding. In 1888 work was done upon the small dam to the amount of about \$60. In 1889 nothing appears to have been done except a visit from the officers of the owners, and tests made to ascertain the depth to bedrock with a view to putting in a permanent and substantial dam. In 1890 the companies employed Charles F. Fifer to make a drain ditch for the foundation, for which they paid him about \$800. In 1891 and 1892 a large

¹ Rehearing denied April 22, 1895.

force was employed, the dam permanently built and completed, with the exception of putting in a large iron valve for controlling and discharging the water. Up to that time appellee and its grantors had expended from \$22,000 to \$24,000 in construction. In August, 1889, Charles F. Fifer made a settlement upon 160 acres of land a part of which was in the basin of the reservoir. His line crossed the dam of appellee's, taking a portion of it, on which appellee subsequently built the masonry for the reception of a discharge valve. On August 26, 1889, Fifer filed upon the land as a homestead for agricultural purposes, at the United States land office. In 1890 he "proved up," paid \$200, and took a government certificate of entry. On June 17, 1893, he sold and conveyed the land to the Beaver Brook Reservoir & Canal Company (appellant). In August following (1893) appellant claimed title to that part of the reservoir site and so much of appellee's constructed dam as was embraced within the lines of the land purchased from Fifer, by virtue of the title of Fifer from the government. In the assertion of the rights claimed, appellant, it is alleged, by force and threats prevented appellee from removing the valve, and putting it in place, dispossessed appellee, took absolute possession of the reservoir and dam, and proceeded to remove a portion of the masonry erected, and with timber to finish the dam for the discharge of water. Appellee sued out a temporary writ of injunction restraining appellant from interfering with its possession. A trial was subsequently had, resulting in a decree of perpetual injunction, from which the appeal was prosecuted to this court.

Simon T. Horn, for appellants. B. L. Carr and F. P. Secor, for appellee.

REED, P. J. (after stating the facts). Preliminary to the discussion of the legal questions involved, I may be permitted briefly to call attention to some of the peculiar features of the case, and facts evincing the intention and motives of the appellant Fifer, from whom the appellant corporation claimed to have acquired title to the property in controversy. The land taken by him as a homestead for agricultural purposes under the act of congress was, as shown by the evidence, a beaver swamp in the valley of the stream, so much of a bog as to render it almost inaccessible, producing a coarse sedge grass so poor in quality that stock would only eat when forced by hunger, but Fifer testified that a mowing machine might be used on it were it not for the angles and rocks. The balance of the land was covered with cliffs and rocks. The elevation was so great as to render the land totally unfit for cultivation. It is not shown that during the years it was occupied by Fifer an acre of it was put under cultivation. Previous to the taking of the land, a portion of one 40-acre tract, in connection with other

adjoining land, had been taken, and for several years held and occupied as the reservoir site to store water for purposes of irrigation in the valley below. Thirteen thousand dollars had been spent in its improvement, perhaps not very wisely. Although a section of the dam had been carried away by a flood, at the time of his entry over 400 feet of it remained. The irregular shape of the claim taken, and the fact that he called the attention of the officer in the United States land office to the fact of the existence of the dam, and inquired in regard to his legal right to embrace it within his claim limits, shows almost conclusively the intention of the claimant to appropriate the dam, or at least to so control it as to render the remainder, and much larger portion, unavailable to the owners. The inequitable character of his claim of title to the property in controversy is shown by the fact that, with full knowledge of the claim of the owners, he looked on from 1889 to 1893, seeing thousands expended in improvements, recognizing the title and possession by accepting employment and receiving payment to the amount of \$800, and in assisting the owners to appropriate land he claimed to own, and, when over \$20,000 had been expended, and the construction practically finished, to take possession by force, and evict the owners, and, by holding the outlet as a key to the position, appropriating not only that portion within his boundaries but confiscating the balance. Such facts fail to appeal favorably to a court of equity, and go far towards estopping appellants from asserting any claim.

The evidence in regard to the possession previous to August, 1893, is very peculiar and confusing. The evidence of Fifer and several other witnesses for the defense was that, after the entry of Fifer in 1889, he had "sole and exclusive possession." Sole and exclusive possession of what? The evidence established the fact that appellant and its grantors had had the actual possession of the property in controversy for many years, and retained it until forcibly dispossessed in August, 1893. If the evidence was intended to apply to the property in controversy, its falsity was so glaring as to subject it to severe criticism, if intended to be applied to the adjoining land occupied by Fifer, it was almost equally subject to criticism, being misleading in character and in regard to subject-matter where the rights of Fifer and his occupation and possession was conceded, and in regard to property in no way involved in the litigation. If the intention was to show constructive possession by reason of title, there was a misconception of the law of the case. The rule of law is well settled that there can be no constructive possession by virtue of title when there is an actual adverse holding. The fact is clearly established that appellee and its grantors had the possession of the property in controversy all the time; that in 1890 appellant did work for the company to the amount

of \$800; in 1892 and 1893 a large force of mechanics, laborers, and teams were employed, and the work practically completed early in August of the latter year; that on the 17th of August, Fifer shows by his own testimony that he and his associates forcibly dispossessed appellee, and the testimony clearly shows that the possession so taken at that date was the first actual possession of Fifer or his grantees. Fifer and other witnesses for the defense, in regard to their testimony as to possession, stand upon record in an unenviable light. Justice to them requires that they should apply or explain their testimony. It is evident the appellee and its grantors had possession of the locus in controversy from 1882 until August 17, 1893. It is urged, first, in the argument of appellant, that appellee and its grantors failed to secure title to the reservoir site and the water by a failure to apply it to a beneficial use. The constitution requires the application to a beneficial use in order to secure the right for the use of water appropriated. The appropriation or intention to appropriate must of necessity precede the application. The language of the decisions is that the application to a beneficial use must be made within a reasonable time, and what is a reasonable time must depend upon the facts and circumstances of each particular case. That the interval from 1882 until 1893 was presumptively too long must be conceded, were the reasons and circumstances unexplained; and the explanation in this case can hardly be deemed sufficient, but how can that inure to the benefit of appellants? If by neglect to apply the water within a proper time the right to apply was forfeited, the water reverted, and any one could proceed to appropriate and apply it; but such right could only attach while the right of the former claimant was in abeyance by reason of his negligence, and the second party must have availed himself of the right before the re-entry and prosecution of the enterprise by the first party, unless during the interim, when, by failure to prosecute the enterprise, the water right may be regarded as having reverted, some party intervenes, and makes a valid and legal appropriation of the water. The first party may resume, and, if such resumption occurs before intervening rights attach, the right to appropriate is lost. The question of abandonment by appellee and its grantors subsequently, urged by appellant's counsel, is so analogous to and intimately connected with the subject under discussion, that both may be discussed in this connection. The authorities are agreed that the question is one of intention, and the intention must be deduced from the facts and circumstances of each case. That a party claiming an abandonment must make it a defense upon the trial, has to sustain the burden of proof, and must establish the fact by clear and unequivocal evidence, see *Waring v. Crow*, 11 Cal. 366; *Richardson v. McNulty*, 24 Cal. 330. "Mere lapse of time does not constitute an abandonment, but it may be given

in evidence for the purpose of ascertaining the intention of the parties." *Moon v. Rollins*, 36 Cal. 333. "It must appear from the evidence that there was a leaving of the claim without any intention of returning, or making any further use of it." *Bell v. Mining Co.*, 36 Cal. 214; *Smith v. Cushing*, 41 Cal. 97; *Judson v. Malloy*, 40 Cal. 299; *Strang v. Ryan*, 46 Cal. 33; *Water Power Co. v. Veghte*, 21 N. J. Eq. 463.

Appellant corporation claims the water for the same use as appellee,—to be stored, and, when needed, to be carried below and distributed for irrigating; and this right is based only upon the common-law rights of a riparian proprietor by virtue of the ownership of the land through which the stream passes. No right for the use and purposes contemplated can be predicated upon the ownership of the soil, and as appurtenant to or a part of the realty. The common-law right, by virtue of the fee in the land, only extends to the use of the water upon the land owned, and the water must be returned to its natural channel, within his boundaries, without serious diminution in quantity, for the benefit of riparian proprietors below. *Gould, Waters*, § 213 et seq.; *Ang. Water Courses*, §§ 90-96; *Elliot v. Railroad*, 10 Cush. 193; *Gillett v. Johnson*, 30 Conn. 180; *Ewing v. Colquhoun*, 2 App. Cas. 839; *Sandwich v. Railroad Co.*, 10 Oh. Div. 707; *Garwood v. Railroad Co.*, 83 N. Y. 400. It will be readily seen that the right to construct reservoirs for the storage of water, to control, transport, and dispose of it for irrigation, cannot be based upon the common-law right pertaining to the ownership of land; and such use, being at variance with and in derogation of the common law of riparian ownership, can only be predicated upon special constitutional and statutory provisions permitting such use, and the ownership of the land is no factor, only in so far as it obviates the necessity of the exercise of the law of eminent domain. Hence it follows that without appropriation of water, construction, and application of water, as provided by the constitution and statutes, which are conditions precedent to the ownership of the use of water, appellant had no claim or legal right whatever. Both parties claiming the water for distribution or sale at some lower point, how can appellant claim superior title by reason of appellee's failure to apply to a beneficial use, where it has not complied with either of the constitutional requirements of appropriation and application, that it insists are requisites. No attempt was made to show that appellants had done either. Fifer bought from the government 160 acres of land, ostensibly for and under the law controlling agricultural land, for \$200, a small part of which overlapped the improvement of appellee. The claim is that by the overlapping of the few acres appellant can take the entire property, completed, without appropriation or application of water, and with less than

\$50 expenditure; take the twenty-odd thousand dollars expended, the balance of the reservoir site, store water, transport it, and dispose of it. In equity the facts only need be stated. All appellant got from Fifer was the fee to the few acres used, which appellee could proceed to condemn and take under the law of eminent domain. If appellee failed to proceed and make compensation, appellant, under our statutes, could have proceeded, and compelled compensation. The logic of appellant's contention seems to be that appellee and its grantors, by failing to prosecute the enterprise with sufficient energy from 1882 to 1890, forfeited its rights; and, although no intervening rights of appropriation attached during the existence of such inactivity, a resumption and vigorous prosecution of the enterprise to completion was ineffectual; the theory, in effect, being that by reason of the former negligence the title was so lost that all that was necessary to vest the title in another was to lie by and watch, and, when completed, take possession by force. Such claims can receive no countenance in a court of equity. Counsel contends that the grantors of appellee secured no rights by its entry and occupation of a part of the public domain under the act of congress of July 26, 1866, for the reason that the entry was not made until 1882, and says, "The act only acknowledged and confirmed rights existing prior to its passage." This construction seems to be in direct conflict with the language of the act, where it is said: "Provided, however, that whenever after the passage of this act any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler upon the public domain the party committing such injury or damage shall be liable to the party injured for such injury or damage." The amendments to the act, made July 9, 1870, and May 10, 1872, are not noticed by counsel. In section 17 of the former act it is provided: "That none of the rights conferred by sections 5, 8 and 9 of the act to which this act is amendatory shall be abrogated by this act and the same are hereby extended to all public lands affected by this act; and all patents granted or pre-emption of homesteads allowed shall be subject to any vested and accrued water-rights or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the ninth section of the act to which this is amendatory." The construction of the statute by counsel not only contradicts the act, but is very different from that of the United States courts. In *U. M. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371, it was said: "The act of congress of July 26, 1866, is prospective in its operation." See, also, *Broder v. Mining Co.*, 101 U. S. 276; *Basey v. Gallagher*, 20 Wall. 670.

It is urged in argument by appellant's counsel that appellee had failed to comply with the law by not filing with the county clerk and recorder and the state hydraulic engineer a statement of his claim. We can find nothing in the law of congress making such course obligatory, nor is it shown that at that time there was such an officer as state hydraulic engineer. Admitting that a declaratory statement should have been filed, the only object was that of notice, and where, as in this case, actual notice by observation of the premises was admitted, no claim of ignorance or surprise could be made, and no record notice was necessary. The extent and nature of the appropriation was obvious. Vested rights in the land under the act of 1866 and amendments had attached to the land previous to his entry, and he took the land subject to existing rights and conditions, and with full knowledge.

Counsel urges the hardship and great wrong inflicted upon appellant Fifer by being dispossessed of land upon which he has resided for years, and the improvements made by him. Only a small portion of the 160 acres is involved, and the only improvements upon it appear to have been a fence upon the line crossing the dam of appellee. It is not shown that he ever attempted any cultivation, or that there was any part of the land susceptible of any cultivation. The cabin into which he moved at the time of his entry, and afterwards occupied, had been previously built by some one else; and repairs of it, with the exception of some fence, not making an inclosure, is all the improvement ever shown to have been made by him. In his zeal for his client Fifer, and in urging the great wrong perpetrated by dispossessing him of his home which he had occupied for years, counsel overlooks two important facts established by Fifer's testimony: (1) That his former possession was desultory, that he was absent for a year at one time, and that some other party had the possession, and occupied the cabin; (2) that on the 17th of June, 1893, he had sold and conveyed the property to his codefendant, the Beaver Brook Company, and that from and after that date he had no interest whatever, and only acted as the agent of the grantee. Illustrated by subsequent facts, the motive in making the entry upon the land, and the inequitable character of the claim of Fifer and his grantee, are apparent, and appellant corporation, intending to use the property for the same purpose as appellee,—for the storage, transportation, and distribution of water,—must show compliance with the constitution and laws of the state, and cannot base a right upon the alleged shortcomings of appellee. The trial court was justified in its finding and decree of perpetual injunction, and the judgment and decree will be affirmed. Affirmed.

(1 Kan. A. 145)

MIEHELL v. GRIEST et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 6, 1895.)

MECHANICS' LIENS—RELEASE OF LIEN ON PART OF PROPERTY—EFFECT.

1. The evidence examined, and held to be sufficient to sustain the findings of fact by the court.

2. Where the owner of a city lot, for himself and as agent for the owner of an adjoining lot, makes an entire contract for the purchase of lumber for the erection of a house upon each of said lots, without any agreement as to the quantity to be used in each house, and the same is so furnished and used, the person furnishing such lumber is entitled to a lien for the full amount due therefor, under the mechanic's lien law, upon both said lots and the improvements thereon, without making any apportionment between them; and, after part payment, a release of one lot from the lien by consent of all parties does not operate to release the remaining lot from the lien for the balance unpaid.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. Miller, Judge.

Action by D. J. Griest and Robert Garrett against Jerome Mlexell, to enforce a mechanic's lien. There was judgment for plaintiffs, and defendant brings error. Affirmed.

Rees, Hoyt & Searles, for plaintiff in error. McGrew & Watson, for defendants in error.

GARVER, J. The errors assigned in this case and urged upon the court are on the findings of fact and conclusions of law made by the court. Counsel for plaintiff in error, at considerable length, recites the evidence introduced, and contends that it does not sustain the findings of fact. We think it is sufficient for that purpose, and, under the long-established rule of the supreme court, we cannot weigh the testimony, and say whether, in our judgment, it does not preponderate the other way. The court found that the claim sued for was due for lumber furnished for the erection of a building on a certain lot in Kansas City, Kan.; that at the time the contract therefor was made, and the lumber furnished, one Willis Johnson owned said lot, Hester Johnson owning an adjoining lot; that Willis Johnson, for himself and as agent for Hester Johnson, made a contract with the plaintiffs to furnish certain lumber for the erection of two houses, one on each of said lots; that the lumber was delivered at said lots, and portions of it used in each house; that lumber to the value of that sued for was used in the house erected on the lot on which the lien is claimed in this action; and that a statement for the lien was filed within the statutory time after the completion of the building and the furnishing of the material.

The principal controversy is whether a material man is entitled to a lien where material is thus furnished for the erection of two separate houses, and it cannot be shown what particular lumber went into each. It must be admitted that in some

cases when the material is so furnished it may be very difficult for the trial court to make proper apportionment between the two houses, but it is not a difficulty which is necessarily insurmountable. In this case the court has expressly found that lumber was used, to at least the extent to which the lien was allowed, for this particular house. It is not necessary, to uphold such finding, that there be direct and positive testimony that any particular lumber was so used. *Rice v. Hodga*, 26 Kan. 164; *McGarry v. Averill*, 50 Kan. 362, 31 Pac. 1082; *Shaw v. Thompson*, 105 Mass. 345. It is objected by the plaintiff in error that the court was influenced in so finding by testimony admitted showing that the owner of the building and the defendant in error, when making a partial settlement of their accounts, agreed as to the amount of lumber that went into each house. It is claimed that such testimony is not competent or admissible; that a lien arises out of the furnishing of materials for and the added value which their use gives to the premises; and that no such lien can arise out of a mere contract of the parties. Conceding the correctness of this proposition, yet we think the testimony was competent as an admission of the owner of the property, while he was owner and in possession, and was properly considered by the court along with the other evidence in the case. *Edwards v. Derrickson*, 28 N. J. Law, 39; *Ballou v. Black*, 17 Neb. 389, 23 N. W. 3; *Whart. Ev.* § 1156.

Were not the defendants in error entitled to a lien on this lot and building, even without any special apportionment of the lumber between the two houses, and without any finding of the amount of lumber actually used in this one? The lumber furnished for both amounted to the sum of \$603.55. The sum of \$356 being paid by Hester Johnson, her lot was released from any claim of lien thereon, and the balance of \$247.55 was held as a lien against the other lot. In *Carr v. Hooper*, 48 Kan. 253, 29 Pac. 398, it was held: "Where work and material are furnished in the erection of five buildings upon a single lot under an entire contract with the owner, a lien attaches to the lot and buildings for all the materials and labor furnished; and a release of a part of such lot by the contractor from the lien, to enable the owner to secure a loan thereon, will not defeat the lien on the other portion of the lot." The same principle will apply in this case. It is the entirety of the contract which gives effect to such rule. In principle it can make no difference that the lots are not owned by the same person, or that the buildings are erected upon a tract of land which is divided into two portions by a lot line. When the owners of two such contiguous lots join in making an entire contract for the erection of improvements upon both, they are held to pledge the credit of the whole property, and each part thereof, to the payment of the sum which they have thus jointly and severally bound themselves to pay. Under facts similar

to those of Carr v. Hooper, the supreme court of Massachusetts, in Wall v. Robinson, 115 Mass. 429, applied the same rule, holding that the labor upon each building created a lien on the whole premises. In Batchelder v. Rand, 117 Mass. 176, a similar question arose before the same court, as to the right to a mechanic's lien when the houses were on separate, but adjoining, lots; and the court held that, as the buildings were erected under an entire contract, each lot was subject to a lien for the improvement on all. To the same effect are Doolittle v. Plenz, 16 Neb. 153, 20 N. W. 116; Manufacturing Co. v. Shea, 24 Or. 40, 32 Pac. 759; Phillips v. Gilbert, 101 U. S. 721; Pennock v. Hoover, 5 Rawle, 291; Miller v. Shepard, 50 Minn. 286, 52 N. W. 894; Fullerton v. Leonard (S. D.) 52 N. W. 325; Sergeant v. Denby, 87 Va. 206, 12 S. E. 402; Williams v. Judd-Wells Co. (Iowa) 59 N. W. 271. The release of one lot from the lien with the consent of all parties concerned, would not release the remaining lot. Carr v. Hooper, *supra*. Under either view of the facts, therefore, the court properly held the lot in controversy subject to the lien for the amount due. Mixell purchased the property subject to this right of lien, and is bound to the same extent his grantor was.

The newly-discovered evidence presented on the motion for a new trial was merely cumulative, and it was not error for the court to refuse a new trial on that ground. City of Olathe v. Horner, 38 Kan. 312, 16 Pac. 468; Douglass v. Anthony, 45 Kan. 439, 25 Pac. 853. The judgment will be affirmed.

(1 Kan. A. 304)

CLARK v. CITY OF OTTAWA.

(Court of Appeals of Kansas, Southern Department, E. D. July 16, 1895.)

RECORD ON APPEAL—JURISDICTION—DISMISSAL.

Under section 1, c. 245, Laws 1889, the record brought to this court must affirmatively show that the court has jurisdiction, or the case will be dismissed. And when the record shows that the amount or value in controversy is less than \$100, there must be incorporated in the record a certificate of the district judge showing that the case is within the exception of the statute, and a mere statement to that effect, signed by the judge, and affixed to, but forming no part of, the record, confers no jurisdiction upon this court.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by the city of Ottawa against William H. Clark. Judgment for plaintiff, and defendant brings error.

William H. Clark, in pro. per. William A. Deford, for defendant in error.

COLE, J. This is an action brought by the city of Ottawa against William H. Clark to recover a fee of \$72, claimed by the city

to be due on account of said Clark having connected his premises with the sewer mains of said city. A jurisdictional question confronts us at the outset. The amount involved in this appeal is less than \$100, and, unless it is one of the excepted cases, and a certificate to that effect forms part of the record, this court has no jurisdiction. Loomis v. Bass, 48 Kan. 28, 28 Pac. 1012. Attached to the papers in this case is a statement which reads as follows (omitting caption): "The above-entitled action, involving the tax or revenue law, is one belonging to the excepted classes as provided in Sec. 1, c. 245, Laws of 1889. A. W. Benson, Judge." This is not a certificate as contemplated by the statute, nor is it in any sense incorporated in the record so as to give this court jurisdiction. While it now appears affixed to the record, it is no part of it; and it further appears by the copy made upon the filing of this case in the supreme court that even this bare statement was not included in the papers then filed. For these reasons this court has no jurisdiction, and the action is dismissed. All the judges concurring.

(1 Kan. A. 501)

WORDEN v. JONES, Sheriff, et al.

(Court of Appeals of Kansas, Southern Department, C. D. July 16, 1895.)

EXECUTION—RESTRAINING ENFORCEMENT—CONTRIBUTION BETWEEN JOINT DEFENDANTS.

1. Where a judgment has been fully paid and satisfied, except the cost of suit, and an execution issued thereon for the collection of the original judgment and cost, upon a tender of all cost and accruing cost the party will be entitled to an injunction to restrain the sheriff from a levy and sale of property under such execution.

2. Where the petition of the plaintiff alleges the rendition of a joint judgment against three different persons, and that the same was duly assigned to D. & W., and that the same was fully paid to said assignees, except the cost of said action, and that he had tendered all the cost and accrued cost to the sheriff, he is entitled to an injunction to prevent the levy and sale of his property thereunder.

3. Where one of several parties to a joint judgment furnishes all the money to pay the same, he may compel contribution from the other parties to such judgment; and in such case, after so paying, is entitled to the benefit of the judgment to enforce collection or repayment, if, within 10 days after his payment, he files with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment. Upon filing of such notice, the clerk shall make an entry thereof on the margin of the docket. Contribution may then be enforced by execution.

4. Where the plaintiff's petition alleges the rendition of a joint judgment against three several persons, and that the same was duly assigned to D. & W., and the said judgment has been fully paid to such assignees, except the costs, and alleges tender of all cost in said action, and accrued cost, and the answer of the defendants admits the rendition of judgment, the assignment to D. & W., but denies that the same was fully paid, but alleges that the same was duly assigned by the said D. & W. to another person, who was not a party to such judgment, and

that he is the owner thereof, and is proceeding to enforce the same by levy of execution and sale of property thereunder, and the plaintiff in his reply alleges that the party taking the assignment from D. & W. was the managing agent and chief officer of one of said defendants, which was a corporation, and that the money was furnished by said corporation to its officer, or there was an agreement between the corporation and its officer to repay him, and that the assignment was taken by such person in fraud of the rights of the plaintiff, and to compel him to pay the full amount of the judgment to said defendant corporation, *held*, that the sustaining of the demurrer to said reply was error.

(Syllabus by the Court.)

Error from district court, Reno county.

Action by James Worden against J. W. Jones, sheriff, J. C. Holloway, and Davidson & Williams to enjoin the collection of a judgment. Judgment for defendants, and plaintiff brings error. Reversed.

J. W. Jones and J. A. Troutman, for plaintiff in error. Whiteside & Gleason, for defendants in error.

JOHNSON, P. J. On January 13, 1891, James Worden filed his petition with the clerk of the district court of Reno county, Kan., alleging that on the 18th day of March, 1890, J. C. Holloway obtained a judgment in said court against James Worden, Sidney E. Peck, and Swift & Co., a corporation, for the sum of \$840.62, with interest at 6 per cent. from the date of judgment, and costs taxed at \$88.40, and that thereafter the said Holloway assigned said judgment to his codefendants Davidson & Williams, and in April, 1890, said judgment was fully paid and satisfied, the said assignees receiving the full amount thereof, except the amount of cost. Afterwards, on the 1st day of December, 1890, an execution was issued from the district court of said county, and he attaches a copy of said execution to his petition. He further avers that he tendered to the sheriff the full amount of cost and accruing cost in said cause, but the sheriff refused to accept and receive the cost and make return of the execution, but levied the same upon Worden's real estate situated in Reno county, Kan., for the purpose of collecting the full amount of judgment, interest, and cost as not satisfied under the execution. Worden also offers to pay all cost which he has not heretofore paid in said cause, and asks that the sheriff be required to accept the same and return the execution; that he be enjoined from proceeding under said execution to sell the property of this plaintiff. The petition contains three several causes of action, setting up substantially the same state of facts in each cause for an injunction. To the petition of plaintiff the defendants on the 22d day of January, 1891, filed their answer, containing three several defenses, in which they admit that the judgment was taken as set forth in plaintiff's petition, and that Hol-

loway transferred the same to Davidson & Williams; but they deny that the judgment was ever paid or satisfied, but aver that said Davidson & Williams, for good and valuable consideration, assigned the judgment to some other party than Swift & Co., to wit, one Edward F. Swift, and that the assignee holds said judgment, and that it is in full force and unsatisfied. The second count in the answer alleges substantially the same facts as the first, and avers the issuing of execution, and that the same is levied upon real estate of the plaintiff, which they are seeking to have sold in satisfaction of the judgment. The third count contains substantially the same allegation, but denies specifically that Davidson & Williams ever received the principal and interest of said judgment from Swift & Co., but avers that the same was assigned to Edward F. Swift, who still owns and controls the same, but whose assignment has not yet been placed on record. The answer is verified by Gleason, attorney for defendants. Defendants also on the same day filed motion to strike out all that part of the third count of plaintiff's petition commencing with the words "Thereafter, on March the 18th, 1890," on the third page of said count, because the matters set up in said count are immaterial to the issues in said cause, and for the second reason that it was redundant and incompetent. This motion has never been passed upon by the court. On the 30th day of January, 1891, plaintiff replied to the answer of the defendants, in which he says that if it be true, as alleged in the answer of the defendants, that Davidson & Williams, assignees of said judgment, assigned the judgment to one Edward F. Swift; that said Swift took the assignment of the judgment to himself for the sole use of the defendant Swift & Co.; that Swift is the manager and controlling official in the management of Swift & Co., whose office is in Kansas City, Kan.; and that said Swift & Co. is a corporation; that if said corporation did not furnish the money to said Edward F. Swift which was turned over to Davidson & Williams for said judgment, it was understood and agreed between said corporation and Edward F. Swift that it would reimburse him and save him harmless by reason of his acts in relation to said judgment,—and avers that said acts were done at the instance and request of Swift & Co. by Edward F. Swift, as agent for defendant corporation, and were in payment of said judgment, but it was assigned to Edward F. Swift for the fraudulent purpose of controlling an execution on said judgment against this plaintiff. On the 22d day of February, 1891, the defendants filed a demurrer to the reply of plaintiff, setting forth four different causes of demurrer thereto, each of which alleges substantially that the facts stated in the reply are not sufficient to overcome the allegation in defendants' answer.

At the March term of the court, 1891, the demurrer to the reply was sustained, and, Worden electing to stand on his petition and reply, judgment was rendered refusing an injunction, and also for costs of suit; and the plaintiff excepted and brings the case to this court for review.

The principal contention in this case is as to whether the judgment of J. C. Holloway against James Worden, Sidney E. Peck, and Swift & Co., a corporation, which was afterwards assigned to Davidson & Williams, was actually paid by Edward F. Swift for and on behalf of Swift & Co., a corporation, of which it is alleged that Edward F. Swift is the principal officer and managing agent. It is shown by the petition, answer, and reply that the judgment was entered as set forth in plaintiff's petition, that it was assigned to Davidson & Williams, and Davidson & Williams received the amount of said judgment from the hands of Edward F. Swift. So the contention is as to whether the said Edward F. Swift paying the money over to the assignees of the said judgment amounts to the payment of said judgment against all of the defendants in said action, and, if it was a payment of said judgment, whether Edward F. Swift had the right to take the assignment of it to himself for the purpose of forcing contribution from the defendants Worden and Peck. The plaintiff in error insists that if Swift & Co. paid the money to Davidson & Williams through Edward F. Swift, the principal officer and managing agent of Swift & Co., as averred in the petition and reply, and the demurrer admits this, then Swift & Co. cannot have an execution issue on the original judgment and levy upon Worden's property and sell the same, thereby forcing him to pay all the judgment to Swift & Co.; that, if Worden is liable to Swift & Co. for anything, the matter must be adjudicated between Worden and Swift & Co. for contribution. The defendants in error contend that, taking the pleadings altogether, they do not contain facts sufficient to entitle the plaintiff to an injunction. It is insisted by the defendants that the reply does not deny any of the allegations in the answer, but in fact confesses them; that, the judgment being a joint one and unappealed from, Swift would be entitled to enforce it against the plaintiff until Swift & Co. had been reimbursed the amount due them thereon. This being a true and fair construction of the pleadings, plaintiff is not entitled to an injunction restraining the enforcement of the execution.

It is further contended that if Swift & Co. had actually furnished the money to pay the judgment, and had it assigned to Edward F. Swift, before Worden could maintain an action for an injunction he would have to tender at least one-half of the judgment to Swift & Co. There is not entire harmony in the authorities upon the question of the right to interpose by way of injunction to

enjoin the enforcement of a judgment which has been fully paid. In an early case, decided in 1814, Chancellor Kent, in speaking on the jurisdiction of the court of chancery to enjoin the enforcement of a judgment by execution and sale of property therefor, says: "The injunction can only be granted upon one of these two grounds: (1) That the plaintiff has already fully paid and satisfied the execution." *Lansing v. Eddy*, 1 Johns. Ch. 49. The better-reasoned cases all seem to hold that where the judgment has been fully paid and satisfied equity will restrain the levy of execution and sale of property thereon. Where the judgment has been fully paid, it would be a great injustice to the party to allow the issue of execution thereon and the sale of his property thereunder, and remit him to his redress by an action at law for his damages. The plaintiff's petition alleges the rendition of judgment by the district court of Reno county in March, 1891, the assignment of the judgment by Holloway to Davidson & Williams, and the payment of the judgment in full to the assignees thereof, except the cost, and the tender of the full amount of costs and accrued costs. The answer to this petition admits the rendition of the judgment, the assignment thereof to Davidson & Williams, and alleges the payment of the amount of the judgment to the assignees by Edward F. Swift, and claims that this was not a payment of the judgment, but it was a purchase of the judgment by Edward F. Swift individually. The reply of the plaintiff alleges that if it is true, as alleged in the answer of the defendants, that Davidson & Williams, assignees of said judgment, assigned the judgment to Edward F. Swift; that Swift took the assignment of the judgment to himself for the sole use of defendant Swift & Co.; that said Swift was the manager and controlling official in the management of Swift & Co.'s business, whose office is in Kansas City, Kan., and that Swift & Co. is a corporation engaged in the packing business; and that the money that paid the judgment was paid by Swift & Co., and the assignment was taken for the purpose of forcing the plaintiff to pay the entire amount to Swift, and was in fraud of his rights. We think, taking the entire pleading on the part of the plaintiff as true, that the plaintiff was entitled to an injunction. It is true that the reply of the plaintiff is not very definite and certain in its averments, but this defect could not be reached by demurrer. If the reply is not sufficiently clear and explicit in its allegations, the defendants should take advantage of this defect by motion to make it more definite and certain by way of amendment. It is contended by the defendant in his brief that if Swift & Co. had actually furnished the money to pay the judgment, and had it assigned to Edward F. Swift, before Worden could maintain his action he would have to tender at least one-half of the judgment, and there is no such tender.

The claim is that Swift, having paid the judgment, is entitled to force contribution from the other defendants, under section 480, c. 80, Gen. St. 1889. This is true if Swift had complied with the provisions of this section on the payment of the amount to Davidson & Williams,—*if*, within 10 days after the payment thereof, he had filed with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment. Upon a filing of such notice the clerk is required to make an entry thereof on the margin of the docket, and upon compliance with the provisions of this section contribution might be had by the issuing of an execution for the collection of the amount that the party was liable for; but no such facts exist in this case. Swift paid the amount due on the judgment to the assignees, and took an assignment thereof to himself, and then attempts to collect the entire amount of the judgment, interest, and costs off of Worden.

It is insisted by counsel for the defendants that "the allegation of the answer, that as between plaintiff and Swift & Co. plaintiff is primarily liable, should be taken as true. If so, plaintiff could not maintain his action until he tenders the whole judgment and cost." We do not so interpret the pleadings. The liability of Worden is a disputed fact, to be determined on the final trial of the case. The court on a final trial of the issues may determine the liability of Worden, as to whether he is primarily liable to Swift & Co., and, if it so finds, may deny the injunction or modify it, as justice and equity may demand. The petition of the plaintiff alleges that the judgment was fully paid and satisfied, and the answer alleges that the payment was made by Edward F. Swift to the assignees of the judgment, and the same was duly assigned to him. The reply alleges that if the money was paid by Edward F. Swift, as alleged, it was on behalf of Swift & Co., and for the fraudulent purpose of controlling the judgment and compelling plaintiff to pay to Swift & Co. the entire amount of the judgment and costs. The demurrer admits the truth of all these allegations, and should have been overruled and the issues determined on a final trial of the case; and, if the plaintiff could prove all the allegations of his pleadings, he was entitled to the relief demanded in his petition. The question of contribution between the plaintiff and Swift & Co. must be determined in a proper proceeding for that purpose. Swift & Co., not having complied with the provisions of section 480, c. 80, Gen. St. 1889, cannot now enforce contribution by execution and sale under the original judgment.

The judgment of the district court is reversed, and the case remanded, with direction to the district court to overrule said demurrer to the reply of plaintiff and proceed with said cause according to the opinion herein expressed. All the judges concurring.

(77 Or. 553)

STEVENS v. CARTER.

(Supreme Court of Oregon. July 20, 1895.)

MANDAMUS—SURRENDER OF OFFICE—QUESTIONS DETERMINED.

1. Under Sess. Laws 1893, p. 62, providing that women over the age of 21 years, citizens of the United States and of this state, shall be eligible to all educational offices within the state, the relator, a woman, received a certificate of election, and qualified as a county superintendent of schools. *Held*, that a peremptory writ of mandamus was properly issued to compel her predecessor to surrender the office to her.

2. The eligibility of one to an office for which he has received a certificate of election in pursuance of a statute authorizing it, and for which he has qualified according to law, will not, in mandamus by him for possession of the office, be passed upon.

3. The constitutionality of a statute will not, as a rule, be passed upon in a collateral proceeding.

Appeal from circuit court, Union county; M. D. Clifford, Judge.

Application by Nellie M. Stevens against J. L. Carter for a writ of mandamus to compel defendant to deliver to her the books and records of the office of county superintendent of schools. From a judgment allowing the writ, defendant appeals. Affirmed.

J. D. Slater, for appellant. T. H. Crawford and J. Baker, for respondent.

MOORE, J. This is a mandamus proceeding to compel the surrender of the books and papers belonging to the office of county superintendent of common schools of Union county. The facts are that at the election in June, 1894, the plaintiff received a plurality of all the votes cast, obtained a certificate of election to the office, and, having qualified as required by law, demanded the said books and papers of the defendant, and, upon his refusal to comply therewith, sued out an alternative writ of mandamus, requiring him to deliver them to her, or show cause why he had not done so. A demurrer to the writ having been overruled, the defendant, for a return thereto, after denying the material allegations contained therein, alleged that the plaintiff was a woman, and by reason thereof was ineligible to hold the office; that in June, 1892, he was elected superintendent, and qualified as such; and that he was holding over under color and claim of right, and was entitled to the insignia of the office. A demurrer to the return having been sustained, the court awarded a peremptory mandamus, from which judgment the defendant appeals, and contends that, he being in possession of the office under color and claim of right, mandamus will not lie to oust him therefrom, and that the plaintiff is ineligible to hold the office, while the plaintiff insists that having obtained the certificate of election, and qualified as required by law, she has a prima facie right to the books and papers, which mandamus will compel the defendant to deliver to her, and that the ques-

tion of eligibility cannot be tried in this proceeding.

To entitle the defendant to invoke the rule of law for which he contends, it must appear that he has a colorable title to the office, and was in possession of it, and discharging the duties thereof, under a claim of right. The return shows that in June, 1892, he was elected to the office in question, and, under the statute, was entitled to hold it for the term of two years, or until his successor was chosen and had qualified. Hill's Code, § 2586. An examination of the writ discloses that in June, 1894, the plaintiff was chosen as his successor, and qualified as required by law (Id. § 2587); hence the defendant's term of office had expired, unless he had a private interest in the ensuing term, by reason of the plaintiff's alleged ineligibility. The right of an officer to hold over after the expiration of his term exists only in cases where there is no legally elected and qualified successor, for when the rights of the successor vest, those of the incumbent terminate. *State v. Bembendorfer*, 96 Ind. 374. If the election of the plaintiff was not legally authorized, the defendant would continue to hold the office, by force of the express provision of the statute. *State v. Simon*, 20 Or. 365, 26 Pac. 170; *State v. Benedict*, 15 Minn. 198 (Gil. 152); *People v. Tilton*, 37 Cal. 614. The defendant, being in office by virtue of a prior election, was not a mere usurper. *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778. And the statute which provides that he should hold the office until his successor is elected and qualified gives him a colorable title; and, if it should be found, in a proper proceeding, that the plaintiff is ineligible, he would have a private interest in the term which would entitle him to hold over. *Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. 802. When a certificate of election has been issued to another, who has qualified thereunder, it is the duty of an incumbent of a public office, at the expiration of his term, to surrender the office to his successor; and should he then desire to contest the eligibility, election, or qualification of the person so holding the certificate, he may do so by proceeding in the manner prescribed by law for determining contested claims to office. *State v. Johnson* (Fla.) 11 South. 845. It would seem to follow that when the official term of an incumbent has expired, and his successor has been elected and qualified, his term is either suspended or terminated; and while he may have a colorable title and private interest in the ensuing term, in case the rights of his successor cannot vest, he cannot hold over under a claim of right until such right has been established in the manner prescribed by law.

The following provisions of the state constitution are deemed applicable, in determining the eligibility of the plaintiff to hold the office of county superintendent of common schools: "There shall be elected in each

county, by the qualified electors thereof, at the time of holding general elections, a county clerk, treasurer, sheriff, coroner and surveyor, who shall severally hold their offices for the term of two years." Article 6, § 6. "Such other county, township, precinct and city officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law." Id. § 7. "No person shall be elected or appointed to a county office who shall not be an elector of the county." Id. § 8. "In all elections not otherwise provided for by this constitution, every white male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months immediately preceding such election, and every white male of foreign birth of the age of twenty-one years and upwards, who shall have resided in this state during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law." Article 2, § 2. It will be observed that article 6, § 6, supra, in designating the officers to be elected in each county, does not enumerate that of county superintendent of common schools, but that office was created by an act of the territorial legislative assembly (*Gen. Laws Or.* 1855, p. 458), and was in force at the time the constitution went into effect, and continued in force by virtue of its express provisions (article 18, § 8). The term, "such other county officers as may be necessary," as used in article 6, § 7, supra, doubtless includes, among others, the county superintendent of common schools. The plaintiff's demurrer to the defendant's return to the alternative writ confesses that she is a woman, but since she was elected in pursuance of a statute which provides that "women over the age of twenty-one years, who are citizens of the United States and of this state, shall be eligible to all educational offices within the state" (*Sess. Laws 1893*, p. 62), we cannot declare her ineligible without holding a statute unconstitutional, and therefore void,—a conclusion a court will rarely ever reach in a collateral proceeding. That the title to an office cannot be tried in a mandamus proceeding is a rule of law so well settled that it needs no citation of authorities to support it. It is also well settled that in such proceeding against the incumbent of a public office, to compel him to deliver the books and papers thereof to one who claims to have been elected as his successor, the certificate of election issued to the claimant, and proof of his qualification thereunder, constitute prima facie evidence of title to the office, and a peremptory writ will be directed to compel the delivery of the insignia of the office, irrespective of the eligibility of the person to whom the

certificate has been issued. In *Crowell v. Lambert*, 10 Minn. 369 (Gil. 295), *Berry, J.*, in rendering the decision of the court in a mandamus proceeding, said: "On the whole, it may be said that the question here is not who will be entitled to the office on an examination into the merits of the election, but who is now entitled to the possession of the books and papers appertaining to the office. The person holding the certificate is, under the circumstances of the case, *prima facie* the officer, and therefore *prima facie* entitled to the insignia and records of the office. In such cases the writ of mandamus is a peculiarly proper, adequate, and speedy remedy, and perhaps the only one by which to enforce the delivery of the books," etc. So, too, in *State v. Sherwood*, 15 Minn. 221 (Gil. 172), the court, in discussing the eligibility of one who held a certificate of election, and sought, by mandamus, to procure a delivery of the books belonging to an office, say: "It would seem, then, to be immaterial, in this proceeding, whether or not the relator was eligible, or was duly elected, to the office, for to try either issue would be to try the title." In *Warner v. Myers*, 4 Or. 72, it was held that the person holding the certificate of election was entitled to a peremptory writ of mandamus to compel the incumbent of the office to deliver the property appertaining thereto. In *People v. Head*, 25 Ill. 325, *Caton, C. J.*, in speaking of the certificate of election which had been issued by a canvassing board, said: "The decision of the canvassers afforded *prima facie* evidence that the relator was legally elected, and entitled him to the office until that canvass should be set aside by a proceeding to be instituted by the defeated candidate in the courts of justice, and in the forms of law." To allow an incumbent to hold over and retain possession of an office after the close of his term, when a certificate of election has been issued to another, who has duly qualified, because, perchance, the incumbent may think his successor is ineligible, or has not been duly elected, would thwart the popular will, as expressed by the majority at the election, and tend to make the incumbent the judge of his own rights, as well as of the eligibility, election, and qualification of his successor. *State v. Oates*, 86 Wis. 634, 57 N. W. 296. The electors having expressed their preference at the polls, it is better that the person chosen by their votes, having obtained the certificate of election, and qualified, should be inducted into office, and the burden of proving the ineligibility and want of election or qualification cast on the prior incumbent, than that his successor should be deprived of his office until he could show himself eligible thereto. It is true that in *State v. Alderman of Pierce City* (Mo. Sup.) 3 S. W. 849, to which our attention has been called, the court denied the peremptory writ of mandamus to compel the incumbent to deliver the books and papers of an office to one

shown by the record to be ineligible; but, in view of the statute authorizing the plaintiff's election, we decline to pass upon the plaintiff's eligibility until the question is before us in a direct proceeding. Having received the certificate of her election, in pursuance of a statute authorizing it, and having qualified, the plaintiff made a *prima facie* case, and showed a *prima facie* right to the possession of the books and papers, which she is entitled to use until the question of her right to do so can be tried in a proper proceeding. It follows that the judgment of the court below must be affirmed, and it is so ordered.

(22 Nev. 385)

CRAW v. WILSON. (No. 1,428.)

(Supreme Court of Nevada. July 26, 1895.)

MINING PARTNERSHIP—STATUTE OF FRAUDS.

A partnership agreement to locate mining claims being within the statute of frauds (St. 1861, p. 11, § 55), one partner cannot claim an interest in a claim located by another under an oral agreement that they should be partners in all such locations, when no trust arises because partnership capital was employed in locating the claim.

Appeal from district court, Lincoln county; A. E. Cheney, Judge.

Action by Charles Craw against Frank Wilson. From a judgment for defendant, plaintiff appeals. Affirmed.

Geo. S. Sawyer and Richards & MacMillan, for appellant. Rives & Osborne, for respondent.

BELKNAP, J. This is a suit in equity for the purpose, among other things, of obtaining a decree determining that plaintiff is a half owner with defendant in certain mining property standing in the name of defendant. The case was tried by the court without a jury. The decision was in favor of defendant. The complaint alleges that, in consideration of the mutual advantages to be derived therefrom, the parties promised and agreed to and with each other to combine their efforts and means in prospecting for and locating water rights, timber claims, and mines and mining claims, and that they should be equal partners in all such locations; that said agreement has never been annulled in any way, but still remains in full force and effect. The answer denies the partnership; admits defendant's ownership in the mines, but denies that such ownership was acquired by virtue of any agreement of partnership, or by the aid of any means, tools, or equipments furnished by the partnership, and alleges that defendant's interest was acquired entirely independently of it. The facts, so far as material to the contention, are that the parties formed a mining partnership by oral agreement, and under it some mining locations were made, and other property acquired. These matters were of small value, and all of them had been settled

long prior to the commencement of this suit. If there was anything left out, it was, according to appellant's testimony, the Hidden Treasure claim, called in the complaint, by mistake, the "Keystone Claim." No effort was made to amend the complaint so as to embrace the Hidden Treasure claim, probably because no value was attached to it, and it was afterwards relocated by a stranger. In the spring of 1892 the defendant went to the Ferguson mining district, and, in connection with others, located the property in dispute.

The important question is whether the Ferguson district mines were located under the partnership. Unless partnership capital was employed in their acquisition, the partnership agreement is within the statute of frauds, and void. The statute declares: "Sec. 55. No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning or declaring the same, or by his lawful agent, thereto authorized in writing." St. 1861, p. 11. Equitable relief may be given against the partner holding the legal title when the property has been acquired by partnership capital upon the theory that a resulting trust exists,—a trust arising by operation of law, and within the exception of the statute. *Colly. Partn.* § 135, and note; *Edgar v. Donnally*, 2 Munn. 387; *Sigourney v. Munn*, 7 Conn. 11. The district court, however, in its decision, under conflicting testimony, held that the mines were not located with partnership capital, and enforced its conclusion by many circumstances in its support. Under well-settled rules, we cannot disturb the finding, but take this occasion to approve of it, as being fully supported by the evidence.

A number of exceptions were taken to the admission of evidence touching the dissolution of the partnership. The admission of this evidence could not have prejudiced the appellant, as the decision against him, as we have seen, was placed upon other grounds. The judgment and order of the district court are affirmed.

BIGELOW, C. J., and BONNIFIELD, J., concur.

(108 Cal. 1)

WINONA WAGON CO. v. BULL. (No. 15, 724.)

(Supreme Court of California. July 5, 1895.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS.

1. Under Civ. Code, § 322, providing that the liability of each stockholder is determined by the amount of stock owned by him at the time the debt was incurred, a stockholder is not liable on a note given by the corporation in pay-

ment of an antecedent indebtedness, but on the original debt.

2. A stockholder's liability is original, and he is not a surety for the corporation.

3. A complaint, in an action to enforce a stockholder's liability on a note given by the corporation, which failed to allege that defendant was a stockholder at the time the original indebtedness was created, is insufficient.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by the Winona Wagon Company against W. W. Bull to enforce defendant's liability as a stockholder. From the judgment therein rendered, plaintiff appeals. Affirmed.

William H. Jordan, for appellant. Bull & Cleary and Crandall & Bull, for respondent.

HAYNES, C. Plaintiff, a foreign corporation, claiming that the Bull & Grant Farm Implement Company, a California corporation, was indebted to it in a large sum of money, brought its action against defendant Bull to enforce his liability as a stockholder in the latter corporation for his proportion of said indebtedness. The cause was tried by the court, and plaintiff had judgment; but, being dissatisfied with the amount recovered, moved for a new trial, and appeals from the judgment and from an order denying its motion.

The complaint contained two counts upon a single cause of action, but upon the trial the first count was abandoned.

The second count, as it was stated in the amended complaint, was upon a promissory note made by the Bull & Grant Farm Implement Company to the plaintiff on November 12, 1890, at one day, for the sum of \$4,954.53, and alleges that defendant Bull, at all the times mentioned in the complaint, owned one-third of the capital stock issued by the corporation, and prayed for judgment against him for one-third of said sum.

Afterwards plaintiff amended said second count by striking out certain lines and inserting the following: "That at the city and county of San Francisco, state of California, on the following dates, the Bull & Grant Farm Implement Company made, executed, and delivered its eight several promissory notes to the plaintiff, for the following sums, to wit:

"On March 30, 1889, for the sum of.....	\$728 89
" April 18, " " "	663 95
" May 13, " " "	898 42
" May 17, " " "	747 87
" July 25, " " "	496 56
" July 25, " " "	496 56
" August 31, " " "	772 78
" August 31, " " "	772 74

"That said eight promissory notes were renewed from time to time by other notes of the Bull & Grant Farm Implement Company. That said last-mentioned renewal notes were on November 12, 1890, renewed by the promissory note of the Bull & Grant Farm Imple-

ment Company to the plaintiff for the sum of four thousand nine hundred and fifty-four and fifty-three one-hundredths (\$4,954.53) dollars. That said last-mentioned note is in the words and figures as follows, to wit." The note set out is sufficiently described above. Following the note, the complaint alleges: "That plaintiff is still the owner and holder of said promissory note, and that no part thereof has ever been paid. Wherefore, plaintiff prays judgment," etc.

The court found that the Bull & Grant Farm Implement Company had issued 500 shares of stock; that, at the date of the execution of each of the eight promissory notes mentioned in said amendment to the complaint, the defendant owned 49 of said shares; and that on November 12, 1890, the date of said last-named note, he owned but 20 shares. The court further found that said note of November 12, 1890, was not given in renewal of any of the notes set out in said amendment to the complaint, but that it was given in payment of them. Upon these facts the court concluded that plaintiff was entitled to judgment for twenty five-hundredths of said last-named note, while appellant contends that the judgment should have been for forty-nine five-hundredths. Appellant's only specification is that the finding that the note of November, 1890, was not taken in renewal, but in payment, is not justified by the evidence. Respondent contends that the judgment must be affirmed, whether said finding is justified by the evidence or not, for the reason that appellant was not entitled to any judgment upon its complaint, and, having obtained a more favorable judgment than it was entitled to, it cannot complain; and he thus puts in issue the sufficiency of the complaint.

It will be observed that the complaint nowhere alleges when "the debt or liability was incurred." It is alleged that on November 12, 1890, a promissory note was executed to the plaintiff by the corporation in which the defendant was a stockholder; but appellant contends that the debt or liability had its inception long before that date, and therefore concedes that the giving of a note does not necessarily show the date of the creation of the debt or liability. But it is not alleged that the debt or liability was created at the date of the several notes given in 1889. For aught that appears in the complaint, they may have been given in renewal of other notes, or upon settlement of accounts for goods sold and delivered, or services rendered, long before their respective dates. "The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred." Civ. Code, § 322. The complaint here cannot be distinguished, as to the point under consideration, from that in *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335. It was there said: "It will be observed that there

is no averment of the time of the incurring of the indebtedness or liability for which the note was given, or of the nature of such indebtedness, or the facts upon which it was founded; the only averment upon the subject being the making and execution of the note and mortgage. The complaint bases the right to recover on the making of the note and the judgment against the corporation; but as the liability of the stockholder is a separate and independent one, commencing with and dependent upon the original indebtedness, it is doubtful if the averments of the complaint in the case at bar are sufficient." That case, however, was decided upon the plea of the statute of limitations; though the court cited with approbation the case of *Tilden v. Gashwiler* (No. 4,052), decided in 1875, where it was held that the liability was upon the original indebtedness, and not upon the note. That the conclusion there reached was right scarcely needs argument or illustration. It is well settled that the liability of the stockholder is an original liability created by the statute; that his liability is dependent upon the fact that he is a stockholder at the time the debt is created, and the extent of his liability is measured by the proportion between the stock then held by him and the total number of shares issued. A corporation may incur a debt, or several distinct debts, to the same person, during a series of months, or years, and afterwards give its note for the aggregate amount, while B., a stockholder at the time the note was given, may not have been such when any one of the several debts included in the note was contracted. An allegation, therefore, that the defendant was a stockholder at the time the note was given, is not an allegation that the debt was incurred at that date, nor that the defendant was a stockholder at any prior date when the indebtedness was in fact contracted. That the stockholder's liability is not upon the note of the corporation was necessarily decided in the late case of *Bank of San Luis Obispo v. Pacific Coast Steamship Co.*, 103 Cal. 594, 37 Pac. 499. In that case the bank loaned the San Luis Hotel Company, a corporation, a large sum of money on December 30, 1896, and took the note of the corporation therefor, payable six months after date. The note became due June 30, 1897. The action against the defendant, as a stockholder, was commenced June 3, 1890, less than three years after the maturity of the note, but more than three years after the loan was made, and it was held that the making of the note did not prevent the statute from running in favor of the stockholder, and that the action was barred under section 359 of the Code of Civil Procedure.

Section 322 of the Civil Code provides: "Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as," etc. In *Tripp v. Huncheson*, 82 Ind. 307, the action

was upon a judgment rendered against the Kankakee Valley Draining Company, a corporation, to recover the amount thereof from the defendants, who were members of the association, under a statute which provided as follows: "The members of every such association shall be individually liable for all debts contracted by and all damages assessed and accrued against the association during their membership." The court said: "This imposes upon the members of such a corporation, as individuals, not as corporators, an absolute primary obligation to pay all debts contracted by the company of which they are members. Their liability is created by the statute, and is distinct from any obligation which they, as corporators, owe to the corporation or its creditors. The corporation has nothing to do with this liability, nor has it the right or power to represent its members as to this individual obligation. It is a matter between the creditors of the corporation and its members, not as corporators, but as individuals. * * * In this and similar cases, by becoming members of the corporation, such members impliedly agree that, as individuals, they will pay all debts contracted by the corporation, and to this agreement the creditors become parties. It is upon this obligation that the creditor who seeks to charge the members of the corporation, as individuals, must sue—not upon a judgment obtained against the corporation." In *Mining Co. v. Woodbury*, 14 Cal. 265, it was held "that an individual corporator, in respect to his personal liability for the debts of the corporation, does not occupy the position of a surety, but that of a principal debtor." But the defendant, though a principal debtor as to debts created while he is a stockholder, is not a party to the note or notes executed by the corporation, and is not liable thereon, but is liable only by force of the statute, and to the extent limited by it. The action here is upon the last note, as to which the allegation is that it remains wholly unpaid. But, even if it were true that the action is upon the eight notes mentioned in the amendment to the complaint, the result must be the same. In neither case does the complaint state a cause of action against the defendant. It must be apparent that the defendant may have been a stockholder, owning a certain number of shares, at the date of the execution of a promissory note by the corporation, and yet not have been a stockholder at the time the debt or liability evidenced by the note was created, or, if then a stockholder, he may have owned a different number of shares. The stockholder's liability is upon the debt to the extent and under the circumstances defined by the statute, and not upon the express promise of the corporation to pay at a particular time and place. There may be cases where the written promise of the corporation is necessary to create a liability against either the corporation or the stock-

holder, but such cases are not considered here. It is therefore not necessary to consider whether the finding excepted to is justified by the evidence.

As the defendant has not appealed, and the plaintiff has obtained a more favorable judgment than it was entitled to, the judgment and order appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(1 Kan. App. 241)

LANE v. WOODRUFF et ux.

(Court of Appeals of Kansas, Southern Department, E. D. July 16, 1895.)

LIEN OF MORTGAGE—SUBROGATION—COVENANTS.

1. A mortgage upon real estate creates a lien upon whatever estate, right, or title the mortgagor may have in the real estate mortgaged.

2. A breach in the covenants of the Woodruffs inures to the benefit of A., M. & Co., the mortgagee of Lane, and if Lane is compelled to and does pay the mortgage of A., M. & Co., he is thereby subrogated to the rights of said mortgagee, and is entitled to maintain this action.

(Syllabus by the Court.)

Error from district court, Labette county; J. D. McCue, Judge.

Action by Mary C. Lane against Gilbert M. Woodruff and wife. Judgment for defendants, and plaintiff brings error. Reversed.

This is an action brought in the district court of Labette county, Kan., by this plaintiff against the said defendants, in which the plaintiff seeks to recover damages sustained by her because of a breach of covenant in a deed executed by these defendants on the 23d day of December, 1885. The petition filed herein is as follows (omitting title):

"Said plaintiff complains of said defendants, and alleges: That on December 3, 1885, said defendants executed and delivered to this plaintiff their certain deed in writing of that date duly acknowledged, a copy of which is hereto attached and made a part hereof, whereby they represented that they had good right and lawful authority to, and pretended to, sell and convey to plaintiff the southwest quarter of section two (2) in township thirty-two (32) of range eighteen (18) in Labette county, Kansas, for and in consideration of the then value of said premises, to wit, the sum of two thousand dollars; whereupon, in pursuance of such supposed purchase by and conveyance to her, she at once took possession of said premises. That by the terms of said deed said defendants covenanted with plaintiff as follows: 'That at the delivery hereof they are the lawful owners of the premises above granted, and seised of a good and indefeasible estate of inheritance therein,

free and clear of all incumbrances,' and 'that they will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, forever, against all persons lawfully claiming the same.' That, as a part of the two thousand dollars consideration paid defendants for said premises, plaintiff assumed and paid off a mortgage at that time existing thereon, for five hundred dollars. That thereafter, and, to wit, on or about August 13, 1886, said plaintiff and her husband, William C. Lane, for the purpose of securing their note to Angell, Matthewson & Co. for \$900, dated August 2, 1886, and bearing seven per cent. per annum interest, payable semi-annually, executed, acknowledged, and delivered to said Angell, Matthewson & Co. their mortgage-deed on the above-described premises. That thereafter, to wit, on or about July 14, 1887, plaintiff and her said husband executed, acknowledged, and delivered to C. B. Kennedy a deed whereby, in consideration of the then value of said premises, to wit, the sum of twenty-five hundred dollars, they purported to sell and convey to him the above-described real estate, with covenants on their part substantially the same as those contained in the said deed from defendants to plaintiff. That thereupon, in pursuance of such purported purchase by and conveyance to him, said C. B. Kennedy took possession of said premises, which he retained until evicted as hereinafter stated. That said conveyance to said C. B. Kennedy, however, was made subject to said mortgage for \$900 and interest placed thereon by plaintiff and her husband, as aforesaid, which sum of \$900 so secured was, by agreement between said parties, deducted from the value and agreed price of said real estate, and was, with plaintiff's consent, retained by said Kennedy for the purpose of applying the same to the payment and discharge of said mortgage when it became due, and only the difference between said sum of \$900 and the contract price of said real estate was paid by said Kennedy to said plaintiff therefor. Plaintiff alleges that at the time of the execution and delivery to her of the deed from defendants as aforesaid, said defendants were not, nor was either of them, seised of a good and indefeasible estate of inheritance in said premises, or in any part thereof, nor did they or either of them at any time thereafter acquire such an estate therein or in any part thereof; nor have said defendants or either of them defended said premises or any part thereof in the quiet and peaceable possession of plaintiff, her heirs and assigns, against all persons lawfully claiming the same, as they in said deed covenanted to do. Plaintiff alleges: That at the time defendants executed and delivered to her the deed aforesaid, George E. Johnson and Wealthy C. Nichols were the full, legal, and equitable owners of the above-described real estate, and entitled

to its possession and enjoyment, and have ever since remained such owners and entitled to such occupancy. That on May 19, 1890, at the May, 1890, term of the district court for Labette county, Kansas, in an action then pending in said court wherein said George E. Johnson and Wealthy C. Nichols were plaintiffs, and said C. B. Kennedy and others were defendants, it was by said court duly and legally ascertained and adjudged that said George E. Johnson and Wealthy C. Nichols were the full, legal, and equitable owners of the above-described premises, and entitled to their possession and enjoyment, and that they recover the possession thereof from said C. B. Kennedy. That said defendants had due notice of the pendency of said action and proceedings, and said Gilbert M. Woodruff, defendant, was one of the parties defendant in said suit. That by virtue of said judgment said Kennedy was ejected from said premises, and said George E. Johnson and Wealthy C. Nichols were put in possession thereof, which they still hold. That at the time of said eviction of said C. B. Kennedy from said premises, they were of the reasonable value of two thousand dollars. That because of the failure of title to said real estate, which said C. B. Kennedy supposed he was obtaining by virtue of the deed hereinbefore described from plaintiff to him, he refused to pay the \$900 note secured by mortgage on said premises as aforesaid, or any part thereof, and because of the failure of such title said Angell, Matthewson & Co., the said mortgagees, were unable to hold said real estate liable for the payment of said note, and therefore required payment thereof from plaintiff, and plaintiff was, because of such failure of title to said real estate, compelled to and did pay said note, and procure the release of said mortgage. That to pay said note plaintiff was compelled to expend for principal and interest a sum exceeding \$950. That, subsequent to the rendition of said judgment and his eviction from said premises as aforesaid, said C. B. Kennedy released said defendants from any action for damages by him sustained on account of breach of warranty and failure to make good their several covenants in their deed to plaintiff hereinbefore described. That in said settlement between Kennedy and the Woodruffs they did not take into consideration the matter of said \$900 mortgage, and said mortgage and the debt secured as aforesaid did not form any portion of the damage settled between said parties. That the only damage claimed by Kennedy or paid by the Woodruffs was the sum actually paid by Kennedy to plaintiffs, which was the difference between the agreed value of said real estate and said \$900, and said mortgage debt of \$900 and interest was left wholly unsettled, and to be adjusted between plaintiff and defendants. Plaintiff alleges that by reason of the matters and facts herein stated, she has been damaged in the sum of one thousand dollars,

all of which damage resulted from a failure on the part of said defendants to keep, observe, and perform their several covenants contained in their said deed to plaintiff. Wherefore plaintiff demands judgment against said defendants for the sum of one thousand dollars, with interest, and for costs of suit. Case & Glasse, Attorneys for Plaintiff.

"This indenture made this third day of December, in the year of our Lord one thousand eight hundred and eighty-five, between Gilbert M. Woodruff and Sara A. Woodruff, his wife, of the city of Parsons, in the county of Labette, and state of Kansas, of the first part, and Mary C. Lane of the second part, witnesseth, that said parties of the first part, in consideration of the sum of two thousand dollars to them duly paid, the receipt of which is hereby acknowledged, have sold, and by these presents do grant and convey, to the party of the second part, her heirs and assigns, all the tract or parcel of land situated in the county of Labette and state of Kansas and described as follows, to wit: The southwest quarter of section two (2), in township thirty-two (32), range eighteen (18) east, with the appurtenances, and all the estate, title, and interest of the said parties of the first part therein. And the said Gilbert M. Woodruff and wife do hereby covenant and agree that at the delivery hereof they are the lawful owners of the premises above granted, and seised of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances except a mortgage for the sum of five hundred dollars, which the party of the second part assumes and agrees to pay, and that they will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, forever, against all persons lawfully claiming the same, except the above-mentioned mortgage. In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year last above written. Gilbert M. Woodruff. [Seal.] Sara A. Woodruff. [Seal.]

"Signed, sealed, and delivered in presence of J. B. Wilson."

(Omitting acknowledgment and filing.)

To which said petition defendants filed the following demurrer (omitting title): "Now come the defendants herein and demur to the petition filed herein upon the ground and for the reason that the petition does not state facts sufficient to constitute a cause of action. Kimball & Osgood, Attorneys for Defendants,"—which said demurrer was by the court sustained, and the sustaining of said demurrer is the error complained of by this plaintiff.

Case & Glasse, for plaintiff in error. Kimball & Osgood, for defendants in error.

DENNISON, J. (after stating the facts). The question to be decided in this case is whether or not the covenants in the deed

given by the Woodruffs to Lane are such covenants as can be recovered upon by said Lane, after having mortgaged the land to Angell, Matthewson & Co., and after having deeded the land to said Kennedy subject to the \$900 mortgage, and after having paid Angell, Matthewson & Co. the said \$900 and interest. A mortgage of real estate in this state passes no title to or interest in the land, but simply creates a lien upon it. The mortgage given to Angell, Matthewson & Co. was a lien upon whatever interest or estate Lane had in the land. After having given the mortgage Lane could only deed the land subject to the lien created by said mortgage, and Kennedy could only take, under the deed, such interest as Lane might have had in the premises at the date of the deed, which was supposed to be the fee title subject to the lien of said mortgage. A lien upon whatever right, title, interest, or estate Lane had in said land passed to the mortgagee, and the mortgage carried with it a lien upon said estate, and the covenants being a part of said estate, and running with the land, said Angell, Matthewson & Co. were entitled to recover upon said covenants. The said Kennedy not having paid the full purchase price of said land, but having retained \$900 with which to pay said mortgage, he is not entitled to all the benefits of the covenants running with said land until he has performed his full contract and paid the full purchase price. Not having paid the \$900, he is not entitled to all the benefits of the covenants until after said \$900 has been fully paid, and these defendants, having settled with the said Kennedy for all damages to them, only settled for what interest he may have had in said lands or said covenants. This plaintiff, having paid the \$900 and the interest thereon to said Angell, Matthewson & Co., is entitled to recover, under said covenants, the damages she sustained by reason of having to pay the said \$900 and interest. In this case the amount for which these defendants were liable upon a breach of their covenants was the purchase price which they received from this plaintiff. The petition alleges that that amount was \$2,000. It also alleges that Kennedy paid this plaintiff \$2,500, which was to include the \$900. This plaintiff was liable upon her covenants to Kennedy for the amount of the purchase price which Kennedy paid her. This plaintiff would be entitled to recover from said Woodruffs, on their covenants, the said sum of \$900 and interest; and said Kennedy would be entitled to recover from them the balance between that amount and \$2,000, and would be entitled to recover from this plaintiff, upon her covenants, the balance between the sum of \$2,500 (less the amount of the mortgage) and the amount received from Woodruffs, or could, if he so desired, recover the whole amount of the purchase price actually paid from this plaintiff. The demurrer should have been overruled. The judgment

of the court below is reversed, and this case remanded to the court below with instructions to overrule the demurrer. All the judges concurring.

(1 Kan. A. 219)

ROE v. BOARD OF COM'RS OF ELK COUNTY.

(Court of Appeals of Kansas, Southern Department, E. D. July 16, 1895.)

PLEADING—IMMATERIAL ALLEGATIONS—MAKING MORE DEFINITE—LIMITATIONS—ACTION FOR PENALTY—COUNTY ATTORNEY.

1. Where a petition contains redundant, irrelevant, or immaterial allegations, which are calculated to prejudice the adverse party upon the trial of such case, the same should be stricken out on motion of the party prejudiced thereby.

2. When the plaintiff's petition is indefinite and uncertain in its allegations, the same should be made certain and definite by amendment, on motion of the adverse party, so that he may be informed of the real matter that he is required to defend against.

3. An action for the recovery of a penalty provided by statute must be commenced within one year after the right of action accrued, or the same will be barred by the statute of limitation, unless the statute creating the penalty prescribes a different limitation.

4. It is the duty of the county attorneys to appear in the several courts of their respective counties and prosecute and defend on behalf of the people all suits, applications, or motions, civil or criminal, arising under the laws of the state, in which the state or county is a party or interested in. They have full legal right to use the name of the state or board of county commissioners in the prosecution of any case in which the state or county is interested, and neither the board of county commissioners nor any member thereof has any power or control over their action in the premises.

(Syllabus by the Court.)

Error from district court, Elk county; M. G. Troup, Judge.

Action by the board of county commissioners of Elk county, Kan., against R. W. M. Roe and others. Judgment for plaintiff against defendant Roe, and said defendant brings error. Reversed.

L. Scott and J. D. McBrian, for plaintiff in error. John Marshall, for defendant in error.

JOHNSON, P. J. This action was brought under section 39, c. 25, Gen. St. 1889, against R. W. M. Roe, to recover back alleged unauthorized fees and money received by him while acting as one of the members of the board of county commissioners of Elk county. On the 29th day of March, 1889, the county attorney, on behalf of the board of county commissioners, filed in the office of the clerk of the district court of said county a petition against the said R. W. M. Roe, as principal, and N. Monna and J. B. Dobyns, sureties on the official bond of the said Roe, and thereafter, on the 17th day of July, 1889, filed its amended petition, in which it sets out and alleges as its first cause of action: (1) That the defendant, Roe, was the duly elected and

qualified county commissioner within and for Elk county, Kan., for the full term of three years, commencing on the second Monday in January, 1887, and that said Roe acted as such county commissioner continuously from the commencement of said term until the 3d day of December, 1888. That before entering upon his duties as such county commissioner the defendant, Roe, executed a bond to the state of Kansas as such county commissioner, as provided by law, with said defendants N. Monna and J. B. Dobyns as sureties, which bond was duly approved and filed in the office of the register of deeds of said county of Elk,—a copy of which bond is attached to said petition, marked Exhibit A, and made a part of the amended petition to the first cause of action therein. It also alleges that one H. B. Marshall, of said county, was the duly elected and qualified commissioner for said county for the full term of three years, ending on the second Monday in January, 1888, and that said Marshall acted as such commissioner during said entire term, and one W. M. Crooks was the duly elected and qualified county commissioner for said county for the full term of three years, ending on the second Monday in January, 1889, and that he acted as such during said entire term. That said defendant Roe was also a duly elected and qualified county commissioner for said county for the term of three years, ending on the second Monday in January, 1887, and that he acted as such during said entire term. That in the years of 1886 and 1887 said Roe, Marshall, and Crooks, while acting in the capacity of county commissioners for said county, unlawfully appropriated to themselves, respectively, large sums of money, and caused the same to be paid from the moneys in the treasury of said county, upon certain pretended claims filed by them, respectively, against said county of Elk, and by them allowed in the years last aforesaid while acting as such commissioners, which sums so unlawfully appropriated amounted to the aggregate sum of \$2,000 and more, in excess of all lawful sums and claims of whatsoever kind and nature that said commissioners were lawfully entitled to receive from said county in said years, which said sums so unlawfully appropriated could not be collected or received from said commissioners while they or either two of them remained in office, nor could action be prosecuted therefor; for said plaintiff alleges that after said moneys were unlawfully appropriated, and before the expiration of one year thereafter, the county attorney of said county commenced in the district court of said county, civil action against said commissioners and each of them to recover part of said moneys thus unlawfully appropriated, and to ascertain by judicial decision whether said commissioners or either of them were by law entitled to receive any part of said moneys, which said actions were de-

feated and a hearing on the merits thereof prevented by the combined efforts of said Roe, Marshall, and Crooks, upon the sole ground that said county attorney commenced said action without the knowledge or consent and without the authority of them, the said commissioners, to which said action, and to the records thereof in said court, reference is here made, and true copies of the motions, with the affidavits of said Roe, Marshall, and Crooks attached thereto, which grounds aforesaid were raised and determined, and said actions against Roe and Crooks were dismissed, are hereto attached, marked Exhibits B and C, and made a part of this petition. Wherefore the plaintiff alleges that, by reason of the premises aforesaid, action for the recovery of moneys aforesaid could not be commenced and prosecuted on the merits thereof while either two of said commissioners remained in office. (2) That said defendant, Roe, did not honestly and faithfully discharge all and singular his duties as such county commissioner during the term commencing on the second Monday in January, 1887, aforesaid, according to law, but failed, neglected, and refused as hereinafter particularly set forth and alleged. (3) That before the commencement of this suit the plaintiff demanded of said defendant, Roe, that he refund to the treasury of said county the moneys hereinafter alleged to have been unlawfully appropriated to said Roe, and by him drawn from the treasury of said county unlawfully, but that he refused and still refuses to refund the same or any part thereof. (4) That said defendant, Roe, on the 7th day of February, 1887, while acting in his official capacity as such county commissioner, procured the allowance of a certain pretended claim against said county of Elk in his favor, and the payment thereof from the moneys in the treasury of said county, for the sum of \$60, a copy of which pretended claim, with the indorsements thereon showing the allowance thereof, is hereto attached, marked Exhibit B, and made a part of this amended petition and first cause of action, and said plaintiff alleges that said pretended claim was not and is not a lawful claim against said county. That said defendant, Roe, had no lawful right to receive said sum of money, or any part thereof, and that the allowance and payment of said pretended claim was unauthorized and in violation of law.

This is the entire allegation contained in the first cause of action. There are eight separate causes of action stated in the petition of the plaintiff. The seven succeeding causes of action merely refer to the general allegation in the first cause of action, without setting out particularly any several causes of action, and refer to Exhibits A, B, C, and D, thereto attached, as a part of each of the several causes of action as they are set forth, and allege the receiving of different sums of money at different times, up to and including the

14th day of July, 1887. To this amended petition the defendant interposed two several motions,—the first motion to strike out certain portions of the plaintiff's amended petition, which motion was overruled by the court, and exceptions taken by the defendant. This motion should have been sustained, as these allegations were unnecessary, redundant, and irrelevant, and tended only to the prejudice of defendant on the trial of said cause. The Code of Civil Procedure requires the plaintiff in his petition to set out the facts constituting his cause of action in ordinary and concise language, and if redundant or irrelevant matter be inserted in any pleading it may be stricken out on motion of the party prejudiced thereby. The next motion was to require the plaintiff to make its petition more definite and certain in the following particulars, and each count of the plaintiff's amended petition separately, by setting out and stating wherein several amounts described in each cause of action were not legal claims against said county of Elk, and wherein and in what respect said claims were and are unlawful and in violation of law, and for what services said claims were presented, and when the same were paid, and how they were paid. (2) That the plaintiff be required to set out in each count to its amended petition when suit was commenced against the defendant, and when the same was terminated, and to set out what the order and judgment of the court in said suit was. (3) That the plaintiff be required to set out in its amended petition, and in each count thereof, separately, wherein the defendant did not honestly and faithfully discharge and perform the duties of his office as county commissioner. (4) That the plaintiff be required to set out separately and in each count of its amended petition wherein the said claim was not a legal claim against said county of Elk, and wherein the defendant had no lawful right to receive the same, and to set out fully wherein said claim was unauthorized by and in violation of law. (5) That the plaintiff be required to set out separately in each count of its amended petition when demand was made on this defendant to pay or return to the plaintiff or the county treasury any of the sums sued for in this action, and how said demand was made, and by whom made. (6) That the plaintiff be required to set out fully in its amended petition wherein action could not be commenced against the defendant on the several causes of action pretended to be set up in the plaintiff's amended petition, and who, if any one, prevented the commencement of said suit, and how the plaintiff was prevented from commencing suits against the defendant on the said several claims sued for in this action, and in what way the plaintiff was prevented from commencing suit on said claim, and who prevented said claims from being sued on. (7) That the plaintiff be required to separately

state and number its several causes of action. Said motion was overruled by the court, and excepted to by the defendant.

The motion of the defendant to require plaintiff to make its petition more definite and certain in certain particulars, and to make each count of the amended petition more definite and certain, should have been sustained. The petition does not show in what respect the claims that are alleged to have been unlawfully allowed by the commissioners and paid out of the county fund were illegal, nor for what services the claims were presented. The petition should contain a statement of facts in plain and concise language, without repetition, showing on what account the claims alleged to have been unlawfully paid were allowed,—whether for services as a member of the board of county commissioners, or whether claims for other and different services outside of those pertaining strictly to his fees as a member of the board of county commissioners. The petition is also defective in not stating wherein the defendant, Roe, did not honestly and faithfully discharge and perform the duties of his office as county commissioner. The averment in the petition is simply a conclusion, without a statement of any facts in relation to the manner in which the defendant, Roe, did perform his duties as a commissioner of Elk county, nor does the petition anywhere show wherein the defendant had no lawful right to receive the money that was allowed him by the commissioners and paid out of the county funds of Elk county. The allegation in the petition that action could not be commenced against the defendant on the several causes of action as set up in its amended petition states no fact why suit could not be commenced against the defendant while the other two members of the board of commissioners remained in office, nor does it allege any fact to show how the defendant had prevented the commencement of suit on the several claims sued on in the petition. The court erred in not sustaining the motion to require the plaintiff to amend its petition in these and other particulars.

After the court had overruled the motion of the defendant to require the plaintiff to make its petition more definite and certain, the defendant filed a demurrer to the amended petition of the plaintiff, setting forth two causes of demurrer thereto: (1) That the several causes of action of plaintiff's petition are improperly joined; (2) that the plaintiff's petition, and each cause of action attempted to be set out in plaintiff's petition separately, for that plaintiff's amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants. The demurrer of the defendants was sustained, as to N. Monna and J. B. Dobyne, to plaintiff's amended petition, and overruled as to R. W. M. Roe, and judgment was rendered by the

court sustaining the demurrer of N. Monna and J. B. Dobyne against the plaintiff, and for their costs; and the defendant, Roe, excepted to the judgment of the court in overruling the demurrer as to himself, and the case comes to this court on the petition in error of Roe alone.

Plaintiff's action is based on section 39, c. 25, Gen. St. 1889, to recover back unauthorized fees and money received by Roe while acting as one of the members of the board of county commissioners. Under this section all fees, costs, or other allowances, of any fees, obtained from or allowed against any county, when the same are not authorized by law and not refunded on demand, may be recovered back in a civil action in the name of a proper county in any court of competent jurisdiction, and on rendering judgment in any such case the justice or the court rendering the same shall add 100 per cent. to the same, to go to the county, and also a fee of \$10 if in a justice court, and \$25 if in the district court, to go to the county attorney or other person prosecuting the same. This is a penal statute, and the action to recover the penalty should be commenced within one year, or else it is barred by the statute of limitation. Section 18, c. 80, Gen. St. 1889, defines the different periods of limitation in cases other than for the recovery of real estate. Subdivision 4 provides: "Within one year an action for libel, slander, assault, battery, malicious prosecution or false imprisonment, and action upon a statute for penalty or forfeiture, except where the statute imposing it prescribed a different limitation." The petition in the case shows that this action is prosecuted for the recovery of a penalty prescribed by statute, and also showing that the action was not commenced within one year from the time the money is alleged to have been received by Roe. The action is barred by the statute of limitation. It was attempted in the amended petition to show such state of facts as suspended the statute of limitation by stating that the action could not be commenced within one year after the receipt of the several sums of money mentioned in the amended petition by reason of the commissioners' refusal to allow the same to be prosecuted on behalf of the board of county commissioners, but it is nowhere alleged that the board of county commissioners interfered to prevent the bringing of suits for the recovery of the money with the legal penalty. It is alleged that the county attorney had commenced a civil action in the district court against the commissioners and each of them to recover part of the money unlawfully appropriated, and to determine by judicial decision whether the commissioners or either of them were by law entitled to receive any part of said money, which said action was defeated and a hearing on the merits thereof prevented

by the combined efforts of Roe, Marshall, and Crooks, upon the sole ground that the said county attorney commenced the action without the knowledge or consent or without the authority of the commissioners, and attaches a copy of the record of such proceedings to the petition, and makes them a part of the amended petition. Upon examination of the record it is shown that the summons was quashed on motion because it was improvidently issued, the plaintiff not having given bond for costs, and not because of the interference of the commissioners. The claim is rested on the simple fact that Roe was a county commissioner, and the sums unlawfully appropriated by the commissioners could not be collected or received from said commissioners while they or either two of them remained in office, nor could an action be prosecuted therefor. This claim cannot be sustained. These facts are not such an exception as would prevent the running of the statute of limitation. It is made the duty of the county attorneys to appear in the several courts of their respective counties, and prosecute and defend on behalf of the people all suits, applications, or motions, civil or criminal, arising under the laws of this state, in which the state or county is a party or interested. He has the full legal right to use the name of the state or board of county commissioners in the prosecution of any case in which the state or county is interested, and the board of county commissioners have no power or control over his action in the premises; and it is further made the duty of the county attorney, in case any county commissioners shall be guilty of a violation of any of the provisions of chapter 25, Gen. St. 1889, to prosecute him for a misdemeanor; and if any commissioner shall be found guilty of a violation of any of the provisions of said chapter, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, be fined in a sum not exceeding \$500 or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and imprisonment. In addition to such fine and imprisonment, every officer who shall be convicted of any official misdemeanor or misconduct in office, or who shall be convicted of any offense, shall forfeit his office. So if the county commissioners of Elk county had violated the law in the manner claimed, the county attorney had full power and authority to prosecute them and, if found guilty, have them removed from office. A member of the board of county commissioners is not the sole manager of the affairs of the county, nor have all the members of the board the power to prevent a prosecution of either civil or criminal action for misconduct in office. The right to bring an action and prosecute the same to final judgment is vested in the county attor-

ney, and the members of the board of county commissioners have no control over him in the matter. The right to bring an action existed all the time.

There are other reasons why the demurrer should have been sustained. The amended petition does not state facts sufficiently well pleaded to constitute a cause of action against the defendant, Roe. It does not appear from the amended petition that the claims upon which the allowances were made were not lawful claims against the county. It is simply alleged that they were unlawful, and attaches copies of the claims allowed, and upon the inspection of the exhibits it discloses the fact that the claims alleged to have been illegal were for services as committee in superintending the construction of a courthouse and a building on the poor farm. For all that appears in the amended petition, the claims were legal and properly allowed. There are other imperfections in the amended petition that are not necessary to be passed upon by this court. There are various other objections and exceptions urged by counsel in the argument of the case, which arose during the trial of the case, and in the motion for new trial, which are not necessary to be passed upon from the view taken of this case, as the case will have to be reversed for errors already pointed out, and as the plaintiff below cannot so amend its petition as to entitle it to recover against the defendant. The judgment of the district court is reversed, and the case remanded, with direction to sustain the demurrer of Roe to the amended petition, and render judgment against the plaintiff for costs of suit. All the judges concurring.

(1 Kan. App. 261)

MANNEN, Sheriff, v. STEBBINS.

(Court of Appeals of Kansas. Southern Department, E. D. July 16, 1895.)

TRIAL—SUBMISSION OF SPECIAL ISSUES—FRAUDULENT CONVEYANCES.

1. The district court may, of its own motion, submit special questions of fact to the jury in a case at law as well as in equity.

2. Certain instructions examined, and held properly refused.

(Syllabus by the Court.)

Error from district court, Wilson county; L. Stillwell, Judge.

Replevin by Amos Stebbins against A. J. Mannen, sheriff of Wilson county. Judgment for plaintiff, and defendant brings error. Affirmed.

S. S. Kirkpatrick, for plaintiff in error. Hudson & Reed, for defendant in error.

COLE, J. In 1889, and for some time prior thereto, J. W. Rowe was engaged in the mercantile business at Coyville, Wilson county, Kan. While so engaged, he borrowed of

Amos Stebbins \$800. Stebbins also became security for Rowe to a further amount of \$400. Rowe was also indebted to certain wholesale merchants for goods purchased, among the firms being Barton Bros. and Smith, Heddens & Co. About April 1, 1889, Rowe sold his stock of goods to Stebbins, the consideration being the cancellation and return of the notes given by Rowe to Stebbins for the money borrowed, the payment by Stebbins of the amounts for which he was security, and some \$250 in cash. After the transfer of the goods to Stebbins, but before the payment of the cash balance, Barton Bros. and Smith, Heddens & Co. attached the goods on the ground of fraud; and Stebbins brought this action in replevin in the district court of Wilson county against Manen, the officer who made the levy. The jury rendered a general verdict in favor of the plaintiff below, and also answered certain special questions of fact submitted by the court upon its own motion, and over the objection of defendant below. From a judgment upon said verdict the sheriff brings the case here.

The plaintiff in error complains first because the court, of its own motion, and over his objection, submitted certain special questions of fact to the jury; and counsel argues in his brief that there is no authority for the court to do so, excepting in an equity case. We think the position not well taken. In *Thomp. Trials*, § 2673, the rule is thus laid down: "But the court does not require a request to be made by either party to put it into motion, for it may of its own motion submit interrogatories to the jury, which will have the same effect as if requested." And in *Warden v. Reser*, 38 Kan. 86, 16 Pac. 60, it was held that the court did not commit error in refusing to submit certain special questions requested by one of the parties to the action, where the court, of its own motion, submitted special questions in similar language, and of like scope and bearing. While it is generally held, under a statute like our own, that a refusal by the trial court to submit proper special questions upon the request of either party is material error, we think the rule is just as general that in the absence of such request the court may, of its own motion, require the jury to specifically find upon the material facts in controversy.

Plaintiff in error further complains of the refusal of the court to give certain special instructions requested by him. The first two were as follows: "(1) The jury are instructed that if they find from the evidence that Stebbins, before he had fully paid for the goods in question, was informed of the demands of Smith, Heddens & Co. and Barton Bros., that any payment made thereafter would be fraudulent as to such creditors. (2) If you further find that before Stebbins paid for the goods, and while he was still owing Rowe a part of the purchase price, he

was informed of the attachments offered in evidence, before he paid said sum to Rowe, the transaction was fraudulent as to such payment, and the plaintiff cannot recover in this action." We can see no error in the refusal of the court to give these instructions. The propositions laid down in them are these: That if one purchase property, and, before paying in full for the same, is informed that the person from whom he has purchased has creditors, of if he is informed that attachments have been placed upon the goods so purchased by creditors of the one from whom he has purchased, and he then pays the balance of the purchase money, such payment is fraudulent as to such creditors; and this without regard to whether the sale was made with intent to defraud, or not. This is not the law. The controversy in this case was whether Stebbins took the goods from Rowe as an innocent purchaser, or not, and this question the trial court fully and fairly submitted to the jury in its general instructions.

The third instruction requested by plaintiff in error was as follows: "(3) If you find from the evidence that Stebbins purchased the goods in good faith, and without any knowledge of any intended fraud on the part of Rowe, but, before paying the purchase price in full, ascertained and was informed of the fraudulent intent of Rowe, Stebbins can only be protected to the extent of the payments actually made, or obligations actually and in good faith assumed, before receiving notice of the fraudulent intent of Rowe; and any payment made to Rowe after receiving notice of the fraudulent intent of Rowe would be in fraud of the creditors of Rowe, and Stebbins cannot be protected in such payment. Knowledge of the issuance of the attachments against the property of Rowe by his creditors would be sufficient notice to Stebbins, and a payment to Rowe after notice of the issuance of the attachments against the property of Rowe would be fraudulent as to creditors, and Stebbins would not be protected in such payments." This instruction, as requested, was properly refused. The mere issuance of an attachment order is no proof of fraud, but merely that some one has alleged fraud. In this case, however, the first question of fact which was submitted to the jury by the court was as follows: "Did Rowe sell the goods in controversy to Stebbins with the intention on the part of him (said Rowe) to hinder, delay, or defraud his creditors?" This question the jury answered in the negative, and we think there was sufficient evidence to sustain such answer. If there was no fraud in the transaction, on the part of Rowe, the attaching creditors and sheriff had no right to the goods; and, the jury having found this material fact against the theory of plaintiff in error, the failure upon the part of the court to give the instruction requested, even if properly framed, would not have been material or prejudicial.

cial error. *City of Kinsley v. Morse*, 40 Kan. 577, 20 Pac. 217. There being no material error in the record, the judgment of the district court is affirmed. All the judges concurring.

(1 Kan. App. 232)

KARR v. BURNS.

(Court of Appeals of Kansas, Southern Department, E. D. July 16, 1895.)

LIS PENDENS—DISMISSAL OF ACTION.

Lis pendens exists only during the pendency of an action, and a dismissal of the action defeats *lis pendens* as to a grantee of the holder of the legal title without actual notice.

(Syllabus by the Court.)

Error to district court, Miami county; J. T. Burris, Judge.

Action by Margaret H. Karr against Milton E. Karr and Flora E. Burns. Judgment in favor of Burns, and plaintiff brings error. Affirmed.

John C. Sheridan, for plaintiff in error.
Sheldon & Sheldon, for defendant in error.

COLE, J. On December 26, 1888, Margaret H. Karr filed her petition in the district court of Miami county, alleging grounds for divorce from her husband, William Karr. She also made W. H. Karr and Milton E. Karr parties defendant in said action, and alleged as a cause of action against them that in 1883 her husband, with their joint means of herself and husband, purchased lots 8 and 9, in block 11, in Fontano, said county, and that the deed for said property was made in the name of her husband, William Karr, but that said William Karr did not record said deed, and that afterwards he returned the same to the grantor, who, at the request of the said William Karr, destroyed said deed, and on May 20, 1886, executed a second deed to Milton E. Karr, who, on May 21, 1886, placed said deed of record, and gave a mortgage upon said premises to William H. Karr; and she further claims in said petition that all these acts after the procurement of the deed were for the purpose of defrauding her of her interest in the premises as the wife of William Karr. A summons was served personally upon William Karr on January 18, 1889, and on William H. Karr and Milton E. Karr on December 28, 1888, and, issues having been joined in said action, the cause came on for trial June 22, 1889, whereupon W. H. Karr and Milton E. Karr objected to the introduction of evidence under said petition on the ground of misjoinder of parties and causes of action, and, the objection having been sustained, Margaret H. Karr dismissed her cause of action without prejudice as to the defendants so objecting, and proceeded to trial upon her action against William Karr, and on July 2, 1889, the court granted her a divorce

and a judgment for alimony in the sum of \$500, and costs of suit. The court further decreed that, as the action had been dismissed as to W. H. Karr and Milton E. Karr, he could make no order as to the real estate described in the petition. On the same day that Margaret H. Karr dismissed her cause of action, as to William H. Karr and Milton E. Karr she commenced a new action against them, and also joined as a party defendant Flora E. Burns, who, on the 4th day of January, 1889, had loaned Milton E. Karr \$300, and taken as security therefor a mortgage upon the real estate above described. In her petition in the second action Margaret H. Karr alleged substantially the same facts with reference to the real estate as in her former petition, and further alleged that the mortgage given by Milton E. Karr to Flora E. Burns was fraudulently executed and delivered, and that at the time of receiving the same the said Flora E. Burns well knew that the conveyance of the premises referred to in the mortgage to Milton E. Karr was fraudulent and void; and said Margaret H. Karr asked that the conveyance to Milton E. Karr be set aside, that the title to said premises be decreed to be in William Karr, that the mortgage to Flora E. Burns be declared null and void, that whatever interest William H. Karr might claim in said premises be held void, and for such further relief as she might in equity be entitled to. Milton E. Karr was personally served with a summons in said action on June 22, 1889, but said service was afterwards quashed upon motion, and service by publication was then made upon William H. Karr and M. E. Karr. The defendant Flora E. Burns filed an answer and cross petition in said section, denying the allegations of the petition, and asking for a foreclosure of her mortgage upon the real estate in dispute. The defendant Milton E. Karr filed his demurrer to the petition of Margaret H. Karr, and the said demurrer coming on to be heard, thereupon said Margaret H. Karr dismissed said action without prejudice, and at the same time obtained leave of the court to answer the cross petition of Flora E. Burns. In her answer to said cross petition, which answer was filed October 11, 1889, Margaret H. Karr alleged a title to said real estate in William Karr, and that at the time of the execution and delivery of the note and mortgage described in the cross petition she, the said Margaret H. Karr, was the wife of said William Karr, and was possessed of a homestead right in said real estate, which she had never conveyed, and that she was at the date of filing said answer, and for a long time prior had been, occupying said real estate for a homestead. She further recited in said answer the allegations contained in the petition theretofore filed by her against William Karr, M. E. Karr, and W. H. Karr, and the various proceedings had in said case, and which are hereinbefore described, including the de-

cre obtained against William Karr; and alleged that she had caused execution to issue against the said real estate, and that a judgment which she had obtained against William Karr was in full force and effect, and that no part had been paid or satisfied; and she asks that the note and mortgage of Flora E. Burns be declared no lien upon said real estate as against the claim of said Margaret H. Karr, and she further asks that William Karr be declared owner of said property, and that Milton E. Karr be declared to have no interest therein. The defendant Flora E. Burns replied to the answer of Margaret H. Karr, and alleged in said reply, in addition to the general denial, that Margaret H. Karr married William Karr in 1871, and separated from him in January of 1886, and that she never afterwards lived with him, nor did she afterwards keep house in the state of Kansas. And further, said Margaret H. Karr did not occupy said premises as a homestead for three years prior to said filing of the said reply, and that, if she was now so occupying it, it was for the purpose of defrauding said Flora E. Burns. She further alleged that at the time of the execution and delivery of her said notes and mortgage the said premises described therein were not occupied by any of the parties of this suit, either as a homestead or otherwise. She further alleged the bringing of the action for divorce above described, and the dismissal of said action as to William H. Karr and Milton E. Karr, and that no judgment was brought therein affecting said real estate. She also recited the proceedings had in the action in which said reply was had, including the dismissal of said suit. This cause afterwards came on to be heard upon the issues joined by the defendant Flora E. Burns and Margaret H. Karr. The cause was tried to the court, a jury having been waived, and a decree rendered foreclosing the mortgage of Flora E. Burns, and declaring the amount due thereupon the first lien upon the real estate in dispute, and a judgment of Margaret H. Karr for alimony a second lien upon said premises. The decree further ordered the sale of said premises and the application of the proceeds as follows: First, to the payment of the costs of said suit and of said sale; second, to the payment of the judgment of Flora E. Burns, with interest thereon; third, to the payment of the costs of the action brought by Margaret H. Karr for divorce; and fourth, to the payment of the judgment for alimony of Margaret H. Karr. From the said decree, as well as the ruling of the court in refusing to set aside the same and grant a new trial, the plaintiff in error brings the case to this court.

Two questions are presented for our consideration, the first being jurisdictional. It is suggested by the brief of defendant in error that William Karr and M. E. Karr are necessary parties in this proceeding in error, and that the cause should be dismissed because

of the failure of the plaintiff in error to bring them into this court. The point is not well taken. Both of these parties were bound by the decree made by the trial court, and neither of them excepted to the same, and the decree, therefore, is final as to them, and no judgment rendered in this court would affect their rights. It is true that Margaret H. Karr had dismissed her cause of action in the court below against both defendants, but at the time of said dismissal the answer and cross petition of Flora E. Burns had been filed, and said William Karr and M. E. Karr, having been properly served, were bound to take notice of all pleadings thereafter filed in said cause. The main question in this case is whether the doctrine of *lis pendens* applies under the pleadings and evidence in this case, and whether Flora E. Burns was a *pendente lite* incumbrancer. Most of the essential facts in this case are clearly shown by the evidence. There can be no doubt that in 1883 William Karr purchased the real estate in question, and that the deed therefor was at that time made to him, but was never recorded. In 1886, Margaret H. Karr was ill, and went to Indiana, and from there to Ohio. She remained away 2½ years, and, while there is not a great deal of evidence on the subject, it fairly appears that she did not intend to return and live with William Karr. About the time of her departure, William Karr returned the deed to the premises in dispute to the grantor named therein, and prevailed upon the said grantor to execute and deliver a second deed, conveying said premises to Milton E. Karr, who was a son of the said William Karr by a former marriage. While it does not fully appear that the means of Mrs. Karr were used in the original purchase, it does appear that the property was bought with the money of William Karr, or the joint means of William Karr and wife, and that Milton E. Karr had not paid any of the purchase price of the said real estate; and there is no doubt, under the evidence, that William Karr took this course in regard to the property for the purpose of placing it beyond the reach of his wife. The evidence further shows that Milton E. Karr placed his deed of record on May 21, 1886. The property described in the deed was rented to a tenant, and was never occupied by William Karr and his wife, or either of them, from the time of the recording of said deed until after the decree of divorce in the action of Margaret H. Karr vs. William Karr, which was in July, 1889. It also clearly appears that Flora E. Burns had no actual knowledge of the fraud on the part of William Karr and Milton E. Karr, and no knowledge of any of the difficulties between the parties, and that the loan was made by an agent of hers in good faith. The application of the doctrine of *lis pendens* is one which has been invoked since the earliest cases, and the rule as finally laid down in the reports of this

country seems to be that, in order for the doctrine to be applied, the action must be properly brought, so that the court shall have jurisdiction over the person and property, and must be vigorously and continuously prosecuted; and, as is stated in Freeman on Judgments (section 203): "If a suit were not prosecuted with effect as if at law, it were discontinued, or the plaintiff suffered nonsuit; or if, in chancery, the suit were dismissed for want of prosecution, or for any other cause, not on the merits; or if, at law or in chancery, any suit abated,—although in all such cases a new action could be brought, it could not affect a purchaser during the pendency of the first suit." There is grave doubt in this case whether the plaintiff in error has ever placed herself in a position to enforce the doctrine of *lis pendens* as against Flora E. Burns. The action which she brought against William Karr, Milton E. Karr, and William H. Karr proceeded to final decree after a dismissal as to Milton E. Karr and W. H. Karr, and this dismissal seems to have been because of a ruling of the court below sustaining an objection to the introduction of evidence as to these defendants because of misjoinder of parties and causes of action. If the action was not properly brought as to Milton E. Karr, in whom the legal title to the property in dispute rested, then the doctrine of *lis pendens* could not be enforced as to a bona fide purchaser or mortgagee pending such action. But, with our view of this case, it is not necessary to decide whether, in the first instance, the plaintiff in error placed herself in such position in the bringing of her cause of action as to permit the enforcement of the doctrine of *lis pendens*. As appears by the record, the first action brought by the plaintiff in error was dismissed on June 22, 1889, as to the defendants Milton E. Karr and W. H. Karr, and, while a new action was commenced immediately by the filing of a petition in which Milton E. Karr and Flora E. Burns were both made defendants, this action of plaintiff in error was also dismissed, and the cause proceeded to trial upon issues framed between Flora E. Burns and Margaret H. Karr. It is true that the answer filed by Margaret H. Karr to the cross petition of Flora E. Burns sets up the same facts that form a part of her petition and original action for divorce, and also of the one filed by her in her second action; and, while the record does not disclose the exact date at which the second dismissal took place, yet it does disclose that there was a lapse of time between the dismissal and the filing of the answer of Margaret H. Karr to the cross petition of Flora E. Burns, and, if *lis pendens* may be said to ever have existed, it was certainly defeated by the failure of plaintiff in error to continuously prosecute her action. *Clarkson v. Morgan*, 6 B. Mon. 441. In the case of *Tootle v. Cahn*, 52 Kan. 73, 34 Pac. 401, which was v.40P.no.17—69

an action brought by the creditors of one Miner, Cahn & Co. dismissed their cause of action, and on the same day instituted another action against Miner, and also caused an order of garnishment to issue, by which they undertook to garnish certain funds in the hands of the clerk of the court of Clark county. Prior to the dismissal and commencement of the new action, Miner had assigned to Tootle all his interest in said fund. In that case the court say: "This assignment and transfer had been received and accepted by the clerk before any new action was begun by Cahn & Co., or any garnishment process had been served. When the action of Cahn & Co. was dismissed, the assignment and transfer became effective, and left nothing in the hands of the clerk to be seized by the process of garnishment or attachment." In the same case the court also say: "We are unable to sustain the decision of the court giving priority of lien or right in the fund to Joseph Cahn & Co. When that firm dismissed its action on August 9th, it lost its lien or claim of lien obtained in that action." It is true, in that case a lien upon certain proceeds was sought to be gained, and *lis pendens* is in no way a lien upon the property sought to be affected; but it would seem that the same rule should apply in case of a dismissal of any action,—that, if an action is dismissed for any purpose, it is dismissed for all purposes. *McPherson v. Storch*, 49 Kan. 321, 30 Pac. 480. In *Hammond v. Paxton*, 58 Mich. 393, 25 N. W. 321, the court say: "The object of the notice is to prevent the party to the litigation from alienating the property in dispute so as to affect the rights of his opponent, and to bind the property, in whosoever hands it may be, with the decree when made in the case. Hence, if the suit were abandoned, or no decree made therein, the purchaser is not affected by the filing of the notice." And in the case of *Grimes v. Chamberlain*, 27 Neb. 605, 43 N. W. 395, it is held that "an entry of dismissal terminates the jurisdiction of the court from the cause of action presented by such plaintiff, except for the purpose of entering the order of dismissal and rendering judgment for costs." It follows from these views that, Flora E. Burns having obtained her mortgage in good faith, the judgment of the trial court granting unto said Flora E. Burns a first lien upon the premises described in her mortgage was correct, and is therefore affirmed. All the judges concurring.

(28 Or. 44)

FARMERS' LOAN & TRUST CO. et al. v.
OREGON PAC. R. CO. et al.

(Supreme Court of Oregon. July 22, 1895.)

RAILROAD FORECLOSURE—MODIFICATION OF DECREE—SALE—INADEQUATE PRICE.

1. The original decree for sale of a railroad under the foreclosure of a trust deed di-

rected the property to be sold as an entirety, for cash, and that so much of the price "as is not required to be paid in cash may be paid in receiver's certificates." *Hdd*, that a subsequent, supplemental order, directing a sale to be made for cash, in United States gold coin, is not a modification of the original decree, in that it does not allow receiver's certificates to be received in payment of any part of the price.

2. Where an original decree for the sale of property under foreclosure of a trust deed makes no provision for the payment of taxes, a subsequent, supplemental decree, providing that all taxes legally due and owing on the property for a year prior to the sale shall be paid out of the proceeds of the sale, "by and under order of the court," is not objectionable, as modifying the original decree, and requiring the payment of taxes without an opportunity to question their validity.

3. Where an original decree for sale of property under foreclosure of a trust deed does not refer to the payment of taxes due on the property, a subsequent, supplemental decree, requiring the purchaser to pay taxes which, under the statute, it would be his duty to pay, is not objectionable on the ground that it would tend to reduce the amount of the purchaser's bid, to the extent of such taxes.

4. A foreclosure sale of property by a sheriff on a date different from that designated in the decree of sale, if confirmed by the court, will be valid.

5. In an action for the foreclosure of a trust deed of railroad property, there was no evidence of the value of the property, but there was evidence that it had been operated under a receiver for four years at an average loss per month of \$6,000, and was at the time of the sale about \$1,000,000 in debt, and had a bonded indebtedness of \$15,000,000, secured by the trust deed. At one of two previous sales ordered, a minimum price of \$1,000,000 had been fixed, and at the other, \$1,250,000, but no sale could be effected. *Held*, that a sale for \$100,000 in cash cannot be held to be for an inadequate consideration.

Appeal from circuit court, Benton county; J. C. Fullerton, Judge.

Action by the Farmers' Loan & Trust Company, trustee, and others, against the Oregon Pacific Railroad Company and others, for the foreclosure of a trust deed. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an appeal from an order confirming a sale of railway franchises and property on the foreclosure of a mortgage. The facts are that, the plaintiffs having commenced a suit against the defendants the Oregon Pacific Railroad Company and the Willamette Valley & Coast Railroad Company to foreclose a mortgage given to secure the payment of bonds amounting to \$15,000,000, a receiver was appointed, and on April 27, 1891, the defendant companies having, by their answers, admitted the allegations of the complaint and supplement thereto, a decree was rendered as prayed for, wherein the mortgaged property was ordered sold by the sheriff of Benton county to the highest bidder for cash, without appraisalment or right of redemption; and said officer was thereby directed to require of the bidder a deposit of not less than \$5,000 in cash, to be applied in part payment of the purchase price if the sale should be confirmed. That on October

23, 1891, the court made an order directing an execution to be issued, and instructing the sheriff to accept no bid less than \$1,000,000, of which sum \$25,000 should be deposited before accepting any bid. That, an execution having been issued, the sheriff, on January 20, 1892, at a sale of the property, accepted the bid of Zephin Job, of \$1,000,000, of which sum \$25,000 was deposited with said officer, who reported the sale to the court, whereupon an order was made that upon the payment of \$975,000 within 30 days the sale should be confirmed; but the bidder having failed to make payment of such sum, or any part thereof, the court, on November 17th of that year, ordered a resale of the property, and directed the sheriff to accept no bid for a less sum than \$1,250,000, of which \$200,000 was required to be deposited before any bid could be accepted. That, a second execution having been issued, the sheriff was unable to sell the property under these terms, and, by order of the court, returned the writ. That on April 10, 1893, the court again ordered a resale of the property, and directed the sheriff to require a deposit of \$200,000 from the bidder before any bid should be accepted, and on December 15th of that year, another writ having been issued, the sheriff accepted the bid of \$200,000 from J. J. Beldon, Henry Martin, F. K. Pendleton, S. S. Hollingsworth, Joseph Wharton, and James K. Blair; but on the 26th of that month the court, upon the officer's return of the writ, refused to confirm the sale, and made an order setting it aside, and directing the return of the deposit. That on March 2, 1894, the court, upon due notice to Zephin Job and the corporation to whom he had assigned his right of purchase, made an order setting aside the conditional confirmation of the sale made upon his bid, directing a resale of the property to the highest bidder for what it would bring in cash, and instructing the sheriff to accept no bid until \$200,000 had been deposited with him by the bidder. That, another execution having been issued, the property was advertised to be sold on June 7, 1894, but, failing to receive any bid therefor, the officer returned the writ. That on October 20, 1894, the court made another order, directing a resale of the property on a day, to be fixed by the sheriff, between the 15th and 22d days of December of that year, and instructing him to accept no bid until \$100,000 had been deposited; and, a pluries writ having been issued, the said officer, after having duly advertised the property, and received a deposit of \$100,000, accepted a bid for that amount, and on the 22d day of December, 1894, sold, subject to confirmation, all the property and franchises of the defendant companies to E. L. Bonner and A. B. Hammond for said sum, and on the 26th of said month returned the writ. That on January 3, 1895, the bidders at said sale moved for an order of confirma-

tion, while certain of the appellants, being either general creditors of the defendant corporations, or holding receiver's certificates, filed objections thereto, and on the 19th of that month other appellants filed objections to the confirmation, all of which having been overruled, the court made an order confirming said sale, from which order this appeal is taken.

Wallis Nash, H. C. Watson, E. C. Bronaugh, and W. D. Fenton, for appellants. J. R. Bryson, W. S. McFadden, and G. G. Bingham, for respondents.

MOORE, J. (after stating the facts). The respondents contend that the defendant companies having admitted in their answers that they were insolvent, and that the value of their property and franchises was insufficient to meet the payment of the bonds and overdue interest coupons secured by the mortgage, and no decree having been rendered against them for any deficiency after the sale of their property, and not having made any objections to the confirmation of the sale, they have no appealable interest, and are estopped by the order of confirmation; that none of the other appellants ever intervened in the court below, or became parties to the record; that Sanford Bennett, E. C. McShane, and Bronaugh, McArthur, Fenton & Bronaugh are the only persons or firms who filed any objections to the confirmation of sale within the time prescribed by law; that the appellants have no unity of interests; and that Bronaugh, McArthur, Fenton & Bronaugh have not taken a cross appeal. Without considering the respondents' objections, but assuming that the appellants are parties to the record, and properly before the court, we will examine the case upon the merits, as presented by the record.

The appellants contend that the amount bid for the property and franchises was so grossly disproportionate to its value as to render the order of confirmation an abuse of discretion, and, while not expecting the court to set the sale aside on account of inadequacy of the price alone, yet they insist that some excuse should be found for avoiding the effect of the bid in such cases, and suggest as an additional reason therefor that the court had no jurisdiction or authority at a subsequent term to modify or vary the provisions of the original decree; while the respondents, admitting the legal proposition contended for, insist that the subsequent orders of the court did not modify or vary the original decrees, but only prescribed the terms of its enforcement, and that the right to do so is inherent in the court, and was specially reserved in the decree. Assuming, for the sake of the argument, that the amount bid was inadequate, we will examine the original decree, and the order of the court of October 20, 1894, with reference to the right of a purchaser to ten-

der, in part payment of the purchase price, receiver's certificates, as cash,—this being the particular modification of which the appellants complain. The original decree, after providing that the mortgaged property should be sold as an entirety, for cash, and without appraisal or right of redemption, further directs that: "So much of the purchase price as is not required to be paid in cash may be paid in receiver's certificates, and in bonds, overdue interest coupon bonds, at such rate and percentage as the holder would be entitled to receive, in respect of such bonds and coupons, out of the purchase money and proceeds of sale, as the same may be ascertained. If any question should arise as to the sale and amount of such dividend and percentage, or as to the proportion to be paid in cash and the proportion that may be paid in such bonds and coupons, application [for that purpose] may be made to the court from time to time." The sentence last quoted makes no provision for ascertaining what proportion of the purchase price may be paid in receiver's certificates, but the preceding sentence, having provided that so much of it as is not required to be paid in cash may be paid in certificates, bonds, and coupons, places the certificates in the same class with the other evidence of indebtedness, and limits the right of a bidder to tender them in payment of that part of the purchase price not required by the court to be paid in cash. It also required a bidder to deposit the sum of \$5,000 as an earnest of his good faith, and ability to comply with the terms of his offer to purchase, but it did not prescribe what sum should be paid in cash; and hence, in the absence of such a provision, the whole purchase price could be paid only in that manner. If the sale had been made under the original decree, without any application to the court to prescribe what amount of the purchase price should be paid in cash, can it be successfully contended that the purchaser could have tendered either receiver's certificates, bonds, or interest coupons in payment of any part of it? Had the court, on the application of the parties, fixed the amount of the purchase price, less than the whole, which was to have been paid in cash, then the certificates would have been receivable at their face value in liquidation of that part of it not so payable, for the decree made provision for receiving the bonds and coupons only at such rate and percentage as the holders thereof might be entitled to out of the purchase price, and made no reference to the certificates.

The order of October 20, 1894, provided that said sale should be made for cash, in United States gold coin; and it was contended at the argument that, since the receiver's certificates were not payable in like coin, they could not be received in payment of any part of the purchase price, and hence this order substantially modified the original decree. It is sufficient to say that, had they been pay-

able in United States gold coin, they would not have been receivable in payment of any part of the purchase price until the court had prescribed what part less than the whole should be paid in coin.

The order of October 20, 1894, also provided that: "All taxes legally due and owing by the defendant companies up to the 31st day of March, 1894, shall be paid out of the purchase money realized from such sale, by and under the order of this court; and all taxes levied against such properties and franchises after the 31st day of March, 1894, shall be borne and paid by the purchaser or purchasers at such sale." It is contended that the order providing for the payment of the taxes levied on the property of the defendant companies prior to March 31, 1894, substantially modified the original decree, and prejudged the rights of the lien holders, without having given them an opportunity to question the validity of such taxes, and that the portion thereof requiring the purchaser to pay the taxes levied after that date was invalid, and tended to reduce the amount of the purchaser's bid, to the extent of the unascertained tax. We cannot think, from an examination of the order, that the court intended thereby to determine the question of priority of right to the fund which was to be realized from the sale of the property. The record shows that the counties of Benton, Lincoln, Linn, and Marion, upon their petitions to the court, obtained an order directing the receiver to pay the taxes due them from the defendant companies, which, in effect, transferred the rights which the said counties had in the property situated within their respective limits to the fund to be realized from its sale, which fund was to be applied to the payment of these taxes, "by and under the order of the court." The court, in the order complained of, did not find what amount of tax, if any, was due either county, or attempt to establish a prior or any lien in favor of the said counties. It, in effect, provided that the fund realized from the sale should stand in the place of the property, and, upon settlement, be distributed among those having a prior right to it. If the counties had no prior lien on the property for the payment of the delinquent taxes, they could have no prior claim on the fund to be realized from its sale. How could the appellants be injured by this order? If any one had cause to complain, it would be the said counties, and particularly so if the fund was insufficient to pay the delinquent taxes; but they have made no objection to the provisions imposed, with which they are presumably satisfied. While the requirement that the purchaser should pay all taxes levied on the property after March 31, 1894, may have had the effect to reduce the amount of his bid, it was not, in our judgment, invalid, for if the sale had been consummated prior to the issue of the warrant for the collection of

the taxes of that year, and no agreement had been entered into in reference to their payment, it would have been the duty of the purchaser to pay them. Hill's Code, § 2846. The trial court, in fixing the day of sale not later than December 22d, was doubtless aware that it would be impossible for the state board of equalization to complete its examination of the county assessment rolls, and certify the result to the several county clerks, in time to have the tax rolls completed, and warrants issued for the collection of the taxes, until after that date; and we can see no injury resulting from the court's order calling the purchaser's attention to the provisions of the statute in relation to his duty to pay the taxes of 1894.

The court acquired jurisdiction of the subject-matter of the suit by virtue of the constitution and statutes of the state, and of the persons of the defendant companies by their several answers admitting the allegations of the original and supplemental complaints; and the court, having found the amount due from the defendants to the plaintiffs, and that this sum was secured by a deed of trust, foreclosed the same, and ordered a sale of the mortgaged property, and, having had jurisdiction of the subject-matter and persons of the defendant companies, its decree was final, and fully supports the sale of the defendants' property, unless it has been modified by the subsequent orders of the court. Mr. Beach, in his valuable work on Modern Equity Practice (section 905), in speaking of the power of a court to control the execution of its decree, says: "Notwithstanding the general rule that the court has no power whatever, after final decree, to amend, modify, or alter the proofs of the decree, it retains and possesses the power of controlling the time of its execution." The authorities cited in support of the text are *Bound v. Railway Co.*, 55 Fed. 186; *Monkhouse v. Corporation*, 17 Ves. 380; *Edwards v. Cunliffe*, 1 Madd. 287; *Spann v. Spann*, 2 Hill, Ch. 152. In *Bound v. Railway Co.*, supra, the decree ordered the sale of a railroad to be made on April 11, 1893, and an appeal having been taken, in which no supersedeas bond was given, the court, on motion, after adopting the language quoted in the text, postponed the sale to December 12th of that year. In *Monkhouse v. Corporation*, supra, the plaintiff having obtained a decree foreclosing a mortgage, the defendant moved the court to suspend its execution until six months after an appeal could be heard, which motion was allowed upon condition that the defendant pay the interest and costs, upon plaintiff's undertaking to repay the same if the decree should be reversed. In *Edwards v. Cunliffe*, supra, the decree provided that unless the amount due was paid December 23, 1814, the mortgage foreclosure should become absolute, but, the mortgagor being unable to comply with the terms, the date of payment was, upon motion,

extended four times. So, too, in *Spann v. Spann*, supra, *Johnson, J.*, in delivering the opinion of the court upon this question, said: "But it is equally clear that the courts, both of law and equity, or a judge or chancellor at chambers, have the power, and daily exercise it, of suspending the execution of even final process on account of subsequent matter which would render the execution of it oppressive or iniquitous." These authorities clearly support the text of the learned author, and conclusively show that while a court cannot, by a subsequent order, modify the essential features of a final decree, it does possess the inherent right of changing the time of its execution. This right being granted, it must, upon principle, be conceded that a court possesses an equal right to modify by a subsequent order the manner of the enforcement of its decrees, for it requires no more power to modify the manner than it does to change the time of executing them. In *Turner v. Railway Co.*, 8 Biss. 390, Fed. Cas. No. 14,259, Mr. Justice Drummond, in commenting on the modification of a decree by a subsequent order, said: "The facts were that the original decree was entered on the 18th of July, 1877, and the amendment was made in May, 1878. I admit the rule which denies the power of the court over a decree after the term when it was rendered. It cannot change or alter the essential parts of the decree. But what was the order made by the court in May, 1878? It is termed a further direction for the execution of the decree theretofore entered. The original decree provided that the property should be sold on a certain number of days' publication. That was changed by the amendment. The original decree provided for the distribution of the funds arising from the sale in a particular manner. That was changed by the amendment of May, 1878. But these things did not affect the substance of the decree. Of the right of the court to make that order, I cannot doubt." This case was appealed to the supreme court of the United States, where Mr. Justice Harlan, in rendering the decision upon review of the foregoing objection, with others, said: "We do not stop to consider whether these objections find any support in the record, since it is sufficient to say that, if any such errors exist, they necessarily inhere, some in the final decree of foreclosure and sale, and others in the orders which preceded it. They cannot be examined upon an appeal merely from the order confirming the report of sale. Our authority extends, as we have shown, no further than to an examination of the exceptions filed by appellants to the report of sale, from the order confirming which this appeal is taken. And some of these exceptions plainly have reference, not to the sale itself, but to the final decree of foreclosure,—such, for instance, as that the terms of sale were too onerous; that the property was sold subject

to various claims, the amount of which was wholly uncertain; and that the court had no jurisdiction in the case." *Turner v. Trust Co.*, 106 U. S. 552, 1 Sup. Ct. 519. The modifications complained of do not, in our judgment, alter or vary the essential parts of the original decree, and were such as the court had authority to make, in carrying it into execution.

We will now examine the objections to the confirmation:

It is contended that the court having instructed the sheriff to sell the property between the 15th and 22d days of December, 1894, that officer had no license to sell on either of said days, and hence a sale by him on the 22d of that month was void. However this may be, the court has ratified the acts of its agent, and confirmed the sale. "The court," says Mr. Freeman in his work on *Void Judicial Sales* (section 42), "may, if it deems best, ratify various irregularities in the proceedings. If the officer changed the terms of the sale, the court may ratify his action, provided the terms, as changed, are such as the court had power to impose in the first instance." The court in such cases may do by indirection what it could do directly, and, since it could have ordered the sale on the day it occurred, it had power to ratify the act of the officer, if it be conceded that he exceeded his authority by selling the property on the day named. *Jacobs' Appeal*, 23 Pa. St. 477; *Emery v. Vroman*, 19 Wis. *689; *Thorn v. Ingram*, 25 Ark. 58.

The most important contention is that the property and franchises offered for sale were of the value of \$3,000,000; that the rails, rolling stock, and miscellaneous property alone,—not including the land or buildings,—were worth \$450,000; and that the bid of \$100,000 is so grossly inadequate as to shock the conscience, and raise the inference of unfairness, fraud, mistake, or surprise. "The uniform current of the authorities," says the court in *Marlatt v. Warwick*, 18 N. J. Eq. 108, "settles that mere inadequacy of price, where parties stand on an equal footing, and there are no confidential relations between them, is not of itself sufficient to set aside a sale, unless the inadequacy is so gross as to be proof of fraud, or to shock the judgment and the conscience." In the case at bar it is not claimed that the parties did not stand on an equal footing, that there were any confidential relations existing between them, or that there is any proof of fraud, and hence the inadequacy sufficient to set aside the sale must be so gross as to shock the conscience. We have examined the transcript before us in vain to find any evidence of the value of the said property and franchises. The receiver, upon his appointment, made an inventory of all that came to his possession, but he does not appraise a single article, or give the value in gross, except of some unused material on hand. There was no evi-

dence before the trial court of the value, and it would be extremely difficult for us to conclude that the bid was inadequate until we have some evidence upon which the conclusion can be based. It is said that some experts were appointed by a committee of the bondholders to examine the property and appraise its value, but we cannot find that they were ever appointed by or made a report to the court upon this important subject. It does appear, however, from the report of J. W. Whalley, Esq., who was appointed referee to take an account of the receipts and expenses of the defendant companies under the receiver's management, that for a period of about 14 months prior to January 1, 1892, the lines of railroad, and the river and ocean steamers connected therewith, had been operated at a total loss of \$87,983.75, or \$6,281.55 per month; that the receiver had, prior to said date, issued certificates amounting to \$638,041.29; and that the total liabilities on June 30, 1892, were \$905,414.40, less \$37,836.86, which was available in part payment of that amount,—thus showing a total indebtedness at that date of \$867,578.54 beyond the bonded indebtedness of \$15,000,000 and interest, which were secured by the mortgage. How much this debt was increased from June 30, 1892, at which time the referee made his supplemental report, to December 22, 1894, when the sale occurred, the record does not show, but it was admitted in argument that an indebtedness of more than \$1,000,000 had been incurred by the receiver since his appointment, on October 28, 1890. Viewed in the light of a business venture, and not considering the amount necessary to be expended for betterments, a property which was operated as a "going concern" at a total loss of more than \$6,000 per month does not, it must be conceded, present a very inviting field to capitalists; and, while the amount bid for the property may be grossly inadequate, we cannot say that it is so, in the absence of any evidence of its value, and considering that no sum in excess of that amount has been offered by anyone. It is indeed unfortunate that the expenses of the management of the property cannot be realized from its sale. No one can examine the record before us without being impressed with the conviction that the trial court has labored long and earnestly to accomplish this result, but without success, and to continue the operation of the road under the management of a receiver would result in further expense which must be borne by those who can ill afford to add it to their present losses. The court, hoping the bondholders would, by reorganization, buy the property, and pay off the expense of the receiver's management, fixed a minimum price of \$1,000,000, and at another time \$1,250,000, but was unable to effect a sale on these terms, and, after waiting more than four years for the consummation of its hopes, found the illusion dispelled,

and the only remedy remaining was to sell the property for what it would bring, which having been done, and the sale confirmed by a court that was acquainted with the property, and must have known its value, we can, in the absence of any evidence of the value, do nothing more than affirm the decree, which is so ordered.

(1 Kan. App. 209)

BELL v RANKIN.

(Court of Appeals of Kansas, Southern Department, E. D. July 16, 1895.)

AUTHORITY OF AGENT—CONVERSION OF MORTGAGED PROPERTY—REVIEW ON APPEAL—PAROL EVIDENCE.

1. A letter of authority to an agent is properly admitted in evidence to show the scope of his authority.

2. A conditional trade of property taken under a chattel mortgage, the conditions of which have never been fulfilled, is not an appropriation of the property.

3. The question of fraud was raised in the pleadings, evidence was introduced pro and con, and the jury found the facts in favor of this defendant in error. *Held*, it is not the province of this court to disturb said findings.

4. Parol evidence and surrounding facts and circumstances may always be introduced to explain the terms of a written contract, when such terms are not, in and of themselves, sufficiently plain and obvious, or where other evidence has already been introduced tending to make such terms uncertain and ambiguous.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by J. W. Rankin against J. N. Bell. Judgment for plaintiff, and defendant brings error. Affirmed.

This was a case brought in the district court of Franklin county, Kan., by J. W. Rankin, this defendant in error, as plaintiff, against J. N. Bell, this plaintiff in error, as defendant, in which Rankin sought to recover the value of certain goods which the said Bell, as sheriff of Franklin county, had taken under an order of attachment issued by the clerk of the district court against the property of J. H. and J. E. Rankin, partners, doing business under the firm name of Rankin Bros., at Wellsville, Kan., in a certain action then pending in said court, wherein J. C. Glenn was plaintiff and said Rankin Bros. were defendants. It appears from the record in this case that this defendant in error, J. W. Rankin, and his two sons, J. H. and J. E. Rankin, about the 20th of March, 1888, traded property and gave notes for a stock of general merchandise that was then situated in Westphalia, Kan., and, under the partnership name of Rankin Bros., they conducted the said business until the 3d day of January, 1889, when the said J. W. Rankin sold his interest in the business to his two sons, J. H. and J. E. Rankin; and as part of the purchase price for his interest in said goods he took from J. H. and J. E. Rankin their promissory note for \$3,000, due in one year, and

drawing 10 per cent interest from date. On the 24th day of June, 1889, J. H. and J. E. Rankin executed a new note to their father, J. W. Rankin, due January 1, 1890, at 10 per cent. interest from date, and to secure the said note they executed a chattel mortgage upon their general stock of merchandise to the said J. W. Rankin, which said mortgage was duly filed in the office of the register of deeds of Franklin county, Kan. The said J. W. Rankin made S. W. Rankin, another of his sons, his agent to look after his interest under the mortgage. The said chattel mortgage contained the following clause: "But said firm is authorized, during the currency of this mortgage, to continue their business at said store in the usual course, selling said goods at retail at the current prices; but they are to keep a strict account of said sales and pay out the proceeds of the sales to said J. W. Rankin in payment of the debt hereby secured, less the necessary expenses of carrying on said business as aforesaid, to which end they are authorized to buy such goods from time to time as may be necessary to keep such stock in a salable condition, out of the said proceeds; but such new goods so purchased shall be subject to said mortgage the same as the others." And also the further clause: "And it is further agreed that, in case of a sale or disposal, or attempt to dispose or sell, of the goods and chattels hereby mortgaged, or a removal or attempt to remove the same from the county aforesaid, or an unreasonable depreciation in value, or if from any cause the security shall become inadequate, or the party of the second part shall deem himself insecure, then and thenceforth it shall be lawful for the party of the second part, his executors, administrators, and assigns, or his authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels aforesaid may be, to remove and dispose of the same, and all the equity of redemption of said party of the first part, at public auction or private sale, to the person or persons who shall offer the highest price for the same, and out of the avails thereof to retain the full amount of said obligation, with interest thereon, according to the conditions thereof, together with all reasonable costs and expenses attending the same, rendering to said party of the first part or his legal representative the surplus money, if any there be, anything herein to the contrary notwithstanding." On the 3d day of July, 1889, S. W. Rankin, as the agent of his father, took possession of the stock of goods under the mortgage, and was proceeding to sell the same, when several attachments were levied upon said goods, as the property of said Rankin Bros., the second one being the one of J. C. Glenn, upon which this suit is based. After this second attachment had been levied upon the goods, S. W. Rankin, acting as the

agent of his father, made a conditional trade of said goods to T. W. Collingsworth for Western land; the conditions of said trade being that, if said Collingsworth failed to hold the goods, said Rankin would reconvey to him the land given for the goods. Other attachments were levied upon the goods as the property of said Rankin Bros., until they were all exhausted, leaving nothing for J. W. Rankin or for T. W. Collingsworth. The petition of this defendant in error in this case alleges unlawful conversion of the goods. The answer of this plaintiff in error is a general denial, and an allegation from the said Bell that he was the sheriff of Franklin county, Kan., and took the goods by virtue of an order of attachment issued in the case of J. C. Glenn v. Rankin Bros., and that the goods belonged to Rankin Bros., and that the pretended claim of J. W. Rankin was a sham and pretense, and was held by him for the purpose and with the intent to assist the said Rankin Bros. to cheat and defraud their creditors, and to hinder and delay them in the collection of their just claims against the Rankin Bros., and that the said Rankin Bros. were then insolvent and had absconded. The reply of this defendant in error was a general denial. The jury found generally for the plaintiff in the sum of \$810.68, and found specially that the mortgage was executed by Rankin Bros. to J. W. Rankin in good faith, and was a valid mortgage, given for a valuable consideration, and that the mortgagee took possession of the goods under the mortgage. They also found that the value of the merchandise taken under the mortgage was \$4,900, and the value of the goods left in the possession of the mortgagee after the levy of attachment of the case of Glenn v. Rankin Bros. was \$4,349.32; that the trade between Collingsworth and Rankin was a conditional one; that, at the time the mortgagee took possession of the goods, Rankin Bros. were owing him \$3,008, and at the commencement of this suit were owing him \$2,846.50.

C. A. Smart and C. S. Reed, for plaintiff in error. John W. Deford, for defendant in error.

DENNISON, J. (after stating the facts). The brief of the plaintiff in error in this case has been prepared without any regard whatever to rule 7 of this court. On page 6 of his brief, the plaintiff in error says: "The first error to which I desire to call the court's attention is the objection to the introduction of a letter on page 37 of the record"; so we take it for granted that this is the first error complained of. A copy of the letter is as follows: "Tribune, Kansas, June 30, 1889. I, John W. Rankin, do hereby direct and appoint S. Wallace Rankin as my agent to seize and hold under chattel mortgage the stock of general merchandise owned by Rankin Brothers, contained in a store building sit-

uated on lots 10 and 11, block 14, in the city of Wellsville, Franklin county, Kansas, and to proceed to the sale of the same to satisfy said mortgage. John W. Rankin." To the introduction of this letter the defendant objected for the reason that it contradicts the testimony of the witness, and is irrelevant and incompetent, which said objection was overruled and excepted to. This objection was very properly overruled. The letter was entirely competent and material; is the very best proof that John W. Rankin did direct and appoint S. Wallace Rankin as his agent to seize and hold these goods under the chattel mortgage, and to proceed and sell the same to satisfy the mortgage; and, in the absence of any other authority, this was all the power he did have, and the statement that it contradicts the testimony of the witness is no ground for refusing its introduction. If there is a contradiction in the testimony of this witness, it certainly would not be prejudicial to this plaintiff in error, but, on the contrary, would be beneficial to him. This defendant in error rightly says in his brief, "there is no rule of law which prevents a party testifying in his own behalf from contradicting or impeaching himself." The attorney for the plaintiff in error argues the facts in this case, and on page 10 of his brief concludes as follows: "I have called the court's attention to this matter because we believe that the verdict is contrary to the evidence, and that a plainer case of fraud was never presented to a jury." We are at a loss to determine whether this is intended as an argument on a question of law or fact, and whether it is expected this court will determine the matter on questions of fact which have been determined by the jury, where the same have been properly submitted to them by the court after hearing all the evidence, or whether the counsel expects us to consider this an error of law by the court, and expects us to reverse the case for this cause. This question of fraud was raised in the pleadings, and the jury found that the note and mortgage given by Rankin Bros. to this defendant in error was a valid one, given for a valuable consideration, and that defendant, by his agent, S. Wallace Rankin, took possession of the goods, and that the transaction was all in good faith. The jury having found these facts in favor of this defendant in error, it is not the province of this court to disturb them, and, as to the statement that the verdict is contrary to the evidence, there is sufficient evidence to sustain the finding of the jury.

The next error complained of by the plaintiff in error is in the introduction of the evidence of Collingsworth as to the conversation and circumstances which led up to the trade made between S. Wallace Rankin and Collingsworth of the balance of the goods. The question as to this trade was not raised by the pleadings, but was first drawn out upon the cross-examination of S. Wallace Rankin.

It was then developed that Rankin made a conditional trade of the balance of the goods with Collingsworth for two quarter sections of Western land, and thereafter the defendant in error introduced the deeds to the land, and a conditional bill of sale, with the invoice attached, in evidence. The deeds import a consideration of \$1,800, and show incumbrances of \$649.33. The invoice shows the goods to be valued at \$1,800. The following is a copy of the bill of sale: "Wellsville, Kansas, July 6, 1889. Know all men by these presents, that I, the undersigned, have this day sold and delivered to T. W. Collingsworth the goods, wares, and merchandise now remaining in the storeroom lately occupied by Rankin Bros. in Wellsville, Kansas, held by me under a chattel mortgage, in consideration of certain land in Finney and Kearny counties, Kansas, this day conveyed to me by said T. W. Collingsworth and wife. In case said Collingsworth should not be able to hold the goods, I am to convey to him said lands, and make good to him any expense he may be put to in defending said goods. An estimate and invoice of the above-mentioned merchandise is hereto attached. J. W. Rankin, by Wallace Rankin, Agent for Mortgagee. Witness: T. J. Gregory." The evidence of Mr. Collingsworth was to the effect that he was in the store talking to Wallace Rankin after there had been two attachments taken out, and proposed to buy the remainder of the goods, and proposed to trade him a couple of pieces of land; that they finally agreed on a trade, and he then went to Ottawa and sought advice as to whether Wallace Rankin had a right, as the agent of his father, to trade for the goods. He was told that he had, and made a deal for the land, and that he insisted on the condition being put in the agreement that, in case he could not hold the goods, the land was to be reconveyed to him. That he told Wallace Rankin that the land cost him \$3,000, that he was willing to give the land for the goods, but that the talk was that the land had depreciated in value, and was not worth as much as it had been; and in his redirect examination he testified that all the goods had been taken from him, and none of them had ever been returned, and that he had not been allowed to keep any of the goods, or any part of the proceeds of any of them, and that he never sold any of them. There is nothing in this testimony tending to contradict or vary the terms of the written agreement between these parties. The terms of the deeds, bill of sale, and invoice are not very explicit, and evidence had been introduced, over the objection of this defendant in error, tending to make the terms uncertain and ambiguous. "All written contracts may be examined by the light of extrinsic and surrounding circumstances; but, while it is true that parol evidence can never be introduced to contradict or vary the terms of a written contract (except when directly attack-

ed in a court of equity for fraud or mutual mistake), yet parol evidence and surrounding facts and circumstances may always be introduced to explain the terms of a written contract, where such terms are not, in and of themselves, sufficiently plain and obvious, or where other evidence has already been introduced tending to make such terms uncertain and ambiguous." *Simpson v. Kimberlin*, 12 Kan. 579. This plaintiff in error had been permitted upon cross-examination to draw out considerable of the facts and circumstances under which said trade was made, and the court very properly permitted the introduction of the testimony objected to. This plaintiff assigns as error the refusal of the trial judge to permit this plaintiff in error to show that Collingsworth was not relying upon the contract of sale of the goods, but was pursuing the goods. This evidence was properly excluded. This defendant in error was entitled to his legal rights, irrespective of whatever notion or view of the case Collingsworth might take.

The next assignment of error is in overruling the motion of plaintiff in error for judgment on the special verdict of the jury. The jury found specially that the value of the goods left in the possession of the plaintiff after the levy of attachment in the case of *Glenn v. Rankin Bros.* was \$3,349.32, and that said goods were traded conditionally to T. W. Collingsworth for property, and that the amount due upon the note of this defendant in error was \$2,846.50. The plaintiff in error claims that there was no evidence to sustain the special finding of the jury that the trade of T. W. Collingsworth was a conditional one. The bill of sale of the goods shows that the sale was a contingent or conditional one. The jury found that the mortgage to J. W. Rankin was a valid one, given to secure an honest, existing debt, and that he was entitled to the possession of the goods under his mortgage. This being true, he was entitled to hold said goods against everybody until he had realized from them enough to pay him the amount of his note and mortgage, and the reasonable costs and expenses of converting them into money to make such payment; and, when his note and mortgage had been fully paid, the balance of the goods would have been subject to the claim of the creditors of Rankin Bros. Had the trade to Collingsworth been a complete transaction, Rankin would have appropriated the goods which were traded to Collingsworth, and which, according to the special findings of the jury, were of the value of \$3,349.32. The special findings of the jury established Rankin's claim at \$2,846.50. Therefore the goods appropriated would be the full payment of the note and mortgage of said Rankin, and leave over \$500 to be applied to the payment of costs, and the balance to have been turned over to Rankin Bros., or subject to the demands of their creditors. The conditions in the trade are set out in the bill of

sale, and provide, in case Collingsworth should not be able to hold the goods, that Rankin is to convey to him said land, and make good to him any expense he may be put to in defending said goods. According to the evidence in this case, Collingsworth was not able to hold the goods, but they were seized by the creditors of Rankin Bros., and taken out of his possession; and there is nothing in the evidence to show that he ever realized one dollar from them, or that J. W. Rankin has ever received any part of the \$3,846.50 due him upon the mortgage of Rankin Bros. The evidence in this case all tends to show that the trade was contingent or conditional upon the fact that Collingsworth could hold said goods, and was not a completed transaction until it was ascertained whether he could or could not hold them. The fact that the goods were at that time out of his possession, and had been seized by the creditors of Rankin Bros., considering the other evidence in the case, warranted the jury in finding that the trade was a conditional one. The goods were not appropriated by J. W. Rankin and used for his benefit, but were seized by the creditors of Rankin Bros. The motion of plaintiff in error for judgment on the special verdict of the jury was properly overruled.

The only other assignment of error is in the refusal of the court to give certain special instructions asked for by this plaintiff in error. We have examined very carefully the instructions asked and the instructions given, and we find that the instructions given by the learned trial judge cover the law in the case, and no material error was committed in refusing to give the special instructions. The judgment of the court below is affirmed. All the judges concurring.

(1 Kan. A. 287).

In re WALKER.

(Court of Appeals of Kansas, Southern Department, E. D. July 16, 1895.)

VIOLATION OF STRAY LAW—COSTS AGAINST PROSECUTING WITNESS.

In an action before a justice of the peace, in which the defendant is charged with violating paragraph 6707 of the General Statutes of 1889, the complaining witness cannot be adjudged to pay the costs, and be imprisoned for failure to do so, as is provided in paragraph 5451.

(Syllabus by the Court.)

Original application by Arista Walker for a writ of habeas corpus. Granted.

Arista Walker petitioned for a writ of habeas corpus as follows: "Your petitioner represents that one Arista Walker is unlawfully restrained of his liberty by T. J. Allen, sheriff of Bourbon county, Kansas, in the jail of said county; that the pretended cause of such restraint is a commitment issued by F. C. Coryell, a justice of the peace, directing said Allen to hold said Walker till costs amounting to \$18.00 are paid by said Walker. The

illegality of such restraint consists in this, to wit: That the said F. C. Coryell had no authority under the law to assess the costs against Walker and commit him for nonpayment of same, as the action was one brought for a violation of the stray law, and in which Arista Walker was a complaining witness. Wherefore your petitioner prays that a writ of habeas corpus may issue, to the end that said Arista Walker may be discharged from such illegal restraint." The sheriff made due return as follows: "Now comes T. J. Allen, sheriff of Bourbon county, Kansas, and answers the writ of habeas corpus herein, and says: (1) I am the sheriff of said county. As such sheriff, I am ex officio keeper of the county jail of said county. I am restraining the petitioner of his liberty by virtue of a commitment issued by F. C. Coryell, one of the regularly elected, qualified, and acting justices of the peace in and for the city of Fort Scott, Kansas. Said commitment is in all points regular and in conformity with law, and fully authorizes me to imprison the petitioner. The following is a true copy of said commitment: 'In Justice's Court, before F. C. Coryell, J. P., Fort Scott, Bourbon County, Kansas. The State of Kansas vs. M. W. Gilmore. Commitment: Whereas, the above-entitled action was this day tried before me, and the defendant found innocent of the offense charged; and whereas I also find that the complaint was made by A. Walker herein without probable cause,—this is therefore to command R. F. Walters, constable of said city, that he take the body of Arista Walker and commit him to the county jail of said county until said costs are paid. And this is also to command the jailer of said jail to receive and safely keep said A. Walker according to the commands of this writ. Witness my hand at Fort Scott, this 23rd day of May, 1895. F. C. Coryell, Justice of the Peace. I hereby certify this to be a true copy of the original. R. F. Walters, Constable.' (2) Further answering, said sheriff says: Said petitioner was complaining witness in a prosecution against one Gilmore, who was charged by petitioner before said justice with a violation of paragraph 6707, Gen. St. 1889, by selling and disposing of a stray before the title was vested in said Gilmore. On the trial of said Gilmore, and upon the evidence produced by the petitioner on behalf of the state of Kansas, including his own testimony, the justice found said Gilmore not guilty, and also found that the prosecution had been begun by said Walker without probable cause, and so entered the finding on his docket. The evidence upon which the finding was made was to the effect that the said colt was in the pasture of the said Gilmore; that Gilmore had given a rope to a couple of small boys, and told them to take the colt away and keep it until its owner called for it. That was all the 'selling or disposing' that was shown by the evidence, and the testimony was undis-

puted. Thereupon said justice adjudges that the costs should be paid by the complaining witness, A. Walker, and so entered an order upon his docket; and further ordered that said Walker be committed to the county jail until said costs were paid, in compliance with paragraph 5451, Gen. St. 1889. On this order the commitment which I hold was issued. (3) On May 24, 1895, a writ of habeas corpus was obtained from the probate court of Bourbon county, Kansas, upon identically the same grounds laid in the petition herein, and on said date, after a full hearing, the said probate court rendered judgment in favor of the sheriff, and remanded said Walker to the county jail. The said sheriff here returns the writ of habeas corpus with this answer, and alleges that he has full authority under the judgment of said justice of the peace, the judgment of the probate court of Bourbon county, Kansas, and under the commitment heretofore set out, to restrain said petitioner of his liberty. Wherefore, having fully answered, the sheriff asks that the petitioner be remanded to his custody, and that there be judgment rendered against the petitioner, A. Walker, for the costs in this behalf expended."

Pritchard & Shepard and Humphrey & Hudson, for petitioner. C. E. Cory, Co. Atty., for the sheriff.

DENNISON, J. (after stating the facts). The petitioner in this case was the complaining witness against one Gilmore for having violated paragraph 6707, Gen. St. 1889. Upon the trial of the case of *The State vs. Gilmore*, the justice trying the same found that Gilmore was not guilty, and that the prosecution by said Walker was without probable cause, and said justice thereupon adjudged that the costs should be paid by said complaining witness, this petitioner, and ordered him committed to the county jail until said costs were paid, in compliance with paragraph 5451, Id. Section 6707, Id., is one of the sections of the stray law of this state, and reads as follows: "If any person shall sell or dispose of any stray or take the same out of this state before the title shall have vested in him, he shall forfeit and pay to the county double the value of such stray, and may also be punished by fine not to exceed twenty dollars, and imprisonment in the county jail not to exceed thirty days." Paragraph 6710 reads as follows: "Justices of the peace in their respective counties shall have jurisdiction and take cognizance of all actions for the violations of this article, and enforce all the penalties and fines against persons who may be held guilty of such violations. * * *" Paragraph 6711 reads as follows: "Upon the affidavit of any citizen of the county wherein such strays may be held or so taken up, being filed with any justice of the peace of

the county, setting forth that any person, naming him, has disposed of any stray, or in any manner violated the provisions of this article and describing the stray in full, said justice shall issue his summons and writ, as is provided in civil cases, commanding the officer to take the stray into his possession and summons the persons who may have thus violated this article, to appear and answer as is provided in cases of replevin." Paragraph 6712 reads as follows: "All trials before a justice of the peace under this article if demanded by the defendant shall be by a jury of six competent men, to be selected as, in civil cases, who shall, if they find the defendant guilty, assess the fine to be paid by him, or the imprisonment to be inflicted, subject to an appeal as in civil cases." Paragraph 6715 provides what the judgment shall be. The law is complete within itself, and provides its own mode of procedure; and, while paragraph 6707 provides for a fine and imprisonment, the proceedings to obtain such a judgment cannot be had under the Criminal Code. Paragraph 6711 fully provides the method of procedure upon the filing of the affidavit of any citizen: "The justice shall issue his summons and writ as is provided in civil cases, commanding the officer to take the stray into his possession and summons the person who may have thus violated this article, to appear and answer as is provided in cases of replevin." And paragraph 6712 provides "that the jury shall be selected as in civil cases." The code of procedure before justices of the peace in misdemeanors provides that upon the filing of a complaint the justice shall issue a warrant for the arrest of the person complained against. It also provides the manner in which the jury shall be selected. The justice of the peace in this case has attempted to hold this petitioner under paragraph 5451, which reads as follows: "Whenever the defendant tried under the provisions of this act shall be acquitted, he shall be immediately discharged, and if the justice or jury trying the case shall state in the finding that the complaint was malicious or without probable cause, the justice shall enter judgment against the complainant, for all costs that shall have accrued in the proceedings, and shall commit such complainant to jail until such costs be paid, unless he shall execute a bond to the state in double the amount thereof, with security satisfactory to the justice that he will pay such judgment within thirty days after the date of its rendition." This the justice has no right to do. The defendant, Gilmore, was not tried under the provisions of this act, which is chapter 83, entitled "An act regulating the jurisdiction and procedure before justices of the peace in cases of misdemeanor." It will be noticed that the wording of section 5451 is not, "whenever the defendant tried for a misdemeanor shall be acquitted," but it is

"whenever the defendant tried under the provisions of this act shall be acquitted." The defendant was not tried under the provisions of chapter 83 of the code of procedure before justices of the peace in misdemeanors, but was tried under article 3 of chapter 105, relating to strays; and in this act there is no provision for taxing the costs against the complaining witness, or for making a finding that the complaint was malicious or without probable cause, or for imprisoning the complainant for nonpayment of costs. The attorney for the respondent in this case raises the point that this petitioner has made application for a writ of habeas corpus before the probate judge of Bourbon county, Kan., and the writ had been denied, and suggests the question of res adjudicata. This point is not well taken, and the petitioner has a right to apply to this court for a writ, although the same may have been denied by the probate judge. It is the order of this court that the application be allowed, and that said respondent, T. J. Allen, sheriff, and keeper of the county jail of Bourbon county, restore said Arista Walker to liberty. All the judges concurring.

(1 Kan. App. 197)

DWELLING-HOUSE INS. CO. OF BOSTON, MASS., v. OSBORN.

(Court of Appeals of Kansas, Southern Department, E. D. July 16, 1895.)

INSURANCE—ACTION ON POLICY—LIMITATION—OCCUPATION OF PREMISES—WAIVER OF PROOFS OF LOSS—HOMESTEAD.

1. The general rule is that, in the computation of time from an act done, the day on which the act is done will be excluded whenever such exclusion will save a forfeiture. Following this general rule, *held*, where a loss occurs September 15, 1889, under a policy of insurance containing a clause limiting the time within which an action may be maintained to six months "after loss or damage shall occur," and an action is commenced March 15, 1890, upon said policy, said action can be maintained.

2. Where a resident of this state, who is the head of a family, owns two houses located upon a lot and one-half of ground, containing less than one acre, within the limits of a city, and occupies one of the houses, with his family, for living and sleeping purposes, and the other for cooking and kitchen work, and also cultivates the grounds for his family, at the time he joins in a deed of assignment with a partner for the benefit of the creditors of said firm, *held*, both of said houses constitute a part of the homestead of the debtor and his family, and no part of said premises is transferred to the assignee under said deed of assignment.

3. Where a house built for dwelling purposes is used by the owner thereof for cooking and general work in connection with an adjacent house where said owner and his family lodge and eat, such house so used for cooking and general purposes is not "vacant or unoccupied," within the meaning of a clause in an insurance policy which provides that said policy shall become void if the house becomes "vacant or unoccupied."

4. The denial of liability by a general adjuster sent by an insurance company to investigate losses under two policies issued by said

company is the denial of the company, and waives the filing of proofs of loss.

(Syllabus by the Court.)

Error from district court, Bourbon county; S. H. Allen, Judge.

Action on a policy of insurance by Robert Osborn against the Dwelling-House Insurance Company of Boston, Mass. Plaintiff had judgment, and defendant brings error. Affirmed.

J. D. McCleverty, for plaintiff in error. J. D. Hill, for defendant in error.

COLE, J. This is an action brought in the district court of Bourbon county upon a policy of insurance issued by the plaintiff in error to Robert Osborn upon a dwelling house located in Ft. Scott. From a judgment in favor of Osborn in the district court, the insurance company brings the case here. The material facts are that in December, 1886, the Dwelling-House Insurance Company of Boston, Mass., through its resident agent at Ft. Scott, issued to Robert Osborn three policies of insurance. One of these policies does not enter into this case. Of the two policies which are connected with the matter in dispute, one covered a dwelling house occupied permanently by Osborn and his family, and the other, being the one upon which this suit is based, included a house built in part upon the same and in part upon the adjoining lot to the first-named house, and also a barn located upon the premises. The house covered by the policy in suit was leased by Osborn a part of the time, and when not rented a part of its rooms were occupied by Osborn and his family as a kitchen. The outbuildings upon the two lots were used in common when the houses were occupied by separate families, and Osborn reserved and cultivated the rear portion of both lots for a garden. About June 15, 1889, the house covered by the policy in suit became vacant, and Osborn at once moved his kitchen stove and other kitchen furniture into it. He also had some flour in the pantry, and some bed-clothes in one of the closets. He began using that portion of the house indicated, and so continued to use said rooms until the morning of September 15, 1889, when the house was totally destroyed by a fire, which also slightly damaged the house covered by the other policy. It is admitted that the insurance company was properly notified of the loss. Then one Ira Smith, representing the company, visited Ft. Scott, adjusted the loss upon the damaged building, and declined to adjust the loss under the policy in suit. No proofs of loss were filed by Osborn for the house which was totally destroyed. It further appears that on July 5, 1889, the firm of Jones & Osborn, the latter being plaintiff below, made a statutory assignment for the benefit of their creditors. The petition and praecipe in this case were filed in the office of the clerk of the district court of Bourbon county, and a summons issued by him and mailed to

the superintendent of insurance on March 15, 1890. A number of errors are assigned by the insurance company as grounds for reversal of the judgment of the trial court.

The first question which claims our attention is whether this action was commenced in time. The policy in suit contained the following clauses bearing upon the question: "It is mutually agreed that no suit or action against this company upon this policy shall be sustainable in any court of law or equity unless commenced within six months after the loss or damage shall occur; and, if any suit or action shall be commenced after the expiration of said six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." "The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid 60 days after notice, and due and satisfactory proofs shall have been made by the assured and received at the company's home office at Boston, Mass., in accordance with the terms and provisions of this policy hereinafter named." The plaintiff in error contends that as the loss or damage occurred on September 15, 1889, in order for the action to be maintained upon the policy in suit, such action must have been commenced by the 14th day of March, 1890; in other words, that in the computation of time the day of loss must be included. And plaintiff in error further contends that this action was not legally commenced until the date of delivery of the summons to a proper officer for service, and argues that in the case at bar this was on the 17th of March, 1890, the date when the summons was received by the superintendent of insurance, and that, even if the action was commenced by filing of petition and praecipe and the issuance of the summons, still the 15th of March was one day too late. The defendant in error contends that the period of limitation should commence at the expiration of 60 days after the notice of loss, within which period an action could not be maintained upon the policy, and that in the computation of time the day of the loss should be excluded. It seems to be admitted, and is certainly well settled in this state, that a provision in an insurance policy limiting the time within which an action may be maintained is binding upon the parties, and had the effect of abrogating the statutes of limitation of this state. The first question, then, is, what constitutes the commencement of a civil action in this state? Paragraph 4136 of the General Statutes of 1889 reads as follows: "A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing summons to be issued thereon." Under this paragraph, when the plaintiff filed his petition in the office of the clerk of the district court of Bourbon

county, and caused a summons to be issued thereon on the 15th day of March, 1890, his action was commenced. Was the action commenced in time? The position of the defendant in error, that the period of limitation commences at the expiration of the 60 days designated in the policy, within which notice and proofs of loss are to be given and filed, is not well taken. In the case of *McElroy v. Insurance Co.*, 48 Kan. 200, 29 Pac. 478, the supreme court, in an opinion prepared by Mr. Commissioner Simpson, say: "There is some contention in the brief of the plaintiff in error, although none at the bar, that, as this policy gave 60 days within which to make proofs of loss, this time (60 days) must be deducted from the twelve months prescribed by the agreement; but the weight of the well-considered cases is against such construction." The same doctrine is affirmed in *Insurance Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479. This brings us to the question as to what rule is to be adopted in the computation of time under a policy containing a clause like the one in suit. Does the six months "after the loss or damage shall occur" include the day upon which such loss or damage occurred, or in the computation of time is a rule similar to the one contained in section 722 of our Code to be adopted, and the day upon which such loss or damage shall occur to be excluded? The learned counsel for the plaintiff in error argues that as the court hold in *McElroy v. Insurance Co.*, and *Insurance Co. v. Stoffels*, supra, that a claim in an insurance policy limiting the time for the commencement of an action abrogates the limitation of our Code as to time, then it would seem that the rule of our statute as to computation of time would not apply. Admitting the force of the argument, we would then be relegated to the general or common-law rule for the computation of time. Our supreme court have in different cases applied the two opposite rules in the computation of time, some of which cases are cited in the briefs of counsel. An examination of all these cases, as well as numerous authorities from other states, leads us to the conclusion that, while perhaps in a majority of cases where time is to be computed from some event or act done the day within which the event transpired or the act was done is included, yet in a large number of such cases the day of the transpiring of the event or of the doing of the act is excluded in the computation; and we think this is the general rule whenever such exclusion will prevent an estoppel or save forfeiture. In *Bigelow v. Willson*, 1 Pick. 487, under a statute which allowed the redemption of an equitable estate sold on execution within one year next after the time of executing by the officer to the purchaser the deed thereof, it was held that, in computing the year allowed for the redemption, the date on which the deed was executed should be excluded; and in *Kimm v. Osgood*, 19 Mo.

60, where letters of administration were granted January 12, 1852, a demand exhibited January 12, 1853, was held within one year after the granting of the letters. In that case the court says: "We state the rule, then, to be that in the computation of a period of time for an act done the day on which the act is done is to be excluded." In *Sands v. Lyon*, 18 Conn. 18, the same doctrine is held, and in the opinion of the court the following language is used (at page 28): "That instruments shall be so construed, if possible, as that they and the rights depending upon them shall be upheld, not destroyed; the presumption being that instruments are designed to be effectual, and not futile." In *Carothers v. Wheeler*, 1 Or. 186, where a statute required an appeal to be taken from the board of commissioners to the district court within 20 days after a decision by said board, the court says: "For we hold upon authority, as well as in accordance with the rule laid down in our statute, that the time within which an act is to be done shall be computed by excluding the first day and including the last; and, if the last be Sunday, it shall be excluded." In 1 Wood, Lim. Act. (2d Ed.) p. 122, after citing the different authorities in which the rule is laid down as above stated, that author says: "And this rule is applied to all species of contracts, bills of exchange, promissory notes, policies of insurance, wills, and other instruments. And they are to be so understood that the day of the date or the day of the act from which a future time is to be ascertained is to be excluded from the computation." The same doctrine is held in *Menges v. Frick*, 73 Pa. St. 137; *State v. Gasconade Co. Ct.*, 33 Mo. 102; *Inhabitants of Windsor v. Inhabitants of China*, 4 Me. 208. We are satisfied that this doctrine is also in harmony with the case cited by the counsel for plaintiff in error decided by our supreme court, viz. *English v. Williamson*, 34 Kan. 212, 8 Pac. 214. And this rule ought specially to apply in a case like the one at bar, where the time within which an action may be maintained is practically limited to four months.

The next question for consideration is, did the deed of assignment made by Jones & Osborn on July 5, 1889, convey the property destroyed to the assignee named therein? This depends wholly upon whether or not the property destroyed was exempt as the homestead of Osborn, for, if it was, the title did not pass to the assignee for the benefit of the creditors of Jones & Osborn. If it were not a part of Osborn's homestead, then the title passed to the assignee, and the policy was void under the clause contained therein, viz.: "That if the property, or any part thereof, shall be sold or conveyed, or if the interest of the assured in said property, or any part thereof, now is or shall become any other or less than a perfect, legal, and equitable title and ownership, then and in every such case the policy shall become absolutely void." It

is conceded that at the date the policy was issued Osborn had a clear title to the premises covered by the policy, and that the only act, if any, which had deprived him of the title, was the assignment of Jones & Osborn above referred to. The correct rule to apply in such a case is, what was the situation at the time of the assignment? If the use and occupancy of the premises covered by the policy in dispute were such at that time as to bring the house in question within the exemption allowed by the statute, it does not matter whether or not they were exempt at some prior period. As above stated, the house destroyed and covered by the policy in suit was located upon the boundary line of two lots. Both the house destroyed and the one damaged were upon a lot and a half of ground in the city of Ft. Scott, containing less than one acre. On July 5, 1889, Osborn was occupying one house for living and sleeping purposes, and one for cooking purposes. He had the kitchen stove, tables, and other articles belonging to that part of the household in the house destroyed, and had used that house for kitchen purposes continuously since June 13th or 14th. The outbuildings were always used in common, even when he had a tenant in one of the houses, and the rear part of the yard was always reserved by him for a garden. There can be no doubt, under such circumstances, that the whole of said property was the homestead of Osborn, and as such did not pass by the deed of assignment. In *Layson v. Grange*, 48 Kan. 440, 29 Pac. 585, it was held that when a debtor owns a house and three lots, containing less than one acre, within the limits of a city, upon which he resides with his family, and also had a carpenter shop, which he afterwards converted into rooms, which he rented to a family, but did not lease the ground, and reserved the basement of such building for his own use, as well as the lot upon which the building was situated, that the property was homestead, and exempt from forced sale on execution. In that case the premises claimed as not being a part of the homestead were, at the time an execution was levied upon them, actually rented to and occupied by a tenant, and were entirely separate from the house occupied by the debtor and his family as a residence, while in this case, at the time of the execution of the deed of assignment, and at the time of the fire, the building claimed as not a part of the homestead was being actually occupied by Osborn and his family. Counsel for plaintiff in error relies upon *Ashton v. Ingle*, 20 Kan. 670, as an authority supporting his position that the house destroyed passed by the deed of assignment. In that case the portion of the property levied upon was being actually occupied by several tenants, excepting such occupancy gained after judgment by the debtor, and, as the court say, for the purpose of defeating any levy of execution. But the court in that case lay down the rule that the status of the property at that time of judg-

ment was what governed. Applying that rule to the case at bar, the governing status would be that which existed at the time Osborne made the deed of assignment.

The foregoing facts stated, and views expressed, also answer the third question—was this house vacant within the meaning of the policy?—in the negative. The house was being used for dwelling-house purposes, and was being occupied each day. It was neither vacant nor unoccupied under the authorities. In *Shackelton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. 343, the house was occupied by a tenant who vacated it on June 19, 1883. The owner took possession, put her furniture in the building, but she did not take her meals or lodge in the house, which was destroyed by fire July 4th. It was held that the house was not vacant or unoccupied within the meaning of the contract. In *McQueeny v. Insurance Co.*, 52 Ark. 257, 12 S. W. 496, a policy of insurance covered two houses, about 30 feet apart and in the same inclosure, one being occupied by the insured and the other to let at the time of the fire. The insurance was for separate sums on each house, but the premium was paid in gross. Both houses were destroyed, when the dwelling house alone was occupied. It was held that the contract was indivisible, and the premises not vacant, within the meaning of the policy, so as to discharge the company from liability for loss of the house that was to let. And in *Insurance Co. v. Storig*, 137 Ill. 646, 24 N. E. 674, the jury made a special finding to the effect that the insured building was situated in the rear of one in which the owner lived, and was occupied permanently by him for washing, ironing, cooking, eating, and storage, which was held not inconsistent with a general finding that it was occupied as a dwelling house. What is meant by the term "vacant and unoccupied" in a policy of insurance is a question of law, but whether the building was at the time of the loss "vacant and unoccupied" within the meaning of the policy is a question of fact. In this case the trial court clearly defined the meaning of the term "vacant and unoccupied," and the jury by their general verdict said that the building in question was occupied as contemplated by the policy, and there was sufficient evidence to sustain this finding.

The fourth question is, were proofs of loss waived? It must be conceded that, as Osborn failed to make proofs of loss, unless they were waived he cannot recover upon the policy. The evidence in this case shows that the plaintiff in error was a nonresident company, and that at the time of the loss under this policy there was no resident agent at Ft. Scott. Osborn sent a notification of loss to the company at its home office in Boston, and in response thereto, and in about 10 days, one Ira Smith came to Ft. Scott for the insurance Company. He adjusted the loss with Osborn under the policy covering the house that was damaged, and the amount

that was agreed upon was remitted to Osborn from the home office. Smith testified that he had been in the employ of the insurance company about two years, and had during that time adjusted 200 losses, and that the company relied upon his judgment in respect to the management of those losses. Smith was to all intents and purposes the company, so far as the adjustment was concerned, and under the decisions of our supreme court in *Insurance Co. v. Gray*, 43 Kan. 497, 23 Pac. 637, and *Insurance Co. v. Munger*, 49 Kan. 178, 30 Pac. 120, and the authorities there cited, his acts and statements in regard to such loss and adjudgment were properly received in evidence, and were binding upon the company. The evidence is conflict-

ing somewhat as to what some of these acts and statements were. Osborn testified that Smith told him he need not make proofs of loss, that the building was unoccupied, and that the company were not liable for the loss; and in this statement he is in part corroborated by the witness Leonard. Smith testifies that he told Osborn he could not do anything for him, on account of the building being vacant. The jury were justified, under this evidence, in finding that proofs of loss were waived. The rule that the denial of liability on the part of the company waives proof of loss is too well settled to require a citation of authorities. The judgment of the lower court is affirmed. All the justices concurring.

END OF CASES IN VOL. 40.

